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Title 3—

Proclamation 9840 of January 31, 2019

The President

American Heart Month, 2019

By the President of the United States of America**A Proclamation**

Heart disease is America's most prolific killer, responsible for one in four deaths in the United States each year. American Heart Month is an opportunity to remember the loved ones lost to this deadly disease, raise awareness of the warning signs and symptoms of heart disease and heart attacks, and commit to a lifestyle that improves overall heart health.

Although heart disease has persisted as the leading cause of death among Americans for nearly a century, we are steadily eroding its grip on our health. Heart disease claims a smaller and smaller percentage of our loved ones than it did at its height in the 1960s. Through technological advancements and decades of scientific research, we have learned a tremendous amount about the causes of heart disease. We now know that smoking, high blood pressure, high cholesterol, lack of physical activity, obesity, diabetes, and prediabetes are some of the leading factors that can contribute to our risk for heart disease. Most importantly, we have learned that it is never too late or too early to improve your heart health. Small changes—undertaken at any time—such as committing to a healthy diet and regular exercise can make a big difference.

Last November, the Department of Health and Human Services released the second edition of “Physical Activity Guidelines for Americans,” which outlines the importance of physical exercise and provides information on how adults and children can live more active lives and improve their cardiovascular health. Nearly 80 percent of adult Americans, however, fail to meet the key guidelines for both aerobic and muscle strengthening activity. The guidelines recommend that adults get at least two and a half hours per week of moderate aerobic physical activity and muscle-strengthening activities over two or more days each week. Children ages 6 through 17 should get 60 minutes or more of moderate to vigorous physical activity each day. As the risk for heart disease increases with age, it is vital to deter this deadly disease by taking steps to stay physically active throughout life, maintain a healthy body weight, and promote overall heart health, including by eating a well-balanced diet and abstaining from tobacco products.

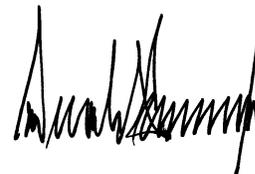
This month, I encourage all Americans to prioritize their health and educate themselves about heart disease. Through our continued efforts as a Nation and as individuals, we can work to reduce the chance of heart disease and ensure both present and future generations of Americans live healthier and fuller lives.

In acknowledgement of the importance of the ongoing fight against heart disease, the Congress, by Joint Resolution approved on December 30, 1963, as amended (36 U.S.C. 101), has requested that the President issue an annual proclamation designating February as American Heart Month.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, do hereby proclaim February 2019 as American Heart Month. The First Lady and I encourage all Americans to participate in National Wear Red Day on February 1, 2019, to raise awareness and reaffirm our commitment to fighting heart disease. I also invite the Governors of the

States, the Commonwealth of Puerto Rico, officials of other areas subject to the jurisdiction of the United States, and the American people to join me in recognizing and reaffirming our commitment to fighting heart disease.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of January, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.



[FR Doc. 2019-01482

2-5-19; 8:45 am]

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Presidential Documents

Proclamation 9841 of January 31, 2019

National African American History Month, 2019

By the President of the United States of America

A Proclamation

In the year 1619, a Dutch trading ship sailed into the Chesapeake Bay and dropped anchor at Point Comfort, Virginia. The vessel's arrival marked the beginning of the unscrupulous slave trade in the American colonies. It was from this immoral origin—and through inhuman conditions, discrimination, and prolonged hardship—that emerged the vibrant culture, singular accomplishments, and groundbreaking triumphs that we honor and celebrate during National African American History Month.

National African American History Month is an occasion to rediscover the enduring stories of African Americans and the gifts of freedom, purpose, and opportunity they have bestowed on future generations. It is also a time to commemorate the countless contributions of African Americans, many of whom lived through and surmounted the scourge of segregation, racial prejudice, and discrimination to enrich every fiber of American life. Their examples of heroism, patriotism, and enterprise have given people of all backgrounds confidence, courage, and faith to pursue their own dreams.

This year's theme, "Black Migrations," highlights the challenges and successes of African Americans as they moved from farms in the agricultural South to centers of industry in the North, Midwest, and West—especially the migrations that occurred in the twentieth century. Through these migrations, millions of African Americans reshaped the demographic landscape of America, starting new lives in cities such as Philadelphia, Detroit, Chicago, and New York City.

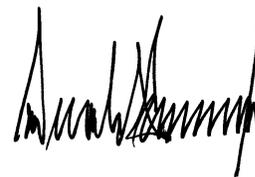
In that time of great change, inspirational leaders, such as Annie Turnbo Malone, charted a new path for many African American men and women. Annie Malone, the daughter of former slaves, became one of the most successful entrepreneurs in America at the turn of the century, and provided opportunities for African Americans to pursue meaningful careers. Through mentorship and education, she empowered others to start their own businesses. She is one of many inspirational African Americans in an era that also produced luminaries such as Mary McLeod Bethune and Booker T. Washington, both of whom encouraged and emboldened disenfranchised black students to push through obstacles and realize their God-given potential.

American history brims with the stories of African Americans who forever changed their communities and our country. We will, for example, never forget the legendary "Queen of Soul," Aretha Franklin, whose unforgettable voice transcended genre and left music transformed, and whose broad appeal in an era of deep division helped to bridge racial divides. Another trailblazer, baseball legend Jackie Robinson, known ubiquitously in Major League Baseball as "42," shattered institutional racism in American athletics when he became the first African-American player to appear in a big league game. Over his career, his exceptional talent and noble character in the face of racial hatred undermined the twin false ideologies of segregation and racial inequality. The spirit and determination of these and other African American heroes make our Nation proud and define what it means to be American.

National African American History Month is a call to each and every citizen of our great land to reflect on the cultural, scientific, political, and economic contributions of African Americans, which are woven throughout American society. We remember, learn from, and build on the past, so that, together, we can build a better and more prosperous future for all Americans.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim February 2019 as National African American History Month. I call upon public officials, educators, librarians, and all the people of the United States to observe this month with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of January, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.



Rules and Regulations

Federal Register

Vol. 84, No. 25

Wednesday, February 6, 2019

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Doc. No. AMS-SC-18-0065; SC18-905-4 FR]

Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Citrus Administrative Committee (Committee) to decrease the assessment rate established for the 2018–19 and subsequent fiscal periods. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective March 8, 2019.

FOR FURTHER INFORMATION CONTACT: Abigail Campos, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or Email: Abigail.Campos@usda.gov or Christian.Nissen@usda.gov.

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

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement and Order No.

905, as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida. Part 905, (referred to as “the Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Committee locally administers the Order and is comprised of growers and handlers operating within the area of production, and a public member.

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, Florida citrus handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable citrus for the 2018–19 crop year, and continue until amended, suspended, or terminated.

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

20 days after the date of the entry of the ruling.

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

This rule decreases the assessment rate from \$0.02, the rate that was established for the 2017–18 and subsequent fiscal periods, to \$0.015 per 4/5-bushel carton of citrus for the 2018–19 and subsequent fiscal periods. Shipments from last season exceeded initial projections after Hurricane Irma, allowing the Committee to maintain their financial reserve. As the industry continues to recover from Hurricane Irma, the Committee estimates that the 2018–19 Florida citrus crop will be around 8,250,000 regulated cartons, an increase of nearly one million cartons from last season. The anticipated increase in production prompted the Committee to recommend the reduction in the assessment rate.

The Committee met on July 17, 2018, and unanimously recommended 2018–19 expenditures of \$130,260 and an assessment rate of \$0.015 per 4/5-bushel carton of citrus. The major expenditures recommended by the Committee for the 2018–19 year include \$113,260 for management, \$9,000 for auditing, and \$4,000 for travel. Budgeted expenses for these items in 2017–18 were \$75,000, \$9,000, and \$4,200, respectively.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, expected shipments of 8.25 million 4/5-bushel cartons, and the amount of funds available in the authorized reserve. Income derived from handler assessments calculated at \$123,750 (8.25 million × \$0.015), along with interest income and funds from the Committee’s authorized reserve, should be adequate to cover budgeted expenses of \$130,260. Funds in the reserve are estimated to be \$147,500 and would be kept within the maximum permitted by the Order. As

stated in § 905.42, the amount of the reserve is not to exceed two fiscal periods' expenses.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2018–19 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

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

According to data from the National Agricultural Statistics Service (NASS), the industry, and the Committee, the weighted average f.o.b. price for Florida

citrus for the 2016–17 season was approximately \$15.20 per carton with total shipments of around 12.6 million cartons. Using the number of handlers, and assuming a normal distribution, the majority of handlers have average annual receipts of more than \$7,500,000 (\$15.20 times 12.6 million equals \$191,520,000 divided by 20 handlers equals \$9,576,000 per handler).

In addition, based on the NASS data, the weighted average grower price for the 2016–17 season was around \$8.30 per carton of citrus. Based on grower price, shipment data, and the total number of Florida citrus growers, and assuming a normal distribution, the average annual grower revenue is below \$750,000 (\$8.30 times 12.6 million cartons equals \$104,580,000 divided by 500 growers equals \$209,160 per grower). Thus, the majority of Florida citrus handlers may be classified as large entities, while the majority of growers may be classified as small entities.

This rule decreases the assessment rate collected from handlers for the 2018–19 and subsequent fiscal periods from \$0.02 to \$0.015 per 4/5-bushel carton of citrus. The Committee unanimously recommended 2018–19 expenditures of \$130,260 and an assessment rate of \$0.015 per 4/5-bushel carton. The assessment rate of \$0.015 is \$0.005 lower than the 2017–18 rate. The quantity of assessable citrus for the 2018–19 fiscal period is estimated at 8.25 million 4/5-bushel cartons. Thus, the \$0.015 rate should provide \$123,750 in assessment income (8.25 million × \$0.015). Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve (currently \$147,500), should be adequate to cover budgeted expenses.

The major expenditures recommended by the Committee for the 2018–19 fiscal year include \$113,260 for management, \$9,000 for auditing, and \$4,000 for travel. Budgeted expenses for these items in 2017–18 were \$75,000, \$9,000, and \$4,200, respectively.

Shipments from last season exceeded initial projections after Hurricane Irma, allowing the Committee to maintain its financial reserve. The Committee estimates the 2018–19 Florida citrus crop will be around 8,250,000 regulated cartons, an increase of nearly one million cartons from last season. The Committee recommended the reduction in the assessment rate based on the anticipated increase in production.

Prior to arriving at this budget and assessment rate, the Committee considered information from the Executive Committee. Alternative

expenditure levels and assessment rates were discussed by the Executive Committee, based upon the relative value of various activities to the citrus industry. The Committee determined that all program activities were adequately funded and essential to the functionality of the Order, thus no alternative expenditure levels were deemed appropriate.

Based on these discussions and estimated shipments, the recommended assessment rate of \$0.015 should provide \$123,750 in assessment income. The Committee determined that assessment revenue, along with funds from reserves and interest income, should be adequate to cover budgeted expenses for the 2018–19 fiscal period.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the average grower price for the 2018–19 season should be approximately \$8.30 per 4/5-bushel carton of citrus. Therefore, the estimated assessment revenue for the 2018–19 crop year as a percentage of total grower revenue would be about 0.2 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers and may also reduce the burden on producers.

The Committee's meeting was widely publicized throughout the Florida citrus industry. All interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 17, 2018, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

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

This rule imposes no additional reporting or recordkeeping requirements on either small or large Florida citrus handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal

rules that duplicate, overlap, or conflict with this final rule.

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

A proposed rule concerning this action was published in the **Federal Register** on October 2, 2018 (83 PR 49499). Copies of the proposed rule were also mailed or sent via facsimile to all Florida citrus handlers. The proposal was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending November 1, 2018, was provided for interested persons to respond to the proposal.

One comment was received in support of the regulation. The commenter stated that producers would benefit from this action and this reduction is a way to ensure production growth and reinvestment in citrus crops year after year. Three additional comments were also received but did not address the merits of this action. Accordingly, no changes will be made to the rule as proposed, based on the comments received.

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

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

List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Pummelos, Reporting and recordkeeping requirements, Tangerines.

For the reasons set forth in the preamble, 7 CFR part 905 is amended as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND PUMMELOS GROWN IN FLORIDA

■ 1. The authority citation for 7 CFR part 905 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 905.235 is revised to read as follows:

§ 905.235 Assessment rate.

On and after August 1, 2018, an assessment rate of \$0.015 per 4/5-bushel carton or equivalent is established for Florida citrus covered under the Order.

Dated: January 31, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–01141 Filed 2–5–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Doc. No. AMS–SC–18–0069; SC18–989–1 FR]

Raisins Produced From Grapes Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Raisin Administrative Committee (Committee) to increase the assessment rate established for the 2018–19 and subsequent crop years. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective February 7, 2019.

FOR FURTHER INFORMATION CONTACT: Kathie Notoro, Marketing Specialist, or Terry Vawter, Acting Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or Email: Kathie.Notoro@usda.gov or Terry.Vawter@usda.gov.

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

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 989, as amended (7 CFR part 989), regulating the handling of raisins produced from grapes grown in California. Part 989 (referred to as the

“Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act”. The Committee locally administers the Order and is comprised of producers and handlers of raisins operating within the area of production, and a public member.

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, California raisin handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate is applicable to all assessable raisins for the 2018–19 crop year, and continue until amended, suspended, or terminated.

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

The Order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Committee’s needs and with the costs of goods and services in their local area, and are in a position to formulate an

appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Therefore, all directly affected persons have an opportunity to participate and provide input.

This rule increases the assessment rate from \$17.00 to \$22.00 per ton of raisins for the 2018–19 and subsequent crop years. The current rate was published in the **Federal Register** during the 2015–16 crop year and was designed to reduce the Committee's monetary reserve to a level that is appropriate under the Order. The higher rate is a result of a smaller crop forecast due to early spring rain damage to the vines. The 2018–19 crop is anticipated to be 275,000 tons, down from the 300,000 tons recorded the previous crop year.

The Committee met on June 27, 2018 and unanimously recommended 2018–19 expenditures of \$5,189,600 and an assessment rate of \$22.00 per ton of raisins. The major expenditures recommended by the Committee for the 2018–19 crop year include salaries and employee-related costs of \$1,187,200; administration costs of \$440,400; compliance activities of \$60,000; research and study costs of \$40,000; and promotion related costs of \$3,637,000. Subtracted from these expenses is \$175,000, which represents reimbursable costs for the shared management of the State marketing raisin program. Budgeted expenditures for these items in 2017–18 were \$1,306,150; \$505,600; \$48,000; \$35,000; and \$3,577,178, respectively.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, expected shipments of 275,000 tons, and the amount of funds available in the authorized reserve. Income derived from handler assessments calculated at \$6,050,000 ($275,000 \times \22.00), should be adequate to cover budgeted expenses of \$5,189,600. The remaining \$860,400 would be added to the Committee's authorized reserve.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or

USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2018–19 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

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

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

There are approximately 2,600 producers of California raisins and approximately 16 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,500,000. (13 CFR 121.201.)

According to the National Agricultural Statistics Service (NASS), data for the most-recently completed crop year (2017) shows that about 8.03 tons of raisins were produced per acre. The 2017 producer price published by NASS was \$1,670 per ton. Thus, the value of raisin production per acre averaged about \$13,410.10 (8.03 tons times \$1,670 per ton). At that average price, a producer would have to farm nearly 56 acres to receive an annual income from raisins of \$750,000 (\$750,000 divided by \$13,410.10 per acre equals 55.93 acres). According to the Committee, the majority of California raisin producers farm less than 56 acres.

In addition, according to data from the Committee, six of the sixteen California raisin handlers have receipts of less than \$7,500,000 and may also be considered small entities. Thus, the majority of producers of California

raisins may be classified as small entities, while the majority of handlers may be classified as large entities.

This rule increases the assessment rate collected from handlers for the 2018–19 and subsequent crop years from \$17.00 to \$22.00 per ton of assessable raisins acquired by handlers. The Committee unanimously recommended 2018–19 expenditures of \$5,189,600 and an assessment rate of \$22.00 per ton of assessable raisins. The assessment rate of \$22.00 is \$5.00 higher than the rate currently in effect. The quantity of assessable raisins for the 2018–19 crop year is estimated at 275,000 tons. Thus, the \$22.00 rate should provide \$6,050,000 in assessment income ($275,000 \times \$22.00$). Income derived from handler assessments, should be adequate to cover budgeted expenses. The remaining \$860,400 would be added to the Committee's authorized reserve.

The major expenditures recommended by the Committee for the 2018–19 crop year include: Salaries and employee-related costs of \$1,187,200; administration costs of \$440,400; compliance activities of \$60,000; research and study costs of \$40,000; and promotion related costs of \$3,637,000. Budgeted expenditures for these items in 2017–18 were \$1,306,150; \$505,600; \$48,000; \$35,000; and \$3,577,178, respectively. The total budget approved for the 2017–18 crop year was \$5,296,928.

The increased assessment rate is necessary to cover the decrease in estimated crop size tonnage from 300,000 tons in 2017–18 to 275,000 tons in 2018–19 while also helping to maintain the Committee's activities at current levels avoiding a reduction in the program's effectiveness, and keeping the monetary reserve to a level that is appropriate under the Order.

Prior to arriving at this budget and assessment rate, the Committee considered information from the Audit Subcommittee which met on June 13, 2018, and discussed alternative spending levels. The recommendation was discussed by the Committee on June 27, 2018, and the Committee ultimately decided that the recommended budget and assessment rate were reasonable and necessary to properly administer the Order.

A review of historical and preliminary information pertaining to the upcoming crop year indicates that the producer price for the 2017–18 crop year was approximately \$1,670.00 per ton of raisins. Utilizing that price, the estimated crop size of 275,000 tons, and the assessment rate of \$22.00 per ton, the estimated assessment revenue for

the 2018–19 crop year as a percentage of total producer revenue is approximately 0.013 percent (assessment revenue of \$6,050,000 divided by total producer revenue \$459,250,000).

This action increases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs would be offset by the benefits derived from the operation of the Order.

The meetings of the Audit Subcommittee and the Committee were widely publicized throughout the California raisin industry. All interested persons were invited to attend the meetings and encouraged to participate in Committee deliberations on all issues. Like all subcommittee and Committee meetings, the June 13, 2018, and June 27, 2018, meetings, respectively, were public meetings, and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581–0178 Vegetable and Specialty Crops. No changes in those requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule does not impose any additional reporting or recordkeeping requirements on either small or large California raisin handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

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

A proposed rule concerning this action was published in the **Federal Register** on October 23, 2018 (83 FR 53402). Copies of the proposed rule were provided to all raisin handlers. The proposal was also made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending November 23, 2018, was provided for interested persons to respond to the proposal. No

comments were received. Accordingly, no changes will be made to the rule as proposed.

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

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

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 989 is amended as follows:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

- 1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

- 2. Section 989.347 is revised to read as follows:

§ 989.347 Assessment rate.

On and after August 1, 2018, an assessment rate of \$22.00 per ton is established for assessable raisins produced from grapes grown in California.

Dated: January 31, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–01139 Filed 2–5–19; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL RESERVE SYSTEM

12 CFR Part 263

[Docket No. R–1647]

RIN 7100–AF36

Rules of Practice for Hearings

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (the “Board”) is

issuing a final rule amending its rules of practice and procedure to adjust the amount of each civil money penalty (“CMP”) provided by law within its jurisdiction to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective on February 6, 2019.

FOR FURTHER INFORMATION CONTACT: Patrick M. Bryan, Assistant General Counsel (202–974–7093), or Thomas O. Kelly, Senior Attorney (202–974–7059), Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Ave. NW, Washington, DC 20551. For users of Telecommunication Device for the Deaf (TDD) only, contact 202–263–4869.

SUPPLEMENTARY INFORMATION:

Federal Civil Penalties Inflation Adjustment Act

The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (“FCPIA Act”), requires federal agencies to adjust, by regulation, the CMPs within their jurisdiction to account for inflation. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the “2015 Act”) ¹ amended the FCPIA Act to require federal agencies to make annual adjustments not later than January 15 of every year. ² The Board is now issuing a new final rule to set the CMP levels pursuant to the required annual adjustment for 2019. The Board will apply these adjusted maximum penalty levels to any penalties assessed on or after February 6, 2019, whose associated violations occurred on or after November 2, 2015. Penalties assessed for violations occurring prior to November 2, 2015, will be subject to the amounts set in the Board's 2012 adjustment pursuant to the FCPIA Act. ³

Under the 2015 Act, the annual adjustment to be made for 2019 is the percentage by which the Consumer Price Index for the month of October 2018 exceeds the Consumer Price Index for the month of October 2017. On December 14, 2018, as directed by the 2015 Act, the Office of Management and Budget (OMB) issued guidance to affected agencies on implementing the required annual adjustment, which included the relevant inflation multiplier. ⁴ Using OMB's multiplier, the

¹ Public Law 114–74, 129 Stat. 599 (2015) (codified at 28 U.S.C. 2461 note).

² 28 U.S.C. 2461 note, 4(b)(1).

³ 77 FR 68680 (Nov. 16, 2012).

⁴ OMB Memorandum M–19–04, *Implementation of Penalty Inflation Adjustments for 2019*, Pursuant

Board calculated the adjusted penalties for its CMPs, rounding the penalties to the nearest dollar.⁵

Administrative Procedure Act

The 2015 Act states that agencies shall make the annual adjustment “notwithstanding section 553 of title 5, United States Code.” Therefore, this rule is not subject to the provisions of the Administrative Procedure Act (the “APA”), 5 U.S.C. 553, requiring notice, public participation, and a deferred effective date.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires a regulatory flexibility analysis only for rules for which an agency is required to publish a general notice of proposed rulemaking. Because the 2015 Act states that agencies’ annual adjustments are to be made notwithstanding section 553 of title 5 of the United States Code—the APA section requiring notice of proposed rulemaking—the Board is not publishing a notice of proposed rulemaking. Therefore, the Regulatory Flexibility Act does not apply.

Paperwork Reduction Act

There is no collection of information required by this final rule that would be subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

List of Subjects in 12 CFR Part 263

Administrative practice and procedure, Claims, Crime, Equal access to justice, Lawyers, Penalties.

Authority and Issuance

For the reasons set forth in the preamble, the Board amends 12 CFR part 263 to read as follows:

PART 263—RULES OF PRACTICE FOR HEARINGS

■ 1. The authority citation for part 263 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 248, 324, 334, 347a, 504, 505, 1464, 1467, 1467a, 1817(j), 1818, 1820(k), 1829, 1831o, 1831p–1, 1832(c), 1847(b), 1847(d), 1884, 1972(2)(F), 3105, 3108, 3110, 3349, 3907, 3909(d), 4717; 15 U.S.C. 21, 781(i), 78o–4, 78o–5, 78u–2; 1639e(k); 28 U.S.C.

to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018).

⁵ Under the 2015 Act and implementing OMB guidance, agencies are not required to make an adjustment to a CMP if, during the 12 months preceding the required adjustment, such penalty increased due to a law other than the 2015 Act by an amount greater than the amount of the required adjustment. No other laws have adjusted the CMPs within the Board’s jurisdiction during the preceding 12 months.

2461 note; 31 U.S.C. 5321; and 42 U.S.C. 4012a.

■ 2. Section 263.65 is revised to read as follows:

§ 263.65 Civil money penalty inflation adjustments.

(a) *Inflation adjustments.* In accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990, the Board has set forth in paragraph (b) of this section the adjusted maximum amounts for each civil money penalty provided by law within the Board’s jurisdiction. The authorizing statutes contain the complete provisions under which the Board may seek a civil money penalty. The adjusted civil money penalties apply only to penalties assessed on or after February 6, 2019, whose associated violations occurred on or after November 2, 2015.

(b) *Maximum civil money penalties.* The maximum (or, in the cases of 12 U.S.C. 334 and 1832(c), fixed) civil money penalties as set forth in the referenced statutory sections are set forth in the table in this paragraph (b).

Statute	Adjusted civil money penalty
12 U.S.C. 324.	
<i>Inadvertently late or misleading reports, inter alia</i>	\$4,027
<i>Other late or misleading reports, inter alia</i>	40,269
<i>Knowingly or reckless false or misleading reports, inter alia</i>	2,013,399
12 U.S.C. 334	292
12 U.S.C. 374a	292
12 U.S.C. 504.	
<i>First Tier</i>	10,067
<i>Second Tier</i>	50,334
<i>Third Tier</i>	2,013,399
12 U.S.C. 505.	
<i>First Tier</i>	10,067
<i>Second Tier</i>	50,334
<i>Third Tier</i>	2,013,399
12 U.S.C. 1464(v)(4)	4,027
12 U.S.C. 1464(v)(5)	40,269
12 U.S.C. 1464(v)(6)	2,013,399
12 U.S.C. 1467a(i)(2)	50,334
12 U.S.C. 1467a(i)(3)	50,334
12 U.S.C. 1467a(r).	
<i>First Tier</i>	4,027
<i>Second Tier</i>	340,269
<i>Third Tier</i>	2,013,399
12 U.S.C. 1817(j)(16).	
<i>First Tier</i>	10,067
<i>Second Tier</i>	50,334
<i>Third Tier</i>	32,013,399
12 U.S.C. 1818(i)(2).	
<i>First Tier</i>	10,067
<i>Second Tier</i>	50,334
<i>Third Tier</i>	2,013,399
12 U.S.C. 1820(k)(6)(A)(ii) ...	331,174

Statute	Adjusted civil money penalty
12 U.S.C. 1832(c)	32,924
12 U.S.C. 1847(b)	50,334
12 U.S.C. 1847(d).	
<i>First Tier</i>	4,027
<i>Second Tier</i>	40,269
<i>Third Tier</i>	2,013,399
12 U.S.C. 1884	292
12 U.S.C. 1972(2)(F).	
<i>First Tier</i>	10,067
<i>Second Tier</i>	50,334
<i>Third Tier</i>	2,013,399
12 U.S.C. 3110(a)	46,013
12 U.S.C. 3110(c).	
<i>First Tier</i>	3,682
<i>Second Tier</i>	36,809
<i>Third Tier</i>	1,840,491
12 U.S.C. 3909(d)	2,505
15 U.S.C. 78u–2(b)(1).	
<i>For a natural person</i>	9,472
<i>For any other person</i>	94,713
15 U.S.C. 78u–2(b)(2).	
<i>For a natural person</i>	94,713
<i>For any other person</i>	473,566
15 U.S.C. 78u–2(b)(3).	
<i>For a natural person</i>	189,427
<i>For any other person</i>	947,130
15 U.S.C. 1639e(k)(1)	11,563
15 U.S.C. 1639e(k)(2)	23,125
42 U.S.C. 4012a(f)(5)	2,187

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, January 29, 2019.

Ann Misback,

Secretary of the Board.

[FR Doc. 2019–01068 Filed 2–5–19; 8:45 am]

BILLING CODE 6210–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

RIN 3133–AE92

Civil Monetary Penalty Inflation Adjustment

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulations to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction to account for inflation. This action, including the amount of the adjustments, is required under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective February 6, 2019.

FOR FURTHER INFORMATION CONTACT:

Marvin Shaw, Staff Attorney, at 1775 Duke Street, Alexandria, VA 22314, or telephone: (703) 518-6553.

SUPPLEMENTARY INFORMATION:

- I. Legal Background
- II. Calculation of Adjustments
- III. Regulatory Procedures

I. Legal Background*A. Statutory Requirements and OMB Guidance*

The Debt Collection Improvement Act of 1996¹ (DCIA) amended the Federal Civil Penalties Inflation Adjustment Act of 1990² (FCPIA Act) to require every federal agency to enact regulations that adjust each CMP provided by law under its jurisdiction by the rate of inflation at least once every four years.

In November 2015, Congress further amended the CMP inflation requirements in the Bipartisan Budget Act of 2015,³ which contains the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 amendments).⁴ This legislation provided for an initial “catch-up” adjustment of CMPs in 2016, followed by annual adjustments. The catch-up adjustment reset CMP maximum amounts by setting aside the inflation adjustments that agencies made in prior years and instead calculated inflation with reference to the year when each CMP was enacted or last modified by Congress. Agencies were required to publish their catch-up adjustments in an interim final rule by July 1, 2016 and make them effective by August 1, 2016.⁵ The NCUA complied with these requirements in a June 2016 interim final rule, followed by an October 2016 final rule to confirm the adjustments as final.⁶

The 2015 amendments also specified how agencies must conduct annual inflation adjustments after the 2016 catch-up adjustment. Following the catch-up adjustment, agencies must make the required adjustments and publish them in the **Federal Register** by

January 15 each year.⁷ For 2017, the NCUA issued an interim final rule on January 6, 2017,⁸ followed by a final rule issued on June 23, 2017.⁹ For 2018, the NCUA issued a final rule to satisfy the agency’s requirement for the 2018 annual adjustments.¹⁰ This document satisfies the agency’s requirement for the 2019 annual adjustment.

The law provides that the adjustments shall be made notwithstanding the section of the Administrative Procedure Act (APA) that requires prior notice and public comment for agency rulemaking.¹¹ The 2015 amendments also specify that each CMP maximum must be increased by the percentage by which the consumer price index for urban consumers (CPI-U)¹² for October of the year immediately preceding the year the adjustment is made exceeds the CPI-U for October of the prior year.¹³ For example, for the adjustment to be made in 2019, an agency must compare the October 2017 and 2018 CPI-U figures.

The 2015 amendments also provide that agencies may forgo the required annual adjustments in certain circumstances. Specifically, in a subsection titled “Other Adjustments Made,” the statute provides that an agency is not required to make an annual adjustment to a CMP if it has been increased by an amount greater than the contemplated annual adjustment in the preceding 12 months.¹⁴ When these criteria are met, the agency has discretion not to make the adjustments otherwise required by the statute.

In addition, the 2015 amendments directed the Office of Management and Budget (OMB) to issue guidance to agencies on implementing the inflation adjustments.¹⁵ OMB is required to issue its guidance each December and, with respect to the 2019 annual adjustment, did so on December 14, 2018.¹⁶ This

OMB guidance for the 2019 adjustments includes an inflationary multiplier (1.02522) to apply to each current CMP maximum amount to determine the adjusted maximum. The guidance also addresses rulemaking procedures and agency reporting and oversight requirements for CMPs.¹⁷

B. Application to the 2019 Adjustments

This section applies the statutory requirements and OMB’s guidance to the NCUA’s CMPs, and sets forth the Board’s calculation of the 2019 adjustments.

As explained above, the 2015 amendments require the NCUA to adjust the maximum amounts of its CMPs by the percentage by which the October 2018 CPI-U (252.885) exceeds the October 2017 CPI-U (246.663). The percentage change is 2.522. This percentage increase can be expressed as an inflation multiplier (the quotient of the October 2018 figure divided by the October 2017 figure). Accordingly, each CMP maximum amount should be multiplied by 1.02522 to determine the adjusted maximum amount. OMB’s guidance identifies the same multiplier.

The Board has considered the exception in the 2015 amendments for adjustments made in the preceding 12 months, discussed above, and has determined that it does not apply. All of the adjustments calculated below are equal to or greater than the adjustments made in January 2018 for each CMP. Accordingly, the exception for greater adjustments in the preceding 12 months does not apply. Thus, the Board lacks discretion to decline to make the adjustments calculated below.

The table below presents the adjustment calculations. The current maximums are found at 12 CFR 747.1001, as adjusted in January 2018. This amount is multiplied by the inflation multiplier to calculate the new maximum in the far right column. Only these adjusted maximum amounts, and not the calculations, will be codified at 12 CFR 747.1001 under this final rule. The adjusted amounts were applicable January 15, 2019, and can be applied to violations that occurred on or after November 2, 2015, the date the 2015 amendments were enacted.¹⁸

Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018), available at https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf.

¹⁷ Id.¹⁸ Public Law 114-74, 129 Stat. 600 (Nov. 2, 2015), codified at 28 U.S.C. 2461 note.⁷ Public Law 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).⁸ 82 FR 7640 (Jan. 23, 2017).⁹ 82 FR 29710 (June 30, 2017).¹⁰ 83 FR 2029 (Jan. 16, 2018).¹¹ Public Law 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).¹² This index is published by the Department of Labor, Bureau of Labor Statistics, and is available at its website: <http://www.bls.gov/cpi/>.¹³ Public Law 114-74, Sec. 701(b)(1)(2)(B), 129 Stat. 584, 600 (Nov. 2, 2015).¹⁴ Public Law 114-74, Sec. 701(b)(1), 129 Stat. 584, 600 (Nov. 2, 2015).¹⁵ Public Law 114-74, Sec. 701(b)(4), 129 Stat. 584, 601 (Nov. 2, 2015).¹⁶ OMB, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil¹ Public Law 104-134, Sec. 31001(s), 110 Stat. 1321-373 (Apr. 26, 1996). The law is codified at 28 U.S.C. 2461 note.² Public Law 101-410, 104 Stat. 890 (Oct. 5, 1990), codified at 28 U.S.C. 2461 note.³ Public Law 114-74, 129 Stat. 584 (Nov. 2, 2015).⁴ 129 Stat. 599.⁵ Public Law 114-74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).⁶ 81 FR 40152 (June 21, 2016); 81 FR 78028 (Nov. 7, 2016).

TABLE—CALCULATION OF MAXIMUM CMP ADJUSTMENTS

Citation	Description/tier ¹⁹	Current maximum (\$)	Multiplier	Adjusted Maximum (\$) (current maximum × multiplier, rounded to nearest dollar)
12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	3,928	1.02522	4,027.
12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	39,278	1.02522	40,269.
12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	Lesser of 1,963,870 or 1% of total CU assets.	1.02522	Lesser of 2,013,399 or 1% of total CU assets.
12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to NCUSIF, or inadvertent submission of false or misleading statement.	3,591	1.02522	3,682.
12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	35,904	1.02522	36,809.
12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	Lesser of 1,795,216 or 1% of total CU assets.	1.02522	Lesser of 1,840,491 or 1% of total CU assets.
12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements.	122	1.02522	125.
12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements.	285	1.02522	292.
12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	9,819	1.02522	10,067.
12 U.S.C. 1786(k)(2)(B)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	49,096	1.02522	50,334.
12 U.S.C. 1786(k)(2)(C)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	1,963,870	1.02522	2,013,399.
12 U.S.C. 1786(k)(2)(C)	Tier 3 (same) (CU)	Lesser of 1,963,870 or 1% of total CU assets.	1.02522	Lesser of 2,013,399 or 1% of total CU assets.
12 U.S.C. 1786(w)(5)(A)(ii)	Non-compliance with senior examiner post-employment restrictions.	323,027	1.02522	331,174.
15 U.S.C. 1639e(k)	Non-compliance with appraisal independence standards (first violation).	11,279	1.02522	11,563.
15 U.S.C. 1639e(k)	Subsequent violations of the same	22,556	1.02522	23,125.
42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements.	2,133	1.02522	2,187.

III. Regulatory Procedures

A. Final Rule Under the APA

In the 2015 amendments to the FCPIA Act, Congress provided that agencies shall make the required inflation adjustments in 2017 and subsequent years notwithstanding 5 U.S.C. 553,²⁰ which requires agencies to follow notice-and-comment procedures in rulemaking and to make rules effective no sooner than 30 days after publication in the **Federal Register**. The 2015 amendments provide a clear exception to these requirements.²¹ In addition, the Board finds that notice-and-comment

procedures would be impracticable and unnecessary under the APA because of the largely ministerial and technical nature of the rule, which affords agencies limited discretion in promulgating the rule, and the statutory deadline for making the adjustments.²² In these circumstances, the Board finds good cause to issue a final rule without issuing a notice of proposed rulemaking or soliciting public comments. The Board also finds good cause to make the final rule effective upon publication because of the statutory deadline. Accordingly, this final rule is issued without prior notice and comment and will become effective immediately upon publication.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act requires the Board to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.²³ For purposes of this analysis, the Board considers small credit unions to be those having under \$100 million in assets.²⁴ This final rule will not have a significant economic impact on a substantial number of small credit unions because it only affects the maximum amounts of CMPs that may be assessed in individual cases, which are not numerous and generally do not involve assessments at the maximum level. In addition, several of the CMPs

¹⁹The table uses condensed descriptions of CMP tiers. Refer to the U.S. Code citations for complete descriptions.

²⁰Public Law 114–74, Sec. 701(b)(1), 129 Stat. 584, 599 (Nov. 2, 2015).

²¹See 5 U.S.C. 559; *Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 396–99 (D.C. Cir. 1998).

²²5 U.S.C. 553(b)(3)(B); see *Mid-Tex Elec. Co-op., Inc. v. Fed. Energy Regulatory Comm’n*, 822 F.2d 1123, (D.C. Cir. 1987).

²³5 U.S.C. 603(a).

²⁴Interpretive Ruling and Policy Statement 15–1, 80 FR 57512 (Sept. 24, 2015).

are limited to a percentage of a credit union's assets. Finally, in assessing CMPs, the Board generally must consider a party's financial resources.²⁵ Because this final rule will affect few, if any, small credit unions, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.²⁶ For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against individuals, entities, or credit unions but does not require any reporting or recordkeeping. Therefore, this final rule will not create new paperwork burdens or modify any existing paperwork burdens.

D. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final rule adjusts the maximum amounts of certain CMPs that the Board may assess against

individuals, entities, and federally insured credit unions, including state-chartered credit unions. However, the final rule does not create any new authority or alter the underlying statutory authorities that enable the Board to assess CMPs. Accordingly, this final rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The Board has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

E. Assessment of Federal Regulations and Policies on Families

The Board has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.²⁷

F. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996²⁸ (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where the Board issues a final rule as defined by Section 551 of the APA.²⁹ The Board has submitted this final rule to OMB for it to determine whether it is a "major rule" within the meaning of the relevant sections of

SBREFA, but the Board does not believe the rule is major.

List of Subjects in 12 CFR Part 747

Credit unions, Civil monetary penalties.

By the National Credit Union Administration Board on January 4, 2019.

Gerard S. Poliquin,
Secretary of the Board.

For the reasons stated above, the NCUA Board amends 12 CFR part 747 as follows:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 1. The authority for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Public Law 101–410; Public Law 104–134; Public Law 109–351; Public Law 114–74.

■ 2. Revise § 747.1001 to read as follows:

§ 747.1001 Adjustment of civil monetary penalties by the rate of inflation.

(a) The NCUA is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890, as amended (28 U.S.C. 2461 note)), to adjust the maximum amount of each civil monetary penalty within its jurisdiction by the rate of inflation. The following chart displays those adjusted amounts, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
(1) 12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	\$4,027.
(2) 12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	\$40,269.
(3) 12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	\$2,013,399 or 1 percent of the total assets of the credit union, whichever is less.
(4) 12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to NCUSIF, or inadvertent submission of false or misleading statement.	\$3,682.
(5) 12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	\$36,809.
(6) 12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	\$1,840,491 or 1 percent of the total assets of the credit union, whichever is less.
(7) 12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	\$125.
(8) 12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	\$292.
(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	\$10,067.

²⁵ 12 U.S.C. 1786(k)(2)(G)(i).

²⁶ 44 U.S.C. 3507(d); 5 CFR part 1320.

²⁷ Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998).

²⁸ Public Law 104–121, 110 Stat. 857 (Mar. 29, 1996).

²⁹ 5 U.S.C. 551.

U.S. Code citation	CMP description	New maximum amount
(10) 12 U.S.C. 1786(k)(2)(A)	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	\$50,334.
(11) 12 U.S.C. 1786(k)(2)(A)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	\$2,013,399.
(12) 12 U.S.C. 1786(k)(2)(A)	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (insured credit union).	\$2,013,399 or 1 percent of the total assets of the credit union, whichever is less.
(13) 12 U.S.C. 1786(w)(5)(ii)	Non-compliance with senior examiner post-employment restrictions.	\$331,174.
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements.	First violation: \$11,563 Subsequent violations: \$23,125.
(15) 42 U.S.C. 4012a(f)(5) ...	Non-compliance with flood insurance requirements	\$2,187.

(b) The adjusted amounts displayed in paragraph (a) of this section apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations pre-dated the increase and occurred after November 2, 2015.

[FR Doc. 2019-01123 Filed 2-5-19; 8:45 am]

BILLING CODE 7535-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL-9988-90-OAR-OECA]

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating this final rule to adjust the level of the maximum (or minimum) statutory civil monetary penalty amounts under the statutes EPA administers. This action is mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“the 2015 Act”). The 2015 Act prescribes a formula for annually adjusting the statutory maximum (or minimum) amount of civil penalties to reflect inflation, maintain the deterrent effect of statutory civil penalties, and promote compliance with the law. The rule does not necessarily revise the penalty amounts that EPA chooses to seek pursuant to its civil penalty policies in a particular case. EPA’s civil penalty policies, which guide enforcement personnel on how to exercise EPA’s statutory penalty authorities, take into account a number of fact-specific considerations, e.g., the seriousness of the violation, the

violator’s good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and a violator’s ability to pay.

DATES: This final rule is effective February 6, 2019, and applicable beginning January 15, 2019.

FOR FURTHER INFORMATION, CONTACT: David Smith-Watts, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, Mail Code 2241A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, telephone number: (202) 564-4083; *smith-watts.david@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Since 1990, federal agencies have been required to issue regulations adjusting for inflation the statutory civil penalties¹ that can be imposed under the laws administered by that agency. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (DCIA), required agencies to review their statutory civil penalties every 4 years, and to adjust the statutory civil penalty amounts for inflation if the increase met the DCIA’s adjustment methodology. In accordance with the DCIA, EPA reviewed and, as appropriate, adjusted the civil penalty levels under each of the statutes the agency implements in 1996 (61 FR 69360), 2004 (69 FR 7121), 2008 (73 FR 75340), and 2013 (78 FR 66643).

The 2015 Act² required each federal agency to adjust the level of statutory

civil penalties under the laws implemented by that agency with an initial “catch-up” adjustment through an interim final rulemaking. The 2015 Act also required federal agencies, beginning on January 15, 2017, to make subsequent annual adjustments for inflation. Section 4 of the 2015 Act requires each federal agency to publish these annual adjustments by January 15 of each year. The purpose of the 2015 Act is to maintain the deterrent effect of civil penalties by translating originally enacted statutory civil penalty amounts to today’s dollars and rounding statutory civil penalties to the nearest dollar.

As required by the 2015 Act, EPA issued a catch-up rule on July 1, 2016, which was effective August 1, 2016 (81 FR 43091). EPA made its first annual adjustment on January 12, 2017, which was effective on January 15, 2017 (82 FR 3633). EPA made its second annual adjustment on January 10, 2018, which was effective on January 15, 2018 (83 FR 1190). Today’s rule implements the third annual adjustment mandated by the 2015 Act.

The 2015 Act describes the method for calculating the adjustments. Each statutory maximum and minimum³ civil monetary penalty is multiplied by the cost-of-living adjustment, which is

L. 114-74) was signed into law on Nov. 2, 2015, and further amended the Federal Civil Penalties Inflation Adjustment Act of 1990.

³ Under Section 3(2)(A) of the 2015 Act, “civil monetary penalty” means “a specific monetary amount as provided by Federal law”; or “has a maximum amount provided for by Federal law.” EPA-administered statutes generally refer to statutory maximum penalties, with the following exceptions: Section 311(b)(7)(D) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(D), refers to a minimum penalty of “not less than \$100,000 . . .”; Section 104B(d)(1) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1414b(d)(1), refers to an exact penalty of \$600 “[f]or each dry ton (or equivalent) of sewage sludge or industrial waste dumped or transported by the person in violation of this subsection in calendar year 1992 . . .”; and Section 325(d)(1) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11045(d)(1), refers to an exact civil penalty of \$25,000 for each frivolous trade secret claim.

¹ The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 28 U.S.C. 2461 note, defines “civil monetary penalty” as “any penalty, fine, or other sanction that—(A)(i) is for a specific monetary amount as provided by Federal law; or (ii) has a maximum amount provided for by Federal law; and (B) is assessed or enforced by an agency pursuant to Federal law; and (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.”

² The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub.

the percentage by which the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October 2018 exceeds the CPI-U for the month of October 2017.⁴

With this rule, the new statutory maximum and minimum penalty levels listed in the seventh column of Table 2 of 40 CFR 19.4 will apply to all civil penalties assessed on or after February 6, 2019, for violations that occurred after November 2, 2015, the date the 2015 Act was enacted. The former maximum and minimum statutory civil penalty levels, which are in the sixth column of Table 2 to 40 CFR 19.4, will now apply only to violations that occurred after November 2, 2015, where the penalties were assessed on or after January 15, 2018 but before February 6, 2019. The statutory penalty levels for violations that occurred after November 2, 2015, where the penalties were assessed on or after August 1, 2016 but before January 15, 2017, are codified in the fourth column of Table 2 to 40 CFR 19.4. The statutory civil penalty levels that apply to violations that occurred on or before November 2, 2015, are codified at Table 1 to 40 CFR 19.4.

The formula for determining the cost-of-living or inflation adjustment to statutory civil penalties consists of the following steps:

Step 1: The cost-of-living adjustment multiplier for 2019 is the percentage by which the CPI-U of October 2018 (252.885) exceeds the CPI-U for the month of October 2017 (246.663), which is 1.02522.⁵ Multiply 1.02522 by the current penalty amount. This is the raw adjusted penalty value.

Step 2: Round the raw adjusted penalty value. Section 5 of the 2015 Act states that any adjustment shall be rounded to the nearest multiple of \$1. The result is the final penalty value for the year.

II. The 2015 Act Requires Federal Agencies To Publish Annual Penalty Inflation Adjustments Notwithstanding Section 553 of the Administrative Procedures Act

⁴ Current and historical CPI-U's can be found on the Bureau of Labor Statistics' website here: <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-201810.pdf>.

⁵ Section 5(b) of the 2015 Act states “. . . the term ‘cost-of-living adjustment’ means the percentage (if any) for each civil monetary penalty by which-

(A) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

(B) the Consumer Price Index for the month of October 1 year before the month of October referred to in subparagraph (A).”

Because the CPI-U for October 2018 is 252.885 and the CPI-U for October 2017 is 246.663, the cost-of-living multiplier is 1.02522 (252.885 divided by 246.663).

Pursuant to section 4 of the 2015 Act, each federal agency is required to publish the next annual adjustments no later than January 15, 2019. However, due to the government shutdown from December 22, 2018, to January 25, 2019, EPA and the Office of **Federal Register** were unable to publish the rule by the January 15, 2019 deadline.

In accordance with section 553 of the Administrative Procedures Act (APA), most rules are subject to notice and comment and are effective no earlier than 30 days after publication in the **Federal Register**. However, Section 4(b)(2) of the 2015 Act provides that each agency shall make the annual inflation adjustments “notwithstanding section 553” of the APA. Consistent with the language of the 2015 Act, this rule is not subject to notice and an opportunity for public comment and will be effective on February 6, 2019.

III. Statutory and Executive Order Reviews

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

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

This action is not a significant regulatory action and was therefore not submitted to OMB for review.

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

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule merely increases the level of statutory civil penalties that can be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. Because the 2015 Act directs Federal agencies to publish this rule notwithstanding section 553 of the APA, this rule is not subject to notice and comment requirements or the RFA.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action is required by the 2015 Act, without the exercise of any policy discretion by EPA. This action also imposes no enforceable duty on any state, local or tribal governments or the private sector. Because the calculation of any increase is formula-driven pursuant to the 2015 Act, EPA has no policy discretion to vary the amount of the adjustment.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It 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.

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

This action does not have tribal implications as specified in Executive Order 13175. This rule merely reconciles the real value of current statutory civil penalty levels to reflect and keep pace with the levels originally set by Congress when the statutes were enacted. The calculation of the increases is formula-driven and prescribed by statute, and EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, this rule will not have a substantial direct effect on tribal governments, 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.

Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

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

J. National Technology Transfer and Advancement Act (NTTAA)

The rulemaking does not involve technical standards.

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

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. Rather, this action is mandated by the 2015 Act, which prescribes a formula for adjusting statutory civil penalties on an annual basis to reflect inflation.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The 2015 Act directs Federal agencies to publish their annual penalty inflation adjustments “notwithstanding section 553 [of the APA].” EPA finds that the APA’s notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest.

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Dated: December 21, 2018.

Andrew R. Wheeler,
Acting Administrator.

For the reasons set out in the preamble, EPA amends title 40, chapter I, part 19 of the Code of Federal Regulations as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101–410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104–134, title III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Pub. L. 105–362, title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub. L. 114–74, title VII, sec. 701(b), Nov. 2, 2015, 129 Stat. 599.

■ 2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

The statutory penalty levels in the last column of Table 1 to § 19.4 apply to all violations which occurred after December 6, 2013 through November 2, 2015, and to violations occurring after November 2, 2015, where penalties were assessed before August 1, 2016. The statutory civil penalty levels set forth in the fourth column of Table 2 of § 19.4 apply to all violations which occurred after November 2, 2015, where the penalties were assessed on or after August 1, 2016 and before January 15, 2017. The statutory civil penalty levels set forth in the fifth column of Table 2 of § 19.4 apply to all violations which occurred after November 2, 2015, where the penalties were assessed on or after January 15, 2017 but before January 15, 2018. The statutory civil penalty levels set forth in the sixth column of Table 2 of § 19.4 apply to all violations which occurred after November 2, 2015, where the penalties were assessed on or after January 15, 2018 but before February 6, 2019. The statutory civil penalty levels set forth in the seventh and last column of Table 2 of § 19.4 apply to all

violations which occur or occurred after November 2, 2015, where the penalties are assessed on or after February 6, 2019.

■ 3. In § 19.4, revise the introductory text and table 2 of section 19.4 to read as follows:

§ 19.4 Statutory civil penalties, as adjusted for inflation, and tables.

Table 1 to § 19.4 sets out the statutory civil penalty provisions of statutes administered by EPA, with the original statutory civil penalty levels, as enacted, and the operative statutory civil penalty levels, as adjusted for inflation, for violations that occurred on or before November 2, 2015, and for violations that occurred after November 2, 2015, where penalties were assessed before August 1, 2016. Table 2 to § 19.4 sets out the statutory civil penalty provisions of statutes administered by EPA, with the third column displaying the original statutory civil penalty levels, as enacted. The fourth column of Table 2 displays the operative statutory civil penalty levels where penalties were assessed on or after August 1, 2016 but before January 15, 2017, for violations that occurred after November 2, 2015. The fifth column displays the operative statutory civil penalty levels where penalties were assessed on or after January 15, 2017 but before January 15, 2018, for violations that occurred after November 2, 2015. The sixth column displays the operative statutory civil penalty levels where penalties were assessed on or after January 15, 2018 but before January 15, 2019, for violations that occurred after November 2, 2015. The seventh and last column displays the operative statutory civil penalty levels where penalties are assessed on or after January 15, 2019, for violations that occur or occurred after November 2, 2015.

* * * * *

TABLE 2 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Environmental statute	Statutory civil penalties, as enacted	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after August 1, 2016 but before January 15, 2017	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2017 but before January 15, 2018	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2018 but before January 15, 2019	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2019
7 U.S.C. 136l(a)(1) ...	Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).	\$5,000	\$18,750	\$19,057	\$19,446	\$19,936
7 U.S.C. 136l(a)(2) ¹ ..	FIFRA	\$1,000/\$500/\$1,000 ...	\$2,750/\$1,772/\$2,750	\$2,795/\$1,801/\$2,795	\$2,852/\$1,838/\$2,852	\$2,924/\$1,884/\$2,924
15 U.S.C. 2615(a)(1)	Toxic Substances Control Act (TSCA).	\$25,000	\$37,500	\$38,114	\$38,892	\$39,873
15 U.S.C. 2647(a)	TSCA	\$5,000	\$10,781	\$10,957	\$11,181	\$11,463
15 U.S.C. 2647(g)	TSCA	\$5,000	\$8,908	\$9,054	\$9,239	\$9,472
31 U.S.C. 3802(a)(1)	Program Fraud Civil Remedies Act (PFCRA).	\$5,000	\$10,781	\$10,957	\$11,181	\$11,463
31 U.S.C. 3802(a)(2)	PFCRA	\$5,000	\$10,781	\$10,957	\$11,181	\$11,463

TABLE 2 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Environmental statute	Statutory civil penalties, as enacted	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after August 1, 2016 but before January 15, 2017	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2017 but before January 15, 2018	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2018 but before January 15, 2019	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2019
33 U.S.C. 1319(d)	Clean Water Act (CWA).	\$25,000	\$51,570	\$52,414	\$53,484	\$54,833
33 U.S.C. 1319(g)(2)(A).	CWA	\$10,000/\$25,000	\$20,628/\$51,570	\$20,965/\$52,414	\$21,393/\$53,484	\$21,933/\$54,833
33 U.S.C. 1319(g)(2)(B).	CWA	\$10,000/\$125,000	\$20,628/\$257,848	\$20,965/\$262,066	\$21,393/\$267,415	\$21,933/\$274,159
33 U.S.C. 1321(b)(6)(B)(i).	CWA	\$10,000/\$25,000	\$17,816/\$44,539	\$18,107/\$45,268	\$18,477/\$46,192	\$18,943/\$47,357
33 U.S.C. 1321(b)(6)(B)(ii).	CWA	\$10,000/\$125,000	\$17,816/\$222,695	\$18,107/\$226,338	\$18,477/\$230,958	\$18,943/\$236,783
33 U.S.C. 1321(b)(7)(A).	CWA	\$25,000/\$1,000	\$44,539/\$1,782	\$45,268/\$1,811	\$46,192/\$1,848	\$47,357/\$1,895
33 U.S.C. 1321(b)(7)(B).	CWA	\$25,000	\$44,539	\$45,268	\$46,192	\$47,357
33 U.S.C. 1321(b)(7)(C).	CWA	\$25,000	\$44,539	\$45,268	\$46,192	\$47,357
33 U.S.C. 1321(b)(7)(D).	CWA	\$100,000/\$3,000	\$178,156/\$5,345	\$181,071/\$5,432	\$184,767/\$5,543	\$189,427/\$5,683
33 U.S.C. 1414b(d)(1)	Marine Protection, Research, and Sanctuaries Act (MPRSA).	\$600	\$1,187	\$1,206	\$1,231	\$1,262
33 U.S.C. 1415(a)	MPRSA	\$50,000/\$125,000	\$187,500/\$247,336	\$190,568/\$251,382	\$194,457/\$256,513	\$199,361/\$262,982
33 U.S.C. 1901 note (see 1409(a)(2)(A)).	Certain Alaskan Cruise Ship Operations (CACSO).	\$10,000/\$25,000	\$13,669/\$34,172	\$13,893/\$34,731	\$14,177/\$35,440	\$14,535/\$36,334
33 U.S.C. 1901 note (see 1409(a)(2)(B)).	CACSO	\$10,000/\$125,000	\$13,669/\$170,861	\$13,893/\$173,656	\$14,177/\$177,200	\$14,535/\$181,669
33 U.S.C. 1901 note (see 1409(b)(1)).	CACSO	\$25,000	\$34,172	\$34,731	\$35,440	\$36,334
33 U.S.C. 1908(b)(1)	Act To Prevent Pollution From Ships (APPS).	\$25,000	\$70,117	\$71,264	\$72,718	\$74,552
33 U.S.C. 1908(b)(2)	APPS	\$5,000	\$14,023	\$14,252	\$14,543	\$14,910
42 U.S.C. 300g-3(b)	Safe Drinking Water Act (SDWA).	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 300g-3(g)(3)(A).	SDWA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 300g-3(g)(3)(B).	SDWA	\$5,000/\$25,000	\$10,781/\$37,561	\$10,957/\$38,175	\$11,181/\$38,954	\$11,463/\$39,936
42 U.S.C. 300g-3(g)(3)(C).	SDWA	\$25,000	\$37,561	\$38,175	\$38,954	\$39,936
42 U.S.C. 300h-2(b)(1).	SDWA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 300h-2(c)(1).	SDWA	\$10,000/\$125,000	\$21,563/\$269,535	\$21,916/\$273,945	\$22,363/\$279,536	\$22,927/\$286,586
42 U.S.C. 300h-2(c)(2).	SDWA	\$5,000/\$125,000	\$10,781/\$269,535	\$10,957/\$273,945	\$11,181/\$279,536	\$11,463/\$286,586
42 U.S.C. 300h-3(c)	SDWA	\$5,000/\$10,000	\$18,750/\$40,000	\$19,057/\$40,654	\$19,446/\$41,484	\$19,936/\$42,530
42 U.S.C. 300i(b)	SDWA	\$15,000	\$22,537	\$22,906	\$23,374	\$23,963
42 U.S.C. 300i-1(c)	SDWA	\$100,000/\$1,000,000	\$131,185/\$1,311,850	\$133,331/\$1,333,312	\$136,052/\$1,360,525	\$139,483/\$1,394,837
42 U.S.C. 300i(e)(2)	SDWA	\$2,500	\$9,375	\$9,528	\$9,722	\$9,967
42 U.S.C. 300i-4(c)	SDWA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 300i-6(b)(2).	SDWA	\$25,000	\$37,561	\$38,175	\$38,954	\$39,936
42 U.S.C. 300j-23(d)	SDWA	\$5,000/\$50,000	\$9,893/\$98,935	\$10,055/\$100,554	\$10,260/\$102,606	\$10,519/\$105,194
42 U.S.C. 4852d(b)(5)	Residential Lead-Based Paint Hazard Reduction Act of 1992.	\$10,000	\$16,773	\$17,047	\$17,395	\$17,834
42 U.S.C. 4910(a)(2)	Noise Control Act of 1972.	\$10,000	\$35,445	\$36,025	\$36,760	\$37,687
42 U.S.C. 6928(a)(3)	Resource Conservation and Recovery Act (RCRA).	\$25,000	\$93,750	\$95,284	\$97,229	\$99,681
42 U.S.C. 6928(c)	RCRA	\$25,000	\$56,467	\$57,391	\$58,562	\$60,039
42 U.S.C. 6928(g)	RCRA	\$25,000	\$70,117	\$71,264	\$72,718	\$74,552
42 U.S.C. 6928(h)(2)	RCRA	\$25,000	\$56,467	\$57,391	\$58,562	\$60,039
42 U.S.C. 6934(e)	RCRA	\$5,000	\$14,023	\$14,252	\$14,543	\$14,910
42 U.S.C. 6973(b)	RCRA	\$5,000	\$14,023	\$14,252	\$14,543	\$14,910
42 U.S.C. 6991e(a)(3)	RCRA	\$25,000	\$56,467	\$57,391	\$58,562	\$60,039
42 U.S.C. 6991e(d)(1)	RCRA	\$10,000	\$22,587	\$22,957	\$23,426	\$24,017
42 U.S.C. 6991e(d)(2)	RCRA	\$10,000	\$22,587	\$22,957	\$23,426	\$24,017
42 U.S.C. 7413(b)	Clean Air Act (CAA)	\$25,000	\$93,750	\$95,284	\$97,229	\$99,681
42 U.S.C. 7413(d)(1)	CAA	\$25,000/\$200,000	\$44,539/\$356,312	\$45,268/\$362,141	\$46,192/\$369,532	\$47,357/\$378,852
42 U.S.C. 7413(d)(3)	CAA	\$5,000	\$8,908	\$9,054	\$9,239	\$9,472
42 U.S.C. 7524(a)	CAA	\$25,000/\$2,500	\$44,539/\$4,454	\$45,268/\$4,527	\$46,192/\$4,619	\$47,357/\$4,735
42 U.S.C. 7524(c)(1)	CAA	\$200,000	\$356,312	\$362,141	\$369,532	\$378,852
42 U.S.C. 7545(d)(1)	CAA	\$25,000	\$44,539	\$45,268	\$46,192	\$47,357
42 U.S.C. 9604(e)(5)(B).	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 9606(b)(1)	CERCLA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 9609(a)(1)	CERCLA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 9609(b)	CERCLA	\$25,000/\$75,000	\$53,907/\$161,721	\$54,789/\$164,367	\$55,907/\$167,722	\$57,317/\$171,952
42 U.S.C. 9609(c)	CERCLA	\$25,000/\$75,000	\$53,907/\$161,721	\$54,789/\$164,367	\$55,907/\$167,722	\$57,317/\$171,952

TABLE 2 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Environmental statute	Statutory civil penalties, as enacted	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after August 1, 2016 but before January 15, 2017	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2017 but before January 15, 2018	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2018 but before January 15, 2019	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 15, 2019
42 U.S.C. 11045(a) ...	Emergency Planning and Community Right-To-Know Act (EPCRA).	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 11045(b)(1)(A).	EPCRA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 11045(b)(2)	EPCRA	\$25,000/\$75,000	\$53,907/\$161,721	\$54,789/\$164,367	\$55,907/\$167,722	\$57,317/\$171,952
42 U.S.C. 11045(b)(3)	EPCRA	\$25,000/\$75,000	\$53,907/\$161,721	\$54,789/\$164,367	\$55,907/\$167,722	\$57,317/\$171,952
42 U.S.C. 11045(c)(1)	EPCRA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 11045(c)(2)	EPCRA	\$10,000	\$21,563	\$21,916	\$22,363	\$22,927
42 U.S.C. 11045(d)(1)	EPCRA	\$25,000	\$53,907	\$54,789	\$55,907	\$57,317
42 U.S.C. 14304(a)(1)	Mercury-Containing and Rechargeable Battery Management Act (Battery Act).	\$10,000	\$15,025	\$15,271	\$15,583	\$15,976
42 U.S.C. 14304(g) ...	Battery Act	\$10,000	\$15,025	\$15,271	\$15,583	\$15,976

¹ Note that 7 U.S.C. 1361(a)(2) contains three separate statutory maximum civil penalty provisions. The first mention of \$1,000 and the \$500 statutory maximum civil penalty amount were originally enacted in 1976 (Pub. L. 95–396), and the second mention of \$1,000 was enacted in 1972 (Pub. L. 92–516).

[FR Doc. 2019–00785 Filed 2–5–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2013–0492; FRL–9989–03–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Interstate Transport Requirements for the 2010 1-Hour Sulfur Dioxide Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the remaining portions of a state implementation plan (SIP) revision submitted by the State of Delaware. This revision addresses the infrastructure requirement for interstate transport of pollution with respect to the 2010 1-hour sulfur dioxide (SO₂) national ambient air quality standard (NAAQS). This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on March 8, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2013–0492. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on

the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. **FOR FURTHER INFORMATION CONTACT:** Joseph Schulingkamp, (215) 814–2021, or by email at schulingkamp.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On May 29, 2013, Delaware submitted, through the Delaware Department of Natural Resources and Environmental Control (DNREC), a revision to its SIP to satisfy the infrastructure requirements of section 110(a)(2) of the CAA for the 2010 1-hour SO₂ NAAQS, including the interstate transport requirements of section 110(a)(2)(D)(i)(I). On January 22, 2014 (79 FR 3506), EPA approved Delaware’s infrastructure SIP submittal for the 2010 1-hour SO₂ NAAQS for all applicable elements of section 110(a)(2) with the exception of 110(a)(2)(D)(i)(I). On August 8, 2018 (83 FR 39035), EPA published a notice of proposed rulemaking (NPRM) approving the portion of Delaware’s SIP addressing the interstate transport requirements of section 110(a)(2)(D)(i)(I) for the 2010 1-hour SO₂ NAAQS. For more information on SO₂ pollution, EPA’s infrastructure requirements, and interstate transport requirements, see Section I of the August 8, 2018 NPRM.

II. Summary of SIP Revision and EPA’s Analysis

The portions of Delaware’s May 29, 2013 SIP submittal addressing interstate

transport (for section 110(a)(2)(D)(i)(I)) discuss how Delaware does not significantly contribute with respect to the 2010 1-hour SO₂ NAAQS to nonattainment in, or interfere with maintenance in, any other state and discusses prevailing wind direction in the region. Delaware described in its submittal several existing SIP-approved measures and other federally enforceable source-specific measures, pursuant to permitting requirements under the CAA, that apply to SO₂ sources within the State.

After evaluating the information on emissions, monitoring data, and meteorological data, EPA concluded that the level of SO₂ emissions in Delaware is primarily due to point sources, which have substantially and permanently reduced SO₂ emissions in the past five years. Additionally, the historical and recent data from SO₂ monitors in close proximity to Delaware’s borders support the conclusion that emissions from point sources in Delaware have been substantially reduced and are not impacting neighboring states. Based on this information, EPA agreed with Delaware’s general conclusion that the existing Delaware SIP is adequate to prevent sources in Delaware from significantly contributing to nonattainment or interfering with maintenance in another state with respect to the 2010 1-hour SO₂ NAAQS. A detailed summary of EPA’s review and rationale for our approval of this SIP revision as meeting CAA section 110(a)(2)(D)(i)(I) for the 2010 1-hour SO₂ NAAQS may be found in EPA’s technical support document (TSD) (docket number: EPA–R03–OAR–2013–0492) and will not be restated here.

III. Response to Comments

EPA received three sets of comments on the August 8, 2018 NPRM. Two of those sets lacked the required specificity to Delaware's SIP submissions and the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I); EPA provides no response to these comments because they fall outside the scope of our action. EPA did receive one relevant set of comments; those comments and EPA's responses are discussed in this section of this rulemaking action.

Comment: The commenter first stated that the SIP must consider SO₂ emissions from refineries and their interstate impacts, including emissions from the Delaware City Refinery. The commenter also stated that consideration must include actual emissions as well as permitted emissions including emissions permitted during startup, shutdown, and malfunction.

Response: EPA agrees with the commenter that the Delaware SIP should consider SO₂ emissions from emission sources in Delaware. However, as stated in the NPRM and the TSD in greater detail, EPA has considered emissions from the Delaware City Refinery, as well as emissions from 33 other facilities in Delaware that produce over one ton per year (tpy) of SO₂. See Table 2 of EPA's TSD. EPA considered actual emissions from the two most recent National Emissions Inventory (NEI) years (the 2011 NEI version 2 and 2014 NEI version 2) as well as the most recent year of data submitted to EPA's Emissions Inventory System (EIS) (the 2015 EIS). In comparing these data sets, EPA was able to evaluate the universe of sources in Delaware that are likely to be responsible for SO₂ emissions potentially contributing to interstate transport to downwind areas and states. In addition, by evaluating the actual emissions data reported to EPA, the Agency has considered emissions from any startup, shutdown, or malfunction events to the greatest extent possible; the process by which states submit data to the NEI system requires states to include emissions related to these events. Thus, EPA did consider actual emissions, including emissions that may have been from startup, shutdown, or malfunction events when evaluating Delaware's SIP revision to address interstate transport.

In addition, the commenter has not provided any specific information that any source, or its emissions, were not included in EPA's analysis or that any source listed in Table 2 of EPA's TSD has substantially higher emissions than what was indicated in Table 2 of EPA's

TSD. EPA's assessment of Delaware's satisfaction of all applicable requirements under CAA section 110(a)(2)(D)(i)(I) for the 2010 SO₂ NAAQS was reasonably informed in part by evaluating the downwind impacts of emissions from these sources. After reviewing this information on emissions, monitoring data, and meteorological data, EPA determined that Delaware does not significantly cause or contribute to nonattainment or interfere with maintenance of the NAAQS in downwind states.

Comment: The commenter claimed it is arbitrary to assume that short-term emissions are equal to long-term emission limits. The commenter claimed it is arbitrary to assume that hourly emissions are never higher than the thirty-day or longer averaging time because there is no basis for this assumption. The commenter further claimed sources almost always exceed their long-term emission limits during shorter periods of time.

Response: EPA agrees with the commenter as a general matter that short-term emissions on an hourly basis could be higher than longer-term hourly emissions on a rolling average, and that a source just meeting its long-term limit could potentially have short-term emissions above the level of that limit. In designations and in review of attainment demonstrations, EPA gives appropriate recognition to this reality. See "Guidance for 1-Hour SO₂ Nonattainment Area SIP Submissions" (April 23, 2014), available at https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf. However, this potential for short term emissions to be higher on an hourly basis and not affect compliance with longer term limits does not affect EPA's conclusion regarding the adequacy of Delaware's SIP for interstate transport relative to the 1-hour SO₂ NAAQS, because the analysis in no way relies on an assumption that short-term emissions remain at or below long-term emission limits. In the NPRM and TSD, EPA did not rely on evaluations of short-term or long-term emission limits to support the conclusion that Delaware does not significantly cause or contribute to nonattainment or interfere with maintenance of the NAAQS in downwind states, nor did the Agency make any statements or conclusions regarding short-term or long-term emission limits, or the relationship between such limits and Delaware not significantly contributing to nonattainment or maintenance issues in

other states.¹ Similarly, EPA's proposed approval of the interstate transport SIP did not rely on any evaluation of hourly emissions or comparisons with thirty-day or longer averaging times, nor did EPA make any assumptions regarding these topics. EPA assessed annual emissions data in order to determine the scope of review necessary as a way to narrow Delaware's universe of sources likely to be responsible for SO₂ emissions potentially contributing to interstate transport. After determining that 62% of Delaware's emissions are from point sources, EPA next focused on individual facilities which emitted above one tpy. EPA chose one tpy as the emissions threshold for consideration for interstate transport because Delaware's universe of point sources was manageable enough to evaluate at this low threshold; this does not preclude EPA from choosing a different threshold in the future or for evaluating interstate transport in a different state. With regards to the commenter's claims about sources "almost always" exceeding their long-term emission limits during shorter periods of time, the commenter did not provide any evidence about any of the 33 named sources evaluated by EPA in the TSD to support such a claim.

Comment: The commenter asserted that, for sources with no emission limits such as flares, EPA's analysis must be based on a mass balance calculation of maximum emissions and be based on the flares not operating unless there is a SIP provision with adequate monitoring which requires the flares to ignite every time the stack is in service.

Response: In the NPRM and TSD, EPA did not make any claims or conclusions regarding emissions from flares, calculating maximum emissions, or any other topic regarding sources with no emission limits. EPA's evaluation regarding Delaware's emissions and whether the SIP adequately addressed obligations in CAA section 110(a)(2)(D)(i)(I) was based on facility-wide actual emissions reported to EPA in both the NEI system and EIS. As such, the commenter's assertion that EPA's analysis must be based on a mass balance calculation of maximum

¹ EPA notes that short-term limits were utilized in modeling performed during the designations process for the Anne Arundel, Maryland nonattainment area. However, EPA did not rely on that modeling for any purposes related to evaluating significant contribution to nonattainment or interference with maintenance of the 2010 SO₂ NAAQS. As further described in the July 7, 2018 TSD and NPRM for this action, based on wind direction, distance, and emissions from Delaware, EPA believes it is unlikely for Delaware's emissions to significantly contribute or interfere with maintenance of the 2010 SO₂ NAAQS.

emissions and be based on the flare not operating is not pertinent to EPA's analysis of Delaware's sources or the adequacy of Delaware's SIP in meeting obligations in 110(a)(2)(D)(i)(I). Thus, no further response is provided.

Comment: Lastly, the commenter stated that it is arbitrary for EPA to rely on prevailing winds as the 2010 SO₂ NAAQS is a 1-hour standard. The commenter states that the meteorology in roughly 99.95% of hours in any given year would be irrelevant because the form of the NAAQS is the 4th high daily maximum one-hour value. The commenter further stated that, unless EPA has evidence in the record that the winds traveled in the same direction as the prevailing winds 99.95% of the year, the use of prevailing winds is irrelevant to the question of whether sources in Delaware significantly contribute to, or interfere with the maintenance of, the NAAQS in New Jersey.

Response: EPA disagrees with the commenter's assertion that it is arbitrary for EPA to rely on prevailing winds as part of the weight of evidence assessment of whether Delaware's SIP satisfies the interstate transport requirements for the 2010 SO₂ NAAQS. EPA believes the central tendency of the distribution of wind directions being away from a receptor location as indicated by a wind rose, and the frequency of winds being in the direction of a receptor location, can be useful factors in determining the likelihood of SO₂ emissions transporting beyond Delaware's borders.

Furthermore, EPA's use of wind rose information is only one of many factors considered in the EPA's weight of evidence analysis and is not the sole factor in determining whether Delaware significantly contributes to nonattainment or interferes with maintenance of the NAAQS in downwind states. In addition to wind rose information, EPA evaluated the distances between sources in Delaware and the borders with other states, currently available ambient monitoring data, permanent and enforceable reductions from facilities in Delaware, and SIP-approved programs that limit any future increases in emissions from sources in Delaware (such as nonattainment new source review and prevention of significant deterioration permitting programs) and implementation of nationally applicable Federal rules (such as 40 CFR part 63, subparts DDDDD and JJJJJ, collectively "EPA's ICI Boilers and Heaters NESHAP Rules").²

² Because EPA's consideration of wind rose information is only one of many factors used in

IV. Final Action

EPA is approving the remaining portions of the May 29, 2013 SIP revision that address interstate transport for the 2010 1-hour SO₂ NAAQS as these portions meet the requirements in CAA section 110 and specifically in 110(a)(2)(D)(i)(I). EPA is approving these portions of the May 29, 2013 SIP submission as a revision to the Delaware SIP.

V. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

evaluating Delaware's transport SIP for the 1-hour SO₂ NAAQS, our evaluation of wind rose information has no implications for how wind rose information may be used or considered in any other EPA action. The technical utility or importance of wind rose information in another action will depend on the specific technical circumstances and related CAA requirements.

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 8, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, addressing Delaware's interstate transport requirements for the 2010 1-hour SO₂ NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 28, 2018.

Cecil Rodrigues,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (e) is amended by revising the entry for

“Section 110(a)(2) Infrastructure Requirements for the 2010 SO₂ NAAQS” and adding a second entry directly beneath that entry for “Section 110(a)(2) Infrastructure Requirements for the 2010 SO₂ NAAQS” to read as follows:

§ 52.420 Identification of plan.

* * * * *
(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * * Section 110(a)(2) Infrastructure Requirements for the 2010 SO ₂ NAAQS.	* * * * * Statewide	* * * * * 5/29/2013	* * * * * 1/22/2014, 79 FR 3506	* * * * * Docket #: 2013–0492. This action addresses the following CAA elements of section 110(a)(2): A, B, C, D(i)(II), D(ii), E, F, G, H, J, K, L, and M.
* * * * * Section 110(a)(2) Infrastructure Requirements for the 2010 SO ₂ NAAQS.	* * * * * Statewide	* * * * * 5/29/2013	* * * * * 2/6/2019, [Insert Federal Register citation].	* * * * * Docket #: 2013–0492. This action addresses CAA section 110(a)(2)(D)(i)(I) (prongs 1 and 2)
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[FR Doc. 2019–01113 Filed 2–5–19; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2018–0383; FRL–9988–37–Region 5]

Air Plan Approval; Illinois; Nonattainment New Source Review Requirements for the 2008 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving, as a State Implementation Plan (SIP) revision, Illinois’ certification that its SIP satisfies the nonattainment new source review (NNSR) requirements of the Clean Air Act (CAA) for the 2008 8-hour ozone National Ambient Air Quality Standard (“NAAQS” or “Standard”). This action permanently stops the Federal Implementation Plan (FIP) clocks triggered by EPA’s February 3 and December 11, 2017 findings that Illinois failed to submit an NNSR plan for the Illinois portion of the Chicago-

Naperville, Illinois-Indiana-Wisconsin area (Chicago Nonattainment Area).

DATES: This final rule is effective on March 8, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2018–0383. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through www.regulations.gov or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone David Ogulei, Environmental Engineer, at (312) 353–0987 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: David Ogulei, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18), Environmental

Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–0987, ogulei.david@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

- I. Background
- II. Summary of EPA Analysis
- III. What comments did we receive on the proposed rule?
- IV. What action is EPA taking?
- V. Statutory and Executive Order Reviews
 - A. General Requirements
 - B. Submission to Congress and the Comptroller General
 - C. Petitions for Judicial Review

I. Background

On March 6, 2015, EPA issued a final rule titled “Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements” (SIP Requirements Rule), which detailed the requirements that state, tribal, and local air quality management agencies must meet as they develop implementation plans for areas where air quality exceeds the 2008 8-hour ozone NAAQS. *See* 80 FR 12264 (March 6, 2015).¹ Areas that were

¹ The SIP Requirements Rule addresses a range of nonattainment area SIP requirements for the 2008

designated as marginal ozone nonattainment areas were required to attain the 2008 8-hour ozone NAAQS no later than 36 months after the effective date of area designations for the 2008 8-hour ozone NAAQS (*i.e.*, July 20, 2015), based on 2012–2014 monitoring data. *See* 80 FR 12268 and 40 CFR 51.1103.

EPA classified the Chicago Nonattainment Area as a marginal nonattainment area for the 2008 8-hour ozone NAAQS on June 11, 2012 (effective July 20, 2012) using certified ambient air quality monitoring data from calendar years 2009–2011. *See* 77 FR 34221. The Chicago Nonattainment Area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties and parts of Grundy and Kendall Counties in Illinois; Lake and Porter Counties in Indiana; and part of Kenosha County in Wisconsin.

On May 4, 2016, pursuant to section 181(b)(2) of the CAA, EPA determined that the Chicago Nonattainment Area failed to attain the 2008 8-hour ozone NAAQS by the July 20, 2015 marginal area attainment deadline and did not meet the CAA section 181(a)(5) criteria, as interpreted in 40 CFR 51.1107, for a 1-year attainment date extension. *See* 81 FR 26697 (May 4, 2016). Thus, EPA reclassified this area by operation of law as moderate for the 2008 8-hour ozone NAAQS. *Id.*² In that action, EPA established January 1, 2017, as the due date for the State to submit all moderate area nonattainment plan SIP requirements applicable to newly reclassified areas.³

8-hour ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology (RACT), reasonably available control measures (RACM), major new source review (NSR), emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP. The rule also revokes the 1997 ozone NAAQS and establishes anti-backsliding requirements.

² The Metro-East area also did not attain the 2008 8-hour ozone NAAQS by July 20, 2015; however, EPA found that area to be eligible for a 1-year attainment date extension, for a new attainment date of July 20, 2016. *See* 81 FR 26697 (May 4, 2016). The Metro-East area includes the Illinois portion of the St. Louis-St. Charles-Farmington, Missouri-Illinois ozone nonattainment area, which includes Madison, Monroe and St. Clair Counties in Illinois, and Franklin, Jefferson, St. Charles, and St. Louis Counties and the City of St. Louis in Missouri.

³ On November 14, 2018, EPA proposed to determine that the Illinois portion of the Chicago Nonattainment Area failed to attain the 2008 ozone NAAQS by the attainment date; thus, the Illinois portion of the Chicago area will be reclassified by operation of law to “serious” upon the effective date of the final reclassification notice. *See* 83 FR 56781. Consequently, Illinois must submit a SIP revision to satisfy the statutory and regulatory requirements for serious areas for the 2008 ozone NAAQS by the submission deadlines established in the final reclassification notice. Today’s action only

As explained in the SIP Requirements Rule, Illinois was required to develop a SIP revision addressing NNSR requirements for its marginal ozone nonattainment areas by July 20, 2015. *See* 80 FR 12266 (March 6, 2015). Additionally, because the Chicago Nonattainment Area was reclassified to moderate nonattainment, Illinois was required to submit a moderate area NNSR SIP by January 1, 2017. *See* 81 FR 26697 (May 4, 2016).⁴ NNSR is a preconstruction review permit program that applies to new major stationary sources or major modifications at existing sources located in a nonattainment area. *See* CAA sections 172(c)(5), 173 and 182. The NNSR requirements for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.160–165.

On February 3, 2017, EPA found that 15 states and the District of Columbia failed to submit SIP revisions to satisfy certain nonattainment plan requirements for the 2008 ozone NAAQS. *See* 82 FR 9158. EPA found, *inter alia*, that Illinois failed to timely submit a SIP revision to satisfy marginal NNSR requirements for the Chicago and Metro-East ozone nonattainment areas. In addition, on December 11, 2017, EPA found, *inter alia*, that Illinois failed to timely submit a revision to its SIP to satisfy moderate NNSR requirements for the Chicago Nonattainment Area. *See* 82 FR 58118.

The February 3 and December 11, 2017 findings established certain deadlines for the imposition of sanctions if Illinois does not submit a timely SIP revision addressing the requirements for which EPA made the findings, as well as deadlines for EPA to promulgate a FIP to address any outstanding SIP requirements. Specifically, Illinois was required to submit a complete SIP addressing the deficiencies that were the basis for each finding within 18 months of the effective dates of the findings (*i.e.*, September 6, 2018 and July 10, 2019, respectively) so as to avoid triggering, pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) in the affected nonattainment area. Additionally, these rules triggered the requirement for EPA to promulgate a FIP for the affected nonattainment area if EPA does not take final action to

addresses the moderate and marginal area SIP requirements as addressed by the February 3 and December 11, 2017 findings.

⁴ Illinois’ obligation to submit the NNSR SIP was not affected by the D.C. Circuit Court’s February 16, 2018 decision on portions of the SIP Requirements Rule in *South Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d 1138 (D.C. Cir. Feb. 16, 2018).

approve the State’s submittal within 2 years of the effective date of the findings (*i.e.*, March 6, 2019, and January 10, 2020, respectively).

On March 1, 2018, EPA redesignated the Metro-East area to attainment for the 2008 8-hour ozone NAAQS because EPA found this area to have met the statutory requirements for redesignation to attainment under the CAA. *See* 83 FR 8756 (March 1, 2018). In that action, EPA also approved, as a revision to the Illinois SIP, Illinois’ plan for maintaining the 2008 ozone NAAQS through calendar year 2030 in the Metro-East area. NNSR SIP revisions are no longer required if an area is redesignated to attainment; the CAA’s Prevention of Significant Deterioration (PSD) program requirements apply in lieu of NNSR. *See* 82 FR 9160 n. 16 (February 3, 2017). Because the Metro-East area is now designated attainment, a NNSR SIP is not required for this area.

On May 23, 2018, the Illinois Environmental Protection Agency (IEPA) submitted a SIP revision requesting EPA’s approval of Illinois’ certification that its existing SIP-approved NNSR regulations fully satisfy the NNSR requirements set forth in 40 CFR 51.165 for both marginal and moderate ozone nonattainment areas for the 2008 ozone NAAQS. IEPA certified that its existing NNSR program covering its ozone nonattainment areas for the 2008 8-hour ozone NAAQS, including the Chicago Nonattainment Area, contains the NNSR elements required by 40 CFR 51.165, as amended by the SIP Requirements Rule, for ozone and its precursors. IEPA certified that it already complies with CAA sections 172(c)(5) and 182(a)(2)(C), which require states that have been designated nonattainment for an ozone NAAQS to submit plans or plan revisions containing certain required elements, including permit programs for the construction and operation of new or modified stationary sources in the nonattainment area. Specifically, IEPA certified that its existing NNSR regulations in Title 35 of Illinois Administrative Code Part 203 (35 IAC Part 203, Major Stationary Sources Construction And Modification) fully satisfy the NNSR requirements set forth in 40 CFR 51.165 for both marginal and moderate ozone nonattainment areas because they contain all NNSR SIP elements required by 40 CFR 51.165 for its ozone nonattainment areas.

On October 9, 2018, EPA issued a notice of proposed rulemaking (proposed rule) in which we proposed to find that IEPA’s submittal addresses Illinois’ obligations as described in the February 3 and December 11, 2017

findings. See 83 FR 50551. Specifically, we proposed to conclude that Illinois' submittal fulfills the 40 CFR 51.1114 revision requirement, meets the requirements of CAA sections 110 and 172 and the minimum SIP requirements of 40 CFR 51.165, as well as Illinois' obligations under EPA's February 3 and December 11, 2017 findings.

II. Summary of EPA Analysis

The minimum SIP requirements for NNSR permitting programs for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.165. See 40 CFR 51.1114. These NNSR program requirements include those promulgated in the "Phase 2 Rule" implementing the 1997 8-hour ozone NAAQS (70 FR 71612, November 29, 2005) and the SIP Requirements Rule implementing the 2008 8-hour ozone NAAQS. Under the Phase 2 Rule, the SIP for each ozone nonattainment area must contain NNSR provisions that: set major source thresholds for nitrogen oxides (NO_x) and volatile organic compounds (VOC) pursuant to 40 CFR 51.165(a)(1)(iv)(A)(1)(i)-(iv) and (a)(1)(iv)(A)(2); classify physical changes as a major source if the change would constitute a major source by itself pursuant to 40 CFR 51.165(a)(1)(iv)(A)(3); consider any significant net emissions increase of NO_x as a significant net emissions increase for ozone pursuant to 40 CFR 51.165(a)(1)(v)(E); consider certain increases of VOC emissions in extreme ozone nonattainment areas as a significant net emissions increase and a major modification for ozone pursuant to 40 CFR 51.165(a)(1)(v)(F); set significant emissions rates for VOC and NO_x as ozone precursors pursuant to 40

CFR 51.165(a)(1)(x)(A)-(C) and (E); contain provisions for emissions reductions credits pursuant to 40 CFR 51.165(a)(3)(ii)(C)(1) and (2); provide that the requirements applicable to VOC also apply to NO_x pursuant to 40 CFR 51.165(a)(8); and set offset ratios for VOC and NO_x pursuant to 40 CFR 51.165(a)(9)(i)-(iii) (renumbered as (a)(9)(ii)-(iv) under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS). Under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS, the SIP for each ozone nonattainment area designated nonattainment for the 2008 8-hour ozone NAAQS and designated nonattainment for the 1997 ozone NAAQS on April 6, 2015, must also contain NNSR provisions that include the anti-backsliding requirements at 40 CFR 51.1105. See 40 CFR 51.165(a)(12).

Illinois' NNSR rules, as set forth in 35 IAC Part 203, are designed to ensure that the construction of a major new source of air pollution or a large increase of emissions at an existing source does not interfere with the attainment demonstration and does not delay timely achievement of the ambient air quality standards. The rules require owners or operators of major projects to: (1) Apply the Lowest Achievable Emission Rate (LAER) or, for certain existing sources, the Best Available Control Technology (BACT) on emissions of the nonattainment pollutant from the major project; (2) offset the emissions of the nonattainment pollutant from a major project by emission reductions from other sources in the nonattainment area; (3) demonstrate that other sources in

Illinois which are under common ownership or control with the person proposing the project are in compliance with the CAA; and (4) analyze alternatives to the particular project to determine whether the benefits of the project outweigh the environmental and social costs.

EPA last approved revisions to Illinois' NNSR rules on May 13, 2003. See 68 FR 25504.⁵ In that action, EPA approved amendments to 35 IAC 203 to better track the language of CAA sections 182(c)(6), (7), and (8). See 68 FR 25505. The changes dealt with how one determines whether a proposed change at a source is a major modification.

Based on our review of the NNSR checklist that IEPA incorporated into its submittal, and the version of 35 IAC 203 approved into the Illinois SIP, we are finding that Illinois' SIP-approved NNSR program at 35 IAC 203 contains the minimum required NNSR elements as specified in 40 CFR 51.165 for Illinois' ozone nonattainment areas. We are approving Illinois' certification that 35 IAC 203 is consistent with 40 CFR 51.165 and meets the requirements of CAA sections 172(c)(5), 173, 110(a)(2), 182(a)(4) and 182(b)(5) under the 2008 ozone standard for the Illinois portion of the Chicago Ozone Nonattainment Area. While some of Illinois' regulations are worded or organized differently than the Federal counterparts, EPA finds that these differences do not affect the relative stringency of such provisions.

The following table lists the specific provisions of Illinois' NNSR rules that EPA finds to address the required elements of the Federal NNSR rules:

Federal rule	Illinois rule
40 CFR 51.165(a)(1)(iv)(A)(1)(i)-(iv), (a)(1)(iv)(A)(2)	35 IAC 203.206(b).
40 CFR 51.165(a)(1)(iv)(A)(3)	35 IAC 203.206(c).
40 CFR 51.165(a)(1)(v)(E)	35 IAC 203.207(b).
40 CFR 51.165(a)(1)(v)(F)	35 IAC 203.207(f).
40 CFR 51.165(a)(1)(x)(A)-(C); (E)	35 IAC 203.207(d), (e) and (f), and 203.209(a) and (b).
40 CFR 51.165(a)(3)(ii) (C)(1) and (2)	35 IAC 203.302(a), 203.303(b) and (f), 203.602, and 203.701.
40 CFR 51.165(a)(8)	35 IAC 203.206(b), 203.207(b), (d), (e) and (f), 203.209(a) and (b), 203.30l(e) and (f), and 203.302.
40 CFR 51.165(a)(9)(ii), (iv)	35 IAC 203.302(a).

III. What comments did we receive on the proposed rule?

Our October 9, 2018 proposed rule (83 FR 50551) provided a 30-day public review and comment period. During the comment period, which closed on November 8, 2018, we received one set of comments. Although the commenter

generally supported our proposal, the commenter also raised concerns that we address below.

Comment: The commenter asserts that due to potential increased health risks to vulnerable communities, new VOC emissions should not be permitted in extreme ozone nonattainment areas pursuant to 40 CFR 51.165(a)(1)(v)(F).

The commenter suggests that instead of issuing new source review (NSR) permits in extreme nonattainment areas, any VOC emissions increases should be banned, and fines should be assessed for each additional ton of VOC emitted within the extreme nonattainment area. The commenter urges Illinois to revise its SIP to eliminate the provisions for

⁵ For other relevant approvals, see 45 FR 11470 (February 21, 1980); 46 FR 44172 (September 3,

1981); 50 FR 38803 (September 25, 1985); 51 FR

10837 (March 31, 1986); 57 FR 59928 (December 17, 1992); and 60 FR 49778 (September 27, 1995).

permitting of new emissions in extreme ozone nonattainment areas.

EPA Response: As we discussed at proposal, our review of Illinois' submittal is limited to the extent to which Illinois' existing NNSR regulations are consistent with the underlying Federal requirements for the 2008 8-hour ozone NAAQS as set forth in 40 CFR 51.160–51.165. EPA is not, through this action, revising the underlying Federal requirements.

Under 40 CFR 51.165(a)(1)(v)(F), if a major stationary source of VOC is located in an extreme ozone nonattainment area that is subject to subpart 2 of part D of title 1 of the CAA, any physical change in, or change in the method of operation of, the major stationary source that results in any increase in emissions of VOC from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone. This Federal requirement therefore provides a mechanism for NSR of new or increased VOC emissions in extreme ozone nonattainment areas. As we discussed in the proposed rule, Illinois has certified, and EPA has found, that the requirements of 40 CFR

51.165(a)(1)(v)(F) are addressed by 35 IAC 203.207(f). Note, however, that under both the Federal and Illinois' EPA-approved regulations, the owner or operator of a new major source or major modification that proposes new or increased VOC or NO_x emissions in an extreme ozone nonattainment area must offset such increase in emissions by an amount equal to or greater than 1.5 tons for each ton of the allowable emissions from the new source or the net increase in emissions from the modification. See 40 CFR 51.165(a)(9)(ii)(E) and 35 IAC 203.302(a)(1)(E).⁶ In addition, if Illinois were to revise its existing regulations to impose additional restrictions on new or increased VOC emissions in extreme ozone nonattainment areas, such revisions could make Illinois' regulations inconsistent with the Federal requirements.

IV. What action is EPA taking?

EPA is approving Illinois' May 23, 2018 SIP revision addressing the NNSR requirements for the 2008 8-hour ozone NAAQS for the Chicago Nonattainment Area. EPA has concluded that Illinois'

⁶Note that the analysis we included with the proposed rule contained a typographical error at 83 FR 50555. We incorrectly listed the offset requirement of 1.3:1, which applies in severe ozone nonattainment areas, twice. The second reference to the 1.3:1 offset ratio should have been to 1.5:1 for extreme ozone nonattainment areas.

submittal fulfills the 40 CFR 51.1114 revision requirement, meets the requirements of CAA sections 110 and 172 and the minimum SIP requirements of 40 CFR 51.165, as well as its obligations under EPA's February 3 and December 11, 2017 findings. This final action to approve Illinois' NNSR certification addresses the deficiencies that were the basis for the February 3 and December 11, 2017 findings and stops the FIP clock for the Illinois portion of the Chicago Nonattainment Area.

V. Statutory and Executive Order Reviews

A. General Requirements

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

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

Executive Order 12898 (59 FR 7629, February 16, 1994).

This final rule approving Illinois' 2008 8-hour ozone NAAQS NNSR SIP revision is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 8, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the CAA.)

List of Subjects in 40 CFR Part 52

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

Dated: December 12, 2018.
Cathy Stepp,
Regional Administrator, Region 5.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

entitled “Ozone (8-hour, 2008) Nonattainment New Source Review Requirements” before the entry entitled “Regional haze plan” to read as follows:

40 CFR part 52 is amended as follows:

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

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

- 2. In § 52.720, the table in paragraph (e) is amended by adding an entry

§ 52.720 Identification of plan.

* * * * *
 (e) * * *

EPA-APPROVED ILLINOIS NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
* * *	* * *	* * *	* * *	* * *
Ozone (8-hour, 2008) Nonattainment New Source Review Requirements.	Chicago area	5/23/2018	2/6/2019, [Insert Federal Register citation].	.....
* * *	* * *	* * *	* * *	* * *

[FR Doc. 2018–27907 Filed 2–5–19; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 170817779–8161–02]

RIN 0648–XG760

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the Pacific cod allocation of the total allowable catch for the Bering Sea Trawl Catcher Vessel A-Season Sector Limitation in the Bering Sea subarea of the BSAI.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), February 1, 2019, through 1200 hours, A.l.t., April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 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 2019 Pacific cod allocation of the total allowable catch for the Bering Sea Trawl Catcher Vessel A-Season Sector Limitation in the Bering Sea subarea of the BSAI is 21,388 metric tons (mt) as established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) and inseason adjustment (83 FR 67144, December 28, 2019).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the Bering Sea Trawl Catcher Vessel A-Season Sector Limitation in the Bering Sea subarea of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 19,000 mt and is setting aside the remaining 2,388 mt as incidental catch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea subarea of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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 closure of directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 31, 2019.

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: February 1, 2019.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–01239 Filed 2–1–19; 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–XG700

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (18.3 meters) length overall using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the A season apportionment of the 2019 total allowable catch of Pacific cod to be harvested.

DATES: Effective February 5, 2019, through 2400 hours, Alaska local time (A.l.t.), December 31, 2019.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) 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 A season apportionment of the 2019 Pacific cod total allowable catch (TAC) specified for vessels using jig gear in the BSAI is 1,355 metric tons (mt) as established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) and inseason adjustment (83 FR 67144, December 28, 2018).

The 2019 Pacific cod TAC allocated to catcher vessels less than 60 feet (18.3 meters(m)) length overall (LOA) using hook-and-line or pot gear in the BSAI is 3,214 mt as established by final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) and inseason adjustment (83 FR 67144, December 28, 2018).

The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that jig vessels will not be able to harvest 1,200 mt of the A season apportionment of the 2019 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(1). Therefore, in accordance with § 679.20(a)(7)(iv)(C), NMFS apportions 1,200 mt of Pacific cod from the A season jig gear apportionment to the annual amount specified for catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

The harvest specifications for 2019 Pacific cod included in final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018) and inseason adjustment (83 FR 67144, December 28, 2018) are revised as follows: 155 mt to the A season apportionment and 1,059 mt to the annual amount for vessels using jig gear, and 4,414 mt to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot 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 reallocation of Pacific cod specified from jig vessels to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear. 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 January 29, 2019.

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: January 31, 2019.

Karen H. Abrams,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–01119 Filed 2–5–19; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 84, No. 25

Wednesday, February 6, 2019

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50, 52, and 100

[Docket No. PRM–50–99; NRC–2011–0189]

Enhancing Reactor Safety Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM), dated July 26, 2011, submitted by the Natural Resources Defense Council, Inc. (NRDC or the petitioner). The petitioner requested that the NRC amend its regulations to require nuclear facilities to confirm seismic and flooding hazards every 10 years and to address any new and significant information. The petition was docketed by the NRC on August 4, 2011, and was assigned Docket No. PRM–50–99. The NRC did not request public comment on this petition because the staff had sufficient information to review the issues raised in the PRM. The NRC is denying the petition because the NRC is addressing the issues raised in the petition using an approach other than rulemaking.

DATES: The docket for PRM–50–99 is closed on February 6, 2019.

ADDRESSES: Please refer to Docket ID NRC–2011–0189 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to <http://www.regulations.gov> and search for Docket ID NRC–2011–0189. Address questions about NRC rulemaking dockets to Carol Gallagher; telephone: 301–415–3463; email: Carol.Gallagher@nrc.gov. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “ADAMS Public Documents” and then select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.

- *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: Solomon Sahle, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–3781; email: Solomon.Sahle@nrc.gov, or Joseph Sebrosky, Office of Nuclear Reactor Regulation, telephone: 301–415–1132; email: Joseph.Sebrosky@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), “Petition for rulemaking—requirements for filing,” provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. On July 26, 2011, the NRC received a PRM from the NRDC. The petitioner requested that the NRC amend its regulations to require nuclear facilities licensed under 10 CFR parts 50, 52, and 100, and other applicable regulations, to confirm seismic hazards and flooding hazards every 10 years and to address any new and significant information, which would include, if necessary, updating the design basis for structures, systems, and components (SSCs) important to safety to protect against the updated hazards.

The petitioner cited Recommendation 2.2 (R2.2) of Section 4.1.1 of the NRC’s post-Fukushima Near-Term Task Force

report (ADAMS Accession No. ML11186A950) as the rationale and basis for the PRM. R2.2 recommended that licensees address any new and significant information and, if necessary, take actions that could include updating the design basis for SSCs important to safety to protect against the updated hazards.

On September 20, 2011 (76 FR 58165), the NRC published a notice of docketing for several PRMs from the NRDC in the **Federal Register**, which included Docket No. PRM–50–99 (Seismic Hazards and Flooding Hazards).¹ The only PRM being addressed in this **Federal Register** notice is PRM–50–99.

II. Reasons for Denial

The NRC is denying the petition because the staff concluded in SECY–15–0137, “Proposed Plans for Resolving Open Fukushima Tier 2 and 3 Recommendations,” Enclosure 2 (ADAMS Accession No. ML15254A006) that the NRC can meet the intent of R2.2 (which is the issue raised in the petition) using an approach other than rulemaking. In the staff requirements memorandum (SRM) for SECY–15–0137, dated February 8, 2016 (ADAMS Accession No. ML16039A175), the Commission approved the staff’s proposed closure plans, including the staff’s plans to use an enhanced process—other than rulemaking—to identify and evaluate new information related to external hazards.

Subsequently, in “Recommendation 2.2: Plan to Ensure Ongoing Assessment of Natural Hazard Information” (ADAMS Accession No. ML16286A569), Enclosure 2 of SECY–16–0144, “Proposed Resolution of Remaining Tier 2 and 3 Recommendations Resulting from the Fukushima Dai-ichi Accident” (ADAMS Accession No. ML16286A552), the staff provided the Commission with additional details regarding the staff’s plan to enhance existing processes to ensure the ongoing assessment of new information and reconfirmation of

¹ The notice also provided Docket Nos. PRM–50–97 (Emergency Preparedness Enhancements for Prolonged Station Blackouts), PRM–50–98 (Emergency Preparedness Enhancements for Multiunit Events), PRM–50–100 (Spent Nuclear Fuel Pool Safety), PRM–50–101 (Station Blackout Mitigation), and PRM–50–102 (Training on Severe Accident Mitigation [sic] Guidelines). The staff reviewed the other PRMs separately as part of the Mitigation of Beyond-Design-Basis Events draft final rule (see SECY–16–0142, dated December 15, 2016 (ADAMS Accession No. ML16291A186)).

natural hazards at nuclear power plants in a manner consistent with R2.2. As noted in Enclosure 2, while R2.2 focused on seismic and flooding hazards, the proposed framework is intended to accommodate a range of natural hazards including earthquakes, flooding, and extreme weather, such as high winds. In the SRM associated with SECY-16-0144, dated May 3, 2017 (ADAMS Accession No. ML17123A453), the Commission approved the staff's recommendations for the development of these process enhancements.

The staff is implementing the process enhancements described in Enclosure 2 of SECY-16-0144 via a process that the staff subsequently identified as the "Process for Ongoing Assessment of Natural Hazard Information" (POANHI). The staff's implementation of these process enhancements is ongoing. A cross-agency team has been formed to implement the POANHI. The team is developing procedures and has begun testing and populating the Natural Hazards Information Digest. The completion and implementation date for POANHI is October 2019.

In summary, the NRC is denying the petition because the staff is addressing the issue raised in the petition through the enhancement of existing NRC processes and the development of associated staff procedures to ensure that the staff proactively and routinely aggregates and assesses new information related to natural hazards (including, but not limited to, seismic and flooding hazards). The Commission-approved approach for ensuring the ongoing, routine, proactive, and systematic assessment of natural hazards information is described in SECY-15-0137 and SECY-16-0144 and associated staff requirements memorandums dated February 8, 2016, and May 3, 2017.

III. Stakeholder Interactions

The NRC held several public meetings to solicit input from stakeholders during the development of SECY-15-0137. This included a public meeting held on October 6, 2015, in which the NRC staff provided the Advisory Committee on Reactor Safeguards (ACRS) Subcommittee on Fukushima with an overview of the staff's plans to resolve all open Near-Term Task Force Tier 2 and 3 recommendations. The staff also discussed these plans with the ACRS Full Committee on November 5, 2015. In addition, the staff provided an overview of its proposed resolution plans for all of the open Tier 2 and 3 recommendations during a Category 2 public meeting held on October 20, 2015. Further, the staff briefed the Commission on the status of Tier 2 and

3 activities during public meetings held on November 17, 2015, and May 17, 2016.

In addition to the meetings discussed above, the NRC held a public meeting of the Fukushima Joint Steering Committee on August 25, 2016, where the NRC discussed the framework for the ongoing assessment of natural hazards information, described in Enclosure 2 of SECY-16-0144, with external stakeholders (ADAMS Accession No. ML16252A221).

On September 22, 2016, the NRC issued a document titled, "White Paper for Staff Assessment of Fukushima Lessons Learned Associated with Other Natural Hazards, Periodic Confirmation of Natural Hazards, and Real-Time Radiation Monitoring" (ADAMS Accession No. ML16230A384). The NRC staff briefed the ACRS Subcommittee on Fukushima on October 19, 2016, and the ACRS Full Committee on November 30, 2016, on the topics covered in the white paper.

IV. Conclusion

For the reasons cited in this document, the NRC is denying PRM-50-99. As explained above, the petition relied upon R2.2 of the NRC's post-Fukushima Near-Term Task Force report. PRM-50-99 did not present any significant new information or arguments.

Dated at Rockville, Maryland, this 31st day of January, 2019.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2019-01182 Filed 2-5-19; 8:45 am]

BILLING CODE 7590-01-P

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2019-02]

Definition of Contribution; Extension of Comment Period

AGENCY: Federal Election Commission.

ACTION: Extension of comment period.

SUMMARY: On January 31, 2019, the Federal Election Commission extended the comment period on the Notification of Availability for the Rulemaking Petition: Definition of Contribution ("NOA"), which sought comment on whether to begin a rulemaking to revise its regulations defining the term "contribution" in light of a recent district court decision in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*. The

Commission has decided to extend the comment period in light of the recent partial government shutdown.

DATES: The comment period for the NOA published December 3, 2018 (83 FR 62282) is extended. Comments must be received on or before March 4, 2019.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission's website at <http://www.fec.gov/fosers>, reference REG 2018-03. Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Robert M. Knop, Assistant General Counsel, 1050 First Street NE, Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Kevin M. Paulsen, Attorney, 1050 First Street NE, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On December 3, 2018, the Federal Election Commission opened the comment period on the NOA published in the **Federal Register** seeking comment on whether to begin a rulemaking to revise its regulations at 11 CFR 100.52 defining the term "contribution" in light of a recent district court decision in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*.¹ The comment period was scheduled to close at 11:59 p.m. on February 1, 2019; however, due to the recent partial government shutdown, the Commission has determined to extend the comment period for thirty days, to close at 11:59 p.m. on March 4, 2019.

On behalf of the Commission.

¹ See Rulemaking Petition: Definition of Contribution, 83 FR 62282 (Dec. 3, 2018).

Dated: January 31, 2019.

Ellen L. Weintraub,

Chair, Federal Election Commission.

[FR Doc. 2019-01194 Filed 2-5-19; 8:45 am]

BILLING CODE 6715-01-P

FEDERAL ELECTION COMMISSION

11 CFR Part 112

[Notice 2019-01]

Rulemaking Petition: Advisory Opinion Procedures; Extension of Comment Period

AGENCY: Federal Election Commission.

ACTION: Extension of comment period.

SUMMARY: On January 31, 2019, the Federal Election Commission extended the comment period on the Notification of Availability for the Rulemaking Petition: Advisory Opinion Procedures, which sought comment on whether to begin a rulemaking to establish specific time periods for the submission of public comments on drafts of advisory opinions. The Commission has decided to extend the comment period in light of the recent partial government shutdown.

DATES: The comment period for the NOA published December 3, 2018 (83 FR 62283) is extended. Comments must be received on or before March 4, 2019.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission's website at www.fec.gov/netdisclaimers or at <http://www.fec.gov/fosers>, reference REG 2016-01.

Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Robert M. Knop, Assistant General Counsel, 1050 1st Street NE, Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Cheryl Hemsley, Attorney, at 1050 1st Street NE, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On December 3, 2018, the Commission opened the comment period on a Notification of Availability published in the **Federal Register** seeking comment on whether to revise the rules at 11 CFR part 112 to establish specific time periods for the submission of public comments on drafts of advisory opinions. The comment period was scheduled to close at 11:59 p.m. on February 1, 2019, however, in light of the partial government shutdown, the Commission has determined to extend the comment period to close at 11:59 p.m. on March 4, 2019.

Dated: January 31, 2019.

On behalf of the Commission,

Ellen L. Weintraub,

Chair, Federal Election Commission.

[FR Doc. 2019-01192 Filed 2-5-19; 8:45 am]

BILLING CODE 6715-01-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 658

[Docket No. FHWA-2018-0042]

RIN 2125-AF86

FAST Act Section 5516 "Additional State Authority" Implementation

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The FHWA requests comments on implementation of Fixing America's Surface Transportation (FAST) Act Section 5516 "Additional State Authority," which provides the State of South Dakota the opportunity to update and revise its routes for Longer Combination Vehicles (LCVs), and commercial motor vehicles (CMVs) with 2 or more cargo-carrying units.

DATES: Comments must be received on or before March 8, 2019. Late comments will be considered to the extent practicable.

ADDRESSES: You may submit comments by any of the following methods:

- *Fax:* 1-202-493-2251;
- *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, 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; or

• *Electronically through the Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name, and docket number (FHWA-2018-0042) or Regulatory Identification Number (RIN) for this rulemaking (2125-AF86). Note that all comments received will be posted without change to: <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. John Berg, Office of Freight Management and Operations (HOFM), (202) 740-4602, or via email at John.Berg@dot.gov, or Mr. William Winne, Office of the Chief Counsel (HCC-40), (202) 366-1397, or via email at William.Winne@dot.gov. Office hours are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document may be viewed online under the docket number noted above through the Federal eRulemaking portal at: <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days this year. Please follow the online instructions. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at: <http://www.archives.gov/federal-register> and the Government Publishing Office's website at: <http://www.gpo.gov/fdsys>. In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. The 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 viewed at: www.dot.gov/privacy.

Physical access to the Docket is available at the U.S. Department of Transportation, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20950, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Background

The FHWA proposes to amend its regulations in 23 CFR 658 Appendix C (Appendix C), governing vehicles subject to 23 U.S.C. 127(d) (LCVs), and 49 U.S.C. 31112 (CMVs with 2 or more cargo-carrying units), in the State of South Dakota.

This action is necessary to implement the provisions of Section 5516 of the FAST Act (Pub. L. 114-94). The Conference Report accompanying the FAST ACT (House Report 114-357, December 1, 2015 at page 506) states,

“Conferees expect that the implementation of section 5516 will provide the maximum flexibility possible to re-route [LCVs] in the affected state to divided highways, highway facilities designed for freight transportation, or along routes that will enhance overall highway safety.”

In an August 30, 2016, letter, the South Dakota Department of Transportation (SDDOT) requested that FHWA add additional routes to South Dakota’s LCV network and provided a map and listing of those routes in Appendix C.

All of the proposed routes are on the National Network (NN), which is comprised of the Interstate System and routes designated as qualifying Federal-aid Primary System highways. Combinations with a cargo-carrying length of 81.5 feet or less may use all NN routes. Combinations with a cargo-carrying length over 81.5 feet are restricted to the Interstate System and the routes listed in Appendix C. This listing of routes is applicable to both double trailers and triple trailers.

Currently designated LCV routes in South Dakota include:

Highway	From MRM	To MRM	Length (miles)	From	To
I-29	0.00	252.65	252.5	Iowa	North Dakota.
I-90	0.00	412.52	413.0	Wyoming	Minnesota.
I-190	0.00	2.03	2.1	Rapid City	I-90.
I-229	0.00	10.83	11.3	I-29	I-90.
US14	333.55	418.11	84.4	S Jct US281	W Jct US14 Bypass at Brookings.
US14 B	418.11	421.32	3.6	W Jct US14 at Brookings	I-29 Exit 133 at Brookings.
US85	44.69	154.88	109.4	I-90 Exit 10 at Spearfish	North Dakota.
US281	70.30	117.37	46.8	I-90 Exit 310 at Plankinton	S Jct US14 west of Huron.
US281	194.53	229.27	33.0	8th Avenue in Aberdeen	North Dakota.
SD50	383.82	416.87	33.0	Burleigh Street in Yankton	I-29 Exit 26.
Total			989.2		

South Dakota proposes adding the following routes:

Highway	From MRM	To MRM	Length (miles)	From	To
US12	80.50	366.36	282.9	North Dakota	I-29.
US14	227.74	333.55	105.5	W Jct US83 at Ft. Pierre	S Jct US281 west of Huron.
SD37	73.08	95.64	22.7	I-90	E Jct SD34.
SD34	330.96	341.20	10.2	W Jct SD37	E Jct SD37.
SD37	105.80	127.70	21.8	W Jct SD34	US14 at Huron.
US18B	38.71	40.54	1.8	W Jct US18 at Hot Springs	E Jct US18 at Hot Springs.
US18	40.54	62.25	21.7	E Jct US18B at Hot Springs	US385 at Oelrichs.
SD79	26.75	74.70	48.0	US18	US16B.
US16B	67.64	72.95	5.4	SD79	I-90.
US83	87.24	119.79	32.5	I-90	W Jct US14 at Ft. Pierre.
US83	138.73	174.10	35.3	E Jct US14	W Jct US212.
US212	219.42	220.20	0.9	W Jct US83	E Jct US83.
US83	175.14	205.92	30.7	E Jct US212	S Jct US12.
US83	212.51	240.73	28.1	N Jct US12	North Dakota.
US212	0.00	13.46	13.4	Wyoming	US85 at Belle Fourche.
US281	124.25	153.38	29.2	N Jct US14	W Jct US212 at Redfield.
US212	306.46	306.97	0.5	W Jct US281 at Redfield	E Jct US281 at Redfield.
US281	153.89	194.24	40.4	E Jct US212 at Redfield	US12 at Aberdeen.
Total			731.1		

Section-by-Section Discussion of the Proposed Changes to 23 CFR 658 Appendix C

The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 restricts the operation of LCVs on the Interstate Highway System and CMV combinations with two or more cargo-carrying units on the NN to the types of vehicles in use on or before

June 1, 1991, subject to State rules, regulations, or restrictions that were in effect on that date. A listing of these vehicles and restrictions is found in Appendix C.

The FHWA proposes to revise Appendix C for the State of South Dakota as authorized in Section 5516 of the FAST Act, which provides South Dakota “the opportunity to update and revise the routes designated as

qualifying Federal-aid Primary System highways under section 31111(e) of title 49, United States Code . . .”. The FAST Act Conference Report states further, “Conferees expect that the implementation of section 5516 will provide the maximum flexibility possible to re-route longer combination vehicles in the affected state to divided highways, highway facilities designed

for freight transportation, or along routes that will enhance overall highway safety.” H. Rept. 114–357 at 506 (2015).

In an August 30, 2016, letter, SDDOT requested that FHWA add the additional routes to South Dakota’s LCV network, and provided a map, listing of those routes, and safety information for LCV routes in the State. All of the proposed routes are on the NN, which is comprised of the Interstate System and routes designated as qualifying Federal-aid Primary System highways.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period and after DOT has had the opportunity to review the comments submitted.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and USDOT Regulatory Policies and Procedures

The FHWA has determined that this action does not constitute a significant regulatory action within the meaning of Executive Order (E.O.) 12866 or within the meaning of DOT regulatory policies and procedures. The proposed amendments would update and revise the routes of the vehicles covered by 23 U.S.C. 127(d) (LCVs), and 49 U.S.C. 31112 (CMVs with 2 or more cargo-carrying units), in South Dakota, as found in 23 CFR 568 Appendix C. In addition, this action complies with the principles of E.O. 13563. After evaluating the costs and benefits of these proposed amendments, FHWA anticipates that the economic impact of this rulemaking would be minimal. These changes are not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency’s action or materially alter the budgetary impact of any entitlements, grants, user

fees, or loan programs. The FHWA anticipates that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not necessary. Finally, this proposed rule is not an E.O. 13771 regulatory action because it is not significant under E.O. 12866.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354; 5 U.S.C. 601–612), FHWA has evaluated the effects of this proposed rule on small entities, such as local governments and businesses. Based on the evaluation, FHWA anticipates that this action would not have a significant economic impact on a substantial number of small entities. The proposed amendments would update the routes of the vehicles covered by 23 U.S.C. 127(d) (LCVs), and 49 U.S.C. 31112 (CMVs with 2 or more cargo-carrying units), in South Dakota, as found in 23 CFR 568 Appendix C. Therefore, I certify that the proposed action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The FHWA has determined that this NPRM would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). The actions proposed in this NPRM would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any 1 year (when adjusted for inflation) in 2014 dollars for either State, local, and Tribal governments in the aggregate, or by the private sector. The FHWA will publish a final analysis, including its response to public comments, when it publishes a final rule.

Executive Order 13132 (Federalism Assessment)

The FHWA has analyzed this proposed rule in accordance with the principles and criteria contained in E.O. 13132. The FHWA has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action would not preempt any State law or State regulation or affect the States’ ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental

consultation on Federal programs and activities apply to this program. This E.O. applies because State and local governments would be directly affected by the proposed regulation, which is a condition on Federal highway funding. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the proposed rule does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this proposed rule for the purposes of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*). Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an Environmental Impact Statement; those that normally require preparation of an Environmental Assessment; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The proposed action is the amendment to the routes listed for vehicles covered by 23 U.S.C. 127(d) (LCVs), and 49 U.S.C. 31112 (CMVs with 2 or more cargo-carrying units) in South Dakota as found in 23 CFR 568 Appendix C, as allowed by Section 5516 of the FAST-Act. This proposed action qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives). The FHWA has evaluated whether the proposed action would involve unusual circumstances or extraordinary circumstances and has determined that this proposed rulemaking action would not involve such circumstances. As a result, FHWA finds that this proposed rulemaking would not result in significant impacts on the human environment.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed rule under E.O. 13175, and believes that it would not have substantial direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on

Indian Tribal governments, and would not preempt Tribal law. This proposed rule would not impose any direct compliance requirements on Indian Tribal governments nor would it have any economic or other impacts on the viability of Indian Tribes. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed rule under E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this proposed action is not a significant energy action under the E.O. and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this proposed action would effect a taking of private property or otherwise have taking implications under E.O. 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this proposed action under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this proposed action would not cause an environmental risk to health or safety that may disproportionately affect children.

Regulation Identifier Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 658

Grant programs-transportation, Highways and roads, Motor carrier size and weight.

Issued on: December 21, 2018.

Brandye L. Hendrickson,

Deputy Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA proposes to revise 23 CFR part 658 Appendix C for South Dakota as follows:

PART 658—TRUCK SIZE AND WEIGHT, ROUTE DESIGNATIONS—LENGTH, WIDTH AND WEIGHT LIMITATIONS

■ 1. The authority citation for part 658 is amended read as follows:

Authority: 23 U.S.C. 127 and 315; 49 U.S.C. 31111, 31112, and 31114; sec. 347, Pub. L. 108–7, 829; sec. 1309, Pub. L. 109–59, 119 Stat. 1219; sec. 115, Pub. L. 109–115, 119 Stat. 2408; sec. 5516, Pub. L. 114–94, 129 Stat. 1312; 49 CFR 1.81(a)(3).

■ 2. Amend Appendix C to Part 658 by revising the “State: South Dakota, Combination: Truck tractor and 2 trailing units—LVC” entry to read as follows:

Appendix C to Part 658—Trucks Over 80,000 Pounds On The Interstate System And Trucks Over STAA Lengths On The National Network

* * * * *

State: South Dakota.

Combination: Truck tractor and 2 trailing units—LCV.

Length of Cargo-Carrying Units: 100 feet.

Maximum Allowable Gross Weight: 129,000 pounds.

Operational Conditions:

Weight: For all combinations, the maximum gross weight on two or more consecutive axles is limited by the Federal Bridge Formula but cannot exceed 129,000 pounds. The weight on single axles or tandem axles spaced 40 inches or less apart may not exceed 20,000 pounds. Tandem axles spaced more than 40 inches but 96 inches or less may not exceed 34,000 pounds. Two consecutive sets of tandem axles may carry a gross load of 34,000 pounds each, provided the overall distance between the first and last axles of the tandems is 36 feet or more. The weight on the steering axle may not exceed 600 pounds per inch of tire width.

For combinations with a cargo-carrying length greater than 81.5 feet the following additional regulations also apply. The weight on all axles (other than the steering axle) may not exceed 500 pounds per inch of tire width. Lift axles and belly axles are not considered load-carrying axles and will not count when determining allowable vehicle weight.

Driver: The driver must have a commercial driver's license with the appropriate endorsement.

Vehicle: For all combinations, a semitrailer or trailer may neither be longer than nor weigh 3,000 pounds more than the trailer located immediately in front of it. Towbars longer than 19 feet must be flagged during daylight hours and lighted at night.

For combinations with a cargo-carrying length of 81.5 feet or less, neither trailer may exceed 45 feet, including load overhang. Vehicles may be 12 feet wide when hauling baled feed during daylight hours.

For combinations with a cargo-carrying length over 81.5 feet long, neither trailer may exceed 48 feet, including load overhang. Loading the rear of the trailer heavier than the front is not allowed. All axles except the steering axle require dual tires. Axles spaced 8 feet or less apart must weigh within 500 pounds of each other. The trailer hitch offset may not exceed 6 feet. The maximum effective rear trailer overhang may not exceed 35 percent of the trailer's wheelbase. The power unit must have sufficient power to maintain 40 miles per hour. A “LONG LOAD” sign measuring 18 inches high by 7 feet long with black on yellow lettering 10 inches high is required on the rear. Offtracking is limited to 8.75 feet for a turning radius of 161 feet.

Offtracking Formula = $161 - \frac{[161^2 - (L_1^2 + L_2^2 + L_3^2 + L_4^2 + L_5^2 + L_6^2 + L_7^2 + L_8^2)]^{1/2}}$

Note: L₁ through L₈ are measurements between points of articulation or vehicle pivot points. Squared dimensions to stinger steer points of articulation are negative. For two trailing unit combinations where at least one trailer is 45 feet long or longer, all the dimensions used to calculate offtracking must be written in the “Permit Restriction” area of the permit along with the offtracking value derived from the calculation.

Permit: For combinations with a cargo-carrying length of 81.5 feet or less, a single-trip permit is required for movement on the Interstate System if the gross vehicle weight exceeds 80,000 pounds. An annual or single-trip permit is required for hauling baled feed over 102 inches wide.

For combinations with a cargo-carrying length greater than 81.5 feet, a single-trip permit is required for all movements. Operations must be discontinued when roads are slippery due to moisture, visibility must be good, and wind conditions must not cause trailer whip or sway.

For all combinations, a fee is charged for any permit.

Access: For combinations with a cargo-carrying length of 81.5 feet or less, access is Statewide off the NN unless restricted by the South Dakota DOT.

For combinations with a cargo-carrying length greater than 81.5 feet, access to operating routes must be approved by the South Dakota DOT.

Routes: Combinations with a cargo-carrying length of 81.5 feet or less may use all NN routes. Combinations with a cargo-carrying length over 81.5 feet, are restricted to the Interstate System and:

Highway	From	To
US12	North Dakota State Line	Jct I-29 at Summit.
US14	Jct US83 at Ft. Pierre	Jct US14B in Pierre.
US14	Jct US14B east of Pierre	W Jct US14 Bypass at Brookings.
US14B	Jct US14 in Pierre	Jct US14 east of Pierre.
US14B	W Jct US14 at Brookings	Jct I-29 Exit 133 at Brookings.
US16B	Jct SD79 south of Rapid City	Jct I-90 at Rapid City.
US18	E Jct US18B at Hot Springs	Jct US385 at Oelrichs.
US18B	W Jct US18 at Hot Springs	E Jct US18 at Hot Springs.
US212	Wyoming State Line	Jct US85 at Belle Fourche.
US212	W Jct US83 west of Gettysburg	E Jct US83 west of Gettysburg.
US212	W Jct US281 in Redfield	E Jct US281 in Redfield.
US281	Jct I-90 Exit 310 at Plankinton	S Jct US14 west of Huron.
US281	Jct US14 north of Wolsley	W Jct US212 in Redfield.
US281	E Jct US212 in Redfield	North Dakota State Line.
US83	Jct I-90 near Vivian	Jct US14 at Ft. Pierre.
US83	Jct US14 east of Pierre	W Jct US212 west of Gettysburg.
US83	E Jct US212 west of Gettysburg	Jct US12 south of Selby.
US83	Jct US12 west of Selby	North Dakota State Line.
US85	I-90 Exit 10 at Spearfish	North Dakota State Line.
SD34	W Jct SD37	E Jct SD37.
SD37	Jct I-90 at Mitchell	E Jct SD34.
SD37	W Jct SD34	Jct US14 at Huron.
SD50	Burleigh Street in Yankton	Jct I-29 Exit 26.
SD79	Jct US18 & US385 at Oelrichs	Jct US16B south of Rapid City.

Legal Citations: SDCL 32-22-8.1, -38, -39, -41, -42, and -52; and Administrative Rules 70:03:01:37, :47, :48, and :60 through :70.

* * * * *

[FR Doc. 2019-01170 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-22-P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4001, 4204, 4206, 4207, 4211, 4219

RIN 1212-AB36

Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: The Pension Benefit Guaranty Corporation proposes to amend its regulations on Allocating Unfunded Vested Benefits to Withdrawing Employers and Notice, Collection, and Redetermination of Withdrawal Liability. The proposed amendments would implement statutory provisions affecting the determination of a withdrawing employer's liability under a multiemployer plan and annual withdrawal liability payment amount when the plan has had benefit reductions, benefit suspensions, surcharges, or contribution increases that must be disregarded. The proposed amendments would also provide simplified withdrawal liability calculation methods.

DATES: Comments must be submitted on or before April 8, 2019.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Email:* reg.comments@pbgc.gov. Include the RIN for this rulemaking (RIN 1212-AB36) in the subject line.

- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and the RIN for this rulemaking (RIN 1212-AB36). All comments received will be posted without change to PBGC's website, <http://www.pbgc.gov>, including any personal information provided. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

FOR FURTHER INFORMATION CONTACT: Hilary Duke (duke.hilary@pbgc.gov), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, 202-326-4400, extension 3839. (TTY users may call the Federal relay service toll-free at 800-877-8339

and ask to be connected to 202-326-4400, extension 3839.)

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of Regulatory Action

This rulemaking is needed to implement statutory changes affecting the determination of an employer's withdrawal liability and annual withdrawal liability payment amount when the employer withdraws from a multiemployer plan. The proposed regulation would provide simplified methods for determining withdrawal liability and annual payment amounts. A multiemployer plan sponsor could adopt these simplified methods to satisfy the statutory requirements and to reduce administrative burden.

PBGC's legal authority for this action is based on section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA; section 305(g)¹ of ERISA, which provides the statutory requirements for changes to withdrawal liability; section 4001 of ERISA (Definitions); section 4204 of ERISA (Sale of Assets); section 4206 of ERISA (Adjustment for Partial Withdrawal); section 4207 (Reduction or Waiver of Complete Withdrawal Liability); section 4211 of ERISA (Methods for Computing Withdrawal Liability); and section 4219 of ERISA (Notice, Collection, Etc., of Withdrawal

¹ Section 305(g) of ERISA and section 432(g) of the Internal Revenue Code (Code) are parallel provisions in ERISA and the Code.

Liability). Section 305(g)(5) of ERISA directs PBGC to provide simplified methods for multiemployer plan sponsors to use in determining withdrawal liability and annual payment amounts.

Major Provisions of the Regulatory Action

This proposed regulation would amend PBGC’s regulations on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) and Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219). The proposed changes would provide guidance and simplified methods for a plan sponsor to—

- Disregard reductions and suspensions of nonforfeitable benefits in determining the plan’s unfunded vested benefits for purposes of calculating withdrawal liability.
- Disregard certain contribution increases if the plan is using the presumptive, modified presumptive, and rolling-5 methods for purposes of determining the allocation of unfunded vested benefits to an employer.
- Disregard certain contribution increases for purposes of determining an employer’s annual withdrawal liability payment.

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- IV. Request for Comments
- V. Applicability
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I. Background

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector

defined benefit pension plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA): A single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. In general, a multiemployer pension plan is a collectively bargained plan involving two or more unrelated employers. This proposed rule deals with multiemployer plans.

Under sections 4201 through 4225 of ERISA, when a contributing employer withdraws from an underfunded multiemployer plan, the plan sponsor assesses withdrawal liability against the employer. Withdrawal liability represents a withdrawing employer’s proportionate share of the plan’s unfunded benefit obligations. To assess withdrawal liability, the plan sponsor must determine the withdrawing employer’s: (1) Allocable share of the plan’s unfunded vested benefits (the value of nonforfeitable benefits that exceeds the value of plan assets) as provided under section 4211, and (2) annual withdrawal liability payment as provided under section 4219.

There are four statutory allocation methods for determining a withdrawing employer’s allocable share of the plan’s unfunded vested benefits under section 4211 of ERISA: The presumptive method, the modified presumptive method, the rolling-5 method, and the direct attribution method. Under the first three methods, the basic formula for an employer’s withdrawal liability is one or more pools of unfunded vested benefits times the withdrawing employer’s allocation fraction—

$$\text{Unfunded Vested Benefit Pool(s)}^2 \times \frac{\text{Withdrawing employer's required contributions}}{\text{All employers' contributions}}$$

The withdrawing employer’s allocation fraction is generally equal to the withdrawing employer’s required contributions over all employers’ contributions over the 5 years preceding the relevant period or periods. Under the fourth method, the direct attribution method, an employer’s withdrawal liability is based on the benefits and assets attributed directly to the employer’s participants’ service, and a portion of the unfunded benefit

obligations not attributable to any present employer.

PBGC’s regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) provides modifications to the allocation methods that plan sponsors may adopt. Part 4211 also provides a process that plan sponsors may use to request approval of other methods.

A withdrawn employer makes annual withdrawal liability payments at a set rate over the number of years necessary to amortize its withdrawal liability,

generally limited to a period of 20 years. If any of an employer’s withdrawal liability remains unpaid under the payment schedule after 20 years, the unpaid amount may be allocated to other employers in addition to their basic withdrawal liability.

Annual withdrawal liability payments are designed to approximate the employer’s annual contributions before its withdrawal. The basic formula for the annual withdrawal liability payment under section 4219(c) of ERISA is a contribution rate multiplied by a

² Under ERISA sections 4211(b) and (c), the presumptive method provides for 20 distinct year-by-year liability pools (each pool represents the

year in which the unfunded liability arose), the modified presumptive method provides for two liability pools, and the rolling-5 method provides

for a single liability pool computed as of the end of the plan year preceding the plan year when the withdrawal occurs.

contribution base. Specifically, the annual withdrawal liability payment is determined as follows—

$$\text{Employer's highest contribution rate in the 10 plan years ending with the year of withdrawal} \times \text{Average number of contribution base units (e.g., hours worked) for the highest 3 consecutive plan years in the 10-year period preceding the year of withdrawal}$$

As the basic formulas show, withdrawal liability and an employer's annual withdrawal liability payment depend, among other things, on the

value of unfunded vested benefits and the amount of contributions.

In response to financial difficulties faced by some multiemployer plans, Congress made statutory changes in

2006 and 2014 that affect benefits and contributions under these plans. The four types of changes provided for are shown in the following table:

Adjustable Benefit Reductions	Reductions in adjustable benefits (e.g., post-retirement death benefits, early retirement benefits) and reductions arising from a restriction on lump sums and other benefits. ³
Benefit Suspensions	Temporary or permanent suspension of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the benefit suspension. ⁴
Surcharges	Surcharges, calculated as a percentage of required contributions, that certain underfunded plans are required to impose on contributing employers. ⁵
Contribution Increases	Contribution increases that plan trustees may require under a funding improvement or rehabilitation plan. ⁶

While each of the changes has its own requirements, they generally are all required to be “disregarded” by the plan sponsor in determining an employer's withdrawal liability. The statutory “disregard” rules require in effect that all computations in determining and assessing withdrawal liability be made using values that do not reflect the lowering of benefits or raising of contributions required to be disregarded.

The Pension Protection Act of 2006, Public Law 109–280 (PPA 2006), amended ERISA's withdrawal liability rules to require a plan sponsor to disregard the adjustable benefits

reductions in section 305(e)(8) of ERISA and the elimination of accelerated forms of distribution in section 305(f) of ERISA (which, for purposes of this preamble are referred to as adjustable benefit reductions) in determining a plan's unfunded vested benefits. PPA 2006 also requires a plan sponsor to disregard the contribution surcharges in section 305(e)(7) of ERISA in determining the allocation of unfunded vested benefits.

PBGC issued a final rule in December 2008 (73 FR 79628) implementing these PPA 2006 “disregard” rules by modifying the definition of “nonforfeitable benefit” for purposes of PBGC's regulations on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) and on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219). PBGC provided simplified methods to determine withdrawal liability for plan sponsors required to disregard adjustable benefit reductions in Technical Update 10–3 (July 15, 2010). The 2008 final rule also excluded the employer surcharge from the numerator and denominator of the allocation fractions used under section 4211 of ERISA. The preamble included an example of the application of the exclusion of surcharge amounts from contributions in the allocation fraction.

The Multiemployer Pension Reform Act of 2014, Public Law 113–235 (MPRA), made further amendments to the withdrawal liability rules and consolidated them with the PPA 2006

changes. The additional MPRA amendments require a plan sponsor to disregard benefit suspensions in determining the plan's unfunded vested benefits for a period of 10 years after the effective date of a benefit suspension. MPRA also requires a plan sponsor to disregard certain contribution increases in determining the allocation of unfunded vested benefits. A plan sponsor must also disregard surcharges and those contribution increases in determining an employer's annual withdrawal liability payment under section 4219 of ERISA.

The MPRA amendments apply to benefit suspensions and contribution increases that go into effect during plan years beginning after December 31, 2014, and to surcharges for which the obligation accrues on or after December 31, 2014.

Congress also authorized PBGC to create simplified methods for applying the “disregard” rules. Each simplified method described in the proposed rule applies to one or more specific aspects of the process of determining and assessing withdrawal liability, and the use of the simplified methods does not detract from the requirement to follow the statutory rules for all other aspects. A plan sponsor would be able to adopt any one or more of the simplified methods. However, a plan sponsor can choose to use an alternative approach that satisfies the requirements of the applicable statutory provisions and regulations rather than any of the simplified methods.

³ Sections 305(e)(8) and (f) of ERISA and 432(e)(8) and (f) of the Code.

⁴ Section 305(e)(9) of ERISA and 432(e)(9) of the Code. The Department of the Treasury must approve an application for a benefit suspension, in consultation with PBGC and the Department of Labor, upon finding that the plan is eligible for the suspension and has satisfied the criteria specified by MPRA. The Department of the Treasury has jurisdiction over benefit suspensions and issued a final rule implementing the MPRA provisions on April 28, 2016 (81 FR 25539).

⁵ Under section 305(e)(7) of ERISA and 432(e)(7) of the Code, each employer otherwise obligated to make contributions for the initial plan year and any subsequent plan year that a plan is in critical status must pay a surcharge to the plan for such plan year, until the effective date of a collective bargaining agreement (or other agreement pursuant to which the employer contributes) that includes terms consistent with the rehabilitation plan adopted by the plan sponsor.

⁶ The plan sponsor of a plan in endangered status for a plan year must adopt a funding improvement plan under section 305(c) of ERISA and 432(c) of the Code. The plan sponsor of a plan in critical status for a plan year must adopt a rehabilitation plan under section 305(e) of ERISA and 432(e) of the Code.

The following sections explain the PPA 2006 and MPRA “disregard” requirements and PBGC’s proposed simplified methods. The proposed rule also would eliminate some language that merely repeats statutory provisions and make other editorial changes.

II. Proposed Regulatory Changes To Reflect Benefit Decreases

A. Requirement To Disregard Adjustable Benefit Reductions and Benefit Suspensions (§ 4211.6)

Under the basic methodology explained above, a plan sponsor must calculate the value of unfunded vested benefits (the value of nonforfeitable benefits that exceeds the value of plan assets)⁷ to determine a withdrawing employer’s liability. In computing nonforfeitable benefits, under section 305(g)(1) of ERISA, a plan sponsor is required to disregard certain adjustable benefit reductions and benefit suspensions.

The proposed regulation would add a new § 4211.6 to PBGC’s unfunded vested benefits allocation regulation to implement the requirements that plan sponsors must disregard adjustable benefit reductions and benefit suspensions in allocating unfunded vested benefits. Proposed § 4211.6 replaces the approach previously taken by PBGC to implement the PPA 2006 “disregard” rules by modifying the definition of “nonforfeitable benefit.” The added MPRA “disregard” rules make that prior approach difficult to sustain. The proposed regulation would eliminate the special definition of “nonforfeitable benefit” in PBGC’s unfunded vested benefits allocation regulation and notice, collection, and redetermination of withdrawal liability regulation.

MPRA limited the requirement for a plan sponsor to disregard a benefit suspension in determining an employer’s withdrawal liability to 10 years. Under the proposed regulation, the requirement to disregard a benefit suspension would apply only for withdrawals that occur within the 10 plan years after the end of the plan year that includes the effective date of the benefit suspension. To calculate withdrawal liability during the 10-year period, a plan sponsor would disregard

the benefit suspension by including the value of the suspended benefits in determining the amount of unfunded vested benefits allocable to an employer. For example, if a plan has a benefit suspension with an effective date within the plan’s 2017 plan year, the plan sponsor would include the value of the suspended benefits in determining the amount of unfunded vested benefits allocable to an employer for any withdrawal occurring in plan years 2018 through 2027. The plan sponsor would not include the value of the suspended benefits in determining the amount of unfunded vested benefits allocable to an employer for a withdrawal occurring after the 2027 plan year.

In cases where a benefit suspension ends and full benefit payments resume during the 10-year period following a suspension, the value of the suspended benefits would continue to be included when calculating withdrawal liability until the end of the plan year in which the resumption of full benefit payments was required as determined under Department of the Treasury guidance, or otherwise occurs.

B. Simplified Methods for Disregarding Adjustable Benefit Reductions and Benefit Suspensions (§ 4211.16)

Under section 305(g)(5) of ERISA, PBGC is required to provide simplified methods for a plan sponsor to determine withdrawal liability when the plan has adjustable benefit reductions or benefit suspensions that are required to be disregarded. PBGC proposes to provide a simplified framework for disregarding adjustable benefit reductions and benefit suspensions in § 4211.16 of PBGC’s unfunded vested benefits allocation regulation.

Under the simplified framework, if a plan has adjustable benefit reductions or benefit suspensions, the plan sponsor would first calculate an employer’s withdrawal liability using the plan’s withdrawal liability method reflecting any adjustable benefit reduction and benefit suspension (proposed § 4211.16(b)(1)). The plan sponsor would add the employer’s proportional share of the value of any adjustable benefit reduction and any benefit suspension (proposed § 4211.16(b)(2)). In summary, withdrawal liability for a withdrawing employer would be based on the sum of the following—

(1) The employer’s allocable amount of unfunded vested benefits determined in accordance with section 4211 of ERISA under the method in use by the plan (based on the value of the plan’s nonforfeitable benefits reflecting any

adjustable benefit reduction and any benefit suspension),⁸ and
(2) The employer’s proportional share of the value of any adjustable benefit reduction and the employer’s proportional share of the value of any suspended benefits.

This is calculated before application of the adjustments required by section 4201(b)(1) of ERISA, including the 20-year cap on payments under section 4219(c)(1)(B) of ERISA.

The proposed simplified framework would provide simplified methods for calculating item (2), the employer’s proportional share of the value of any adjustable benefit reduction and the employer’s proportional share of the value of any suspended benefits. If a plan has adjustable benefit reductions, the plan sponsor would be able to adopt the simplified method discussed below to determine the value of the adjustable benefit reductions. The simplified method is essentially the same as the simplified method described in PBGC Technical Update 10–3. If a plan has a benefit suspension, the plan sponsor would be able to adopt either the static value method or adjusted value method to determine the value of the suspended benefits (also discussed below). The contributions for the allocation fractions for each of the simplified methods would be determined in accordance with the rules for disregarding contribution increases under § 4211.4 of PBGC’s unfunded vested benefits allocation regulation (and permissible modifications and simplifications under §§ 4211.12–4211.15 of PBGC’s unfunded vested benefits allocation regulation).

Under the simplified framework, a plan sponsor must include liabilities for benefits that have been reduced or suspended in the value of vested benefits. But the simplified framework does not require a plan sponsor to calculate what plan assets would have been if benefit payments had been higher. PBGC considered including an adjustment to plan assets in the proposed rule and concluded that it would require additional complicated calculations while only minimally changing results.

1. Employer’s Proportional Share of the Value of an Adjustable Benefit Reduction

The proposed regulation would incorporate the guidance provided in PBGC Technical Update 10–3 (July 15, 2010) for disregarding the value of adjustable benefit reductions. Technical

⁸ The amount of unfunded vested benefits allocable to an employer under section 4211 may not be less than zero.

⁷ The term “unfunded vested benefits” is defined in section 4213(c) of ERISA. However, for purposes of PBGC’s notice, collection, and redetermination of withdrawal liability regulation (29 CFR part 4219), the calculation of unfunded vested benefits, as used in subpart B of the regulation, is modified to reflect the value of certain claims. To avoid confusion, PBGC proposes to add a specific definition of “unfunded vested benefits” in each part of its multiemployer regulations that uses the term.

Update 10–3 explains the simplified method for determining an employer’s proportional share of the value of adjustable benefit reductions. The method applies for any employer withdrawal that occurs in any plan year

following the plan year in which an adjustable benefit reduction takes effect and before the value of the adjustable benefit reduction is fully amortized. The method is summarized in the chart in section II.B.3. below.

An employer’s proportional share of the value of adjustable benefit reductions is determined as of the end of the plan year before withdrawal as follows—

$$\text{The unamortized balance of the value of adjustable benefit reductions} \quad \times \quad \text{The withdrawing employer’s allocation fraction}$$

The value of the adjustable benefit reductions would be determined using the same assumptions used to determine unfunded vested benefits for purposes of section 4211 of ERISA. The unamortized balance as of a plan year would be the value as of the end of the year in which the reductions took effect (base year), reduced as if that amount were being fully amortized in level annual installments over 15 years, at the plan’s valuation interest rate, beginning with the first plan year after the base year.

The withdrawing employer’s allocation fraction is the amount of the employer’s required contributions over a 5-year period divided by the amount of all employers’ contributions over the same 5-year period.

The 5-year period for computing the allocation fraction would be the most recent five plan years ending before the employer’s withdrawal. For purposes of determining the allocation fraction, the denominator would be increased by any employer contributions owed with

respect to earlier periods that were collected in the five plan years and decreased by any amount contributed by an employer that withdrew from the plan during those plan years, or, alternatively, adjusted as permitted under § 4211.12.

For calculating the value of adjustable benefit reductions, Technical Update 10–3 provides an adjustment if the plan uses the rolling-5 method. The value is reduced by outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that withdrew as of the end of the year before the employer’s withdrawal. PBGC is not including this adjustment in this proposed rule. The requirement to reduce the unfunded vested benefits by the present value of future withdrawal liability payments for previously withdrawn employers is part of the rolling-5 calculation, and PBGC believes that excluding this adjustment in the proposed rule avoids some ambiguity that might have led to

additional unnecessary calculations and recordkeeping.

2. Employer’s Proportional Share of the Value of a Benefit Suspension

a. Static Value Method and Adjusted Value Method

PBGC’s proposed simplified framework would provide two simplified methods that a plan sponsor could choose between to calculate a withdrawing employer’s proportional share of the value of a benefit suspension—the static value method and the adjusted value method. Both methods apply for any employer withdrawal that occurs within the 10 plan years after the end of the plan year that includes the effective date of the benefit suspension (10-year period). A chart including a comparison of the two methods is in section II.B.3. below.

Under either method, an employer’s proportional share of the value of a benefit suspension is determined as follows—

$$\text{The present value of the suspended benefits} \quad \times \quad \text{The withdrawing employer’s allocation fraction}$$

Under the static value method, the present value of the suspended benefits as of a single calculation date would be used for all withdrawals in the 10-year period. At the plan sponsor’s option, that present value could be determined as of: (1) The effective date of the benefit suspension (as similar calculations are required as of that date to obtain approval of the benefit suspension); or (2) the last day of the plan year coincident with or following the date of the benefit suspension (as calculations are required as of that date for other withdrawal liability purposes). The present value is determined using the amount of the benefit suspension as authorized by the Department of the Treasury under the plan’s application for benefit suspension.

Under the adjusted value method, the present value of the suspended benefits for a withdrawal in the first year of the

10-year period would be the same as under the static value method. For withdrawals in years 2–10 of the 10-year period, the value of the suspended benefits would be determined as of the “revaluation date,” the last day of the plan year before the employer’s withdrawal. The value of the suspended benefits would be equal to the present value of the benefits not expected to be paid in the year of withdrawal or thereafter due to the benefit suspension. For example, assume that a calendar year multiemployer plan receives final authorization by the Secretary of the Treasury for a benefit suspension, effective January 1, 2018, and a contributing employer withdraws during the 2022 plan year. The revaluation date would be December 31, 2021. The value of the suspended benefits would be the present value of the benefits not expected to be paid after

December 31, 2021, due to the benefit suspension.

For both methods, the withdrawing employer’s allocation fraction is the amount of the employer’s required contributions over a 5-year period divided by the amount of all employers’ contributions over the same 5-year period.

For the static value method, the 5-year period would be determined based on the most recent 5 plan years ending before the plan year in which the benefit suspension takes effect. For the adjusted value method, the 5-year period would be determined based on the most recent 5 plan years ending before the employer’s withdrawal (which is the same 5-year period as is used for the simplified method for adjustable benefit reductions).

For both the static value method and the adjusted value method, the

denominator of the allocation fraction would be increased by any employer contributions owed with respect to earlier periods that were collected in the applicable 5-year period for the allocation fraction and decreased by any amount contributed by an employer that withdrew from the plan during those same 5 plan years, or, alternatively, adjusted as permitted under § 4211.12 (the same adjustments are made using the simplified method for adjustable benefit reductions).

For the static value method, the proposed regulation would require an additional adjustment in the denominator of the allocation fraction for a plan using a method other than the presumptive method or similar method. The denominator after the first year of the 5-year period would be decreased by the contributions of any employers that withdrew and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal. This adjustment is intended to approximate how a withdrawn employer's withdrawal liability would be calculated under the rolling-5 and modified presumptive methods by fully allocating the present value of the suspended benefits to solvent employers. The adjustment is not necessary under the presumptive method, as that method has a specific adjustment for previously allocated withdrawal liabilities that are deemed uncollectible.

Example of Simplified Framework Using the Static Value Method for Disregarding a Benefit Suspension

Assume that a calendar year multiemployer plan receives final authorization by the Secretary of the Treasury for a benefit suspension, effective January 1, 2017. The present value, as of that date, of the benefit suspension is \$30 million. Employer A, a contributing employer, withdraws during the 2021 plan year. Employer A's proportional share of contributions for the 5 plan years ending in 2016 (the year before the benefit suspension takes effect) is 10 percent. Employer A's proportional share of contributions for

the 5 plan years ending before Employer A's withdrawal in 2021 is 11 percent.

The plan uses the rolling-5 method for allocating unfunded vested benefits to withdrawn employers under section 4211 of ERISA. The plan sponsor has adopted by amendment the static value simplified method for disregarding benefit suspensions in determining unfunded vested benefits. Accordingly, there is a one-time valuation of the initial value of the suspended benefits with respect to employer withdrawals occurring during the 2018 through 2027 plan years, the first 10 years of the benefit suspension.

To determine the amount of unfunded vested benefits allocable to Employer A, the plan's actuary would first determine the amount of Employer A's withdrawal liability as of the end of 2020 assuming the benefit suspensions remain in effect. Under the rolling-5 method, if the plan's unfunded vested benefits as determined in the plan's 2020 plan year valuation were \$170 million (not including the present value of the suspended benefits), the share of these unfunded vested benefits allocable to Employer A would be equal to \$170 million multiplied by Employer A's allocation fraction of 11 percent, or \$18.7 million. The plan's actuary would then add to this amount Employer A's proportional 10 percent share of the \$30 million initial value of the suspended benefits, or \$3 million. Employer A's share of the plan's unfunded vested benefits for withdrawal liability purposes would be \$21.7 million (\$18.7 million + \$3 million).

If another significant contributing employer—Employer B—had withdrawn in 2018 and was unable to satisfy its withdrawal liability claim, the allocation fraction applicable to the value of the suspended benefits would be adjusted. The contributions in the denominator for the last 5 plan years ending in 2016 would be reduced by the contributions that were made by Employer B, thereby increasing Employer A's allocable share of the \$30 million value of the suspended benefits.

b. Temporary Benefit Suspension

If a benefit suspension is a temporary suspension of the plan's payment obligations as authorized by the Department of the Treasury, the present value of the suspended benefits includes the value of the suspended benefits only through the ending period of the benefit suspension.

For example, assume that a calendar-year plan has an approved benefit suspension effective December 31, 2018, for a 15-year period ending December 31, 2033. Effective January 1, 2034, benefits are to be restored (prospectively only) to levels not less than those accrued as of December 30, 2018, plus benefits accrued after December 31, 2018. Employer A withdraws in a complete withdrawal during the 2022 plan year. The plan sponsor would first determine Employer A's allocable amount of unfunded vested benefits under section 4211 of ERISA. That amount is the present value of vested benefits as of December 31, 2021, including the present value of the vested benefits that are expected to be restored effective January 1, 2034. The plan sponsor would then determine Employer A's proportional share of the value of the suspended benefits. The plan uses the static value method. The value of the suspended benefits would equal the present value, as of December 31, 2018, of the benefits accrued as of December 30, 2018, that would otherwise have been expected to have been paid, but for the benefit suspension, during the 15-year period beginning December 31, 2018, and ending December 31, 2033. The portion of this present value allocable to Employer A would be added to the unfunded vested benefits allocable to Employer A under section 4211 of ERISA.

3. Chart of Simplified Methods To Determine Employer's Proportional Share of the Value of a Benefit Suspension and an Adjustable Benefit Reduction

The following chart provides a summary of the simplified methods discussed above:

EMPLOYER'S PROPORTIONAL SHARE OF THE VALUE OF A BENEFIT SUSPENSION OR AN ADJUSTABLE BENEFIT REDUCTION
 [Value of benefit × allocation fraction]

Method	Static value method benefit suspension	Adjusted value method benefit suspension	Adjustable benefit reduction
Value of Benefit Suspension or Adjustable Benefit Reduction.	Withdrawals in years 1–10 after the benefit suspension: Present value of the suspended benefits as authorized by the Department of Treasury in accordance with section 305(e)(9) of ERISA calculated as of the date of the benefit suspension or the last day of the plan year coincident with or following the date of the benefit suspension.	Withdrawals in year 1 after the suspension: Same as Static Value Method. Withdrawals in years 2–10 after the suspension: The present value, determined as of the end of the plan year before a withdrawal, of the benefits not expected to be paid in the year of withdrawal or thereafter due to the benefit suspension.	Unamortized balance of the value of the adjustable benefit reduction using the same assumptions as for UVBs for purposes of section 4211 of ERISA and amortization in level annual installments over 15 years.
Allocation Fraction.	For all three methods, the Allocation Fraction is the amount of the employer's required contributions over a 5-year period divided by the amount of all employers' contributions over the same 5-year period. The Allocation Fraction is determined in accordance with rules to disregard contribution increases under § 4211.4 and permissible modifications and simplifications under §§ 4211.12–15.		
Five-Year Period for the Allocation Fraction.	Five consecutive plan years ending before the plan year in which the benefit suspension takes effect.	Five consecutive plan years ending before the employer's withdrawal.	Same as Adjusted Value Method.
Adjustments to Denominator of the Allocation Fraction.	Same as Adjusted Value Method, but using the 5-year period for the Static Value Method. In addition, if a plan uses a method other than the presumptive method, the denominator after the first year of the 5-year period is decreased by the contributions of any employers that withdrew from the plan and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal.	The denominator is increased by any employer contributions owed with respect to earlier periods which were collected in the 5-year period and decreased by any amount contributed by an employer that withdrew from the plan during the 5-year period, or, alternatively, adjusted as permitted under § 4211.12.	Same as Adjusted Value Method.

III. Proposed Regulatory Changes To Reflect Surcharges and Contribution Increases

A. Requirement To Disregard Surcharges and Certain Contribution Increases in Determining the Allocation of Unfunded Vested Benefits to an Employer (§ 4211.4) and the Annual Withdrawal Liability Payment Amount (§ 4219.3)

Changes in contributions can affect the calculation of an employer's withdrawal liability and annual withdrawal liability payment amount. For example, such changes can increase or decrease the allocation fraction (discussed above in section I) that is used to calculate an employer's withdrawal liability. They can also increase or decrease an employer's highest contribution rate used to calculate the employer's annual withdrawal liability payment amount (also discussed above in section I).

Required surcharges and certain contribution increases typically result in an increase in an employer's withdrawal liability even though unfunded vested benefits are being reduced by the increased contributions. Sections 305(g)(2) and (3) of ERISA mitigate the effect on withdrawal liability by

providing that these surcharges and contribution increases that are required or made to enable the plan to meet the requirements of the funding improvement plan or rehabilitation plan are disregarded in determining contribution amounts used for the allocation of unfunded vested benefits and the annual payment amount.

The proposed regulation would amend § 4211.4 of PBGC's unfunded vested benefits allocation regulation and § 4219.3 of PBGC's notice, collection, and redetermination of withdrawal liability regulation to incorporate the requirements to disregard these surcharges and contribution increases. The proposed regulation also would provide simplified methods for disregarding certain contribution increases in the allocation fraction in § 4211.14 of PBGC's unfunded vested benefits allocation regulation (discussed below in section III.B). PBGC is not providing a simplified method for disregarding surcharges in the proposed rule because we believe that plans have been able to apply the statutory requirements without the need for a simplified method.

The provision regarding contribution increases applies to increases in the contribution rate or other required

contribution increases that go into effect during plan years beginning after December 31, 2014.⁹ A special rule under section 305(g)(3)(B) of ERISA provides that a contribution increase is deemed to be required or made to enable the plan to meet the requirement of the funding improvement plan or rehabilitation plan, such that the contribution increase is disregarded. However, the statute provides that this deeming rule does not apply to increases in contributions due to increases in levels of work or increases in contributions that are used to provide an increase in benefits. Accordingly, the proposed regulation would provide that these increases are included as contribution increases for purposes of determining the allocation fraction and the highest contribution rate. Under the proposed regulation, the contributions that are used to provide an increase in benefits includes both contributions that are associated with a plan amendment and additional contributions that provide an increase in benefits as an integral part of the benefit formula (a

⁹The requirement to disregard surcharges for purposes of determining an employer's annual withdrawal liability payment is effective for surcharges the obligation for which accrue on or after December 31, 2014.

“benefit bearing” contribution increase). In addition, under section 305(g)(4) of ERISA, contribution increases are not treated as necessary to satisfy the requirement of the funding improvement plan or rehabilitation plan after the plan has emerged from critical or endangered status. This exception applies only to the determination of the allocation fraction. The table below summarizes the exceptions to the rule to disregard a contribution increase.

<p>Exceptions to Disregarding a Contribution Increase: Allocation fraction and highest contribution rate exceptions (simplified methods for these exceptions are explained in III.B. of the preamble).</p>	<p>(1) Increases in contributions associated with increased levels of work, employment, or periods for which compensation is provided. (2) Additional contributions used to provide an increase in benefits, including an increase in future benefit accruals permitted by sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA and 432(d)(1)(B) or 432(f)(1)(B) of the Code, and additional contributions used to provide a “benefit-bearing” contribution increase.</p>
<p>Allocation fraction exception (simplified methods for this exception are explained in III.C. of the preamble).</p>	<p>(3) The withdrawal occurs on or after the expiration date of the employer’s collective bargaining agreement in effect in the plan year the plan is no longer in endangered or critical status, or, if earlier, the date as of which the employer renegotiates a contribution rate effective after the plan year the plan is no longer in endangered or critical status.</p>

Under sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA and sections 432(d)(1)(B) or 432(f)(1)(B) of the Code, a plan that is subject to a funding improvement or rehabilitation plan could be amended to increase benefits, including future benefit accruals, if the plan actuary certifies that such an increase is paid for out of additional contributions. To determine contribution amounts used for the allocation fraction and the highest contribution rate, a plan sponsor would include contributions that go into effect during plan years beginning after December 31, 2014, that the plan actuary certifies are used to provide an increase in benefits or future accruals. If a plan has a contribution increase that is used to provide an increase in benefits or future accruals for purposes of the allocation fraction, the plan sponsor must also use the contribution increase for determining the highest contribution rate for purposes of the annual withdrawal liability payment amount.

Example: Assume that a plan has an hourly contribution rate of \$3.25 in effect in the plan’s 2014 plan year. The plan sponsor determines that after the plan’s 2014 plan year it will disregard hourly contribution rate increases of \$0.25 per year in determining withdrawal liability because such increases were made to meet the requirements of the plan’s rehabilitation plan. Beginning with the plan’s 2018 plan year, the plan sponsor dedicates \$0.20 of the \$0.25 increase to an increase in benefits. The plan sponsor would use the employers’ hourly contribution rate of \$3.25 in effect in the 2014 plan year to determine contributions until the 2018 plan year. For the 2018 plan year and subsequent years, the plan sponsor would use a \$3.45 hourly contribution rate to

determine contribution amounts used for the allocation fraction and the highest contribution rate.¹⁰

A plan sponsor would also include a “benefit-bearing” contribution increase, *i.e.*, a contribution increase that funds an increase in benefits or accruals as an integral part of the plan’s benefit formula in the determination of contribution amounts that are taken into account for withdrawal liability purposes. Under the proposed regulation, the portion of the contribution increase (fixed amount, specific percentage, etc.) that is funding the increased future benefit accruals must be determined actuarially.¹¹

Example: Assume benefits are 1 percent of contributions per month under a percentage of contributions formula and the employer’s hourly contribution rate increases from \$4.00 to \$4.50 effective in the 2018 plan year. Thus, under the plan formula, the \$0.50 increase provides an increase in future benefit accruals. While the full \$0.50 increase is credited as a benefit accrual under the plan formula, the plan sponsor obtains an actuarial determination that only \$0.20 of that increase is actuarially necessary to fund the nominal increase in benefit accrual and that \$0.30 of the increase will fund past service obligations. For purposes of withdrawal liability, 40 percent of the rehabilitation plan contribution increase is deemed to increase benefit accruals for withdrawal liability purposes (\$0.50

¹⁰ This rate is increased again at such time as Plan X determines that any further increase in contributions is used to fund an increase in benefits.

¹¹ This is consistent with ERISA sections 305(d)(1)(B) and 305(f)(1)(B) and Code sections 432(d)(1)(B) and 432(f)(1)(B), which permit a plan that is subject to a funding improvement or rehabilitation plan to be amended to increase benefits, including future benefit accruals, if the plan actuary certifies that such increase is paid for out of additional contributions.

× 40% = \$0.20). Effective for the 2018 plan year, the plan sponsor would use a \$4.20 hourly contribution rate to determine contribution amounts for the allocation fraction and the highest contribution rate.

PBGC invites public comment on alternative methods that plans might use to identify contribution increases used to provide an increase in benefits.

B. Simplified Methods for Disregarding Certain Contribution Increases in the Allocation Fraction (§ 4211.14)

The allocation fraction that is used to determine an employer’s proportional share of unfunded vested benefits is discussed above in section I. The proposed regulation would add a new § 4211.14 to the unfunded vested benefits allocation regulation to provide a choice of one simplified method for the numerator and two simplified methods for the denominator of the allocation fraction that a plan sponsor could adopt to satisfy the requirements of section 305(g)(3) of ERISA to disregard contribution increases in determining the allocation of unfunded vested benefits.¹² A plan amended to use one or more of the simplified methods in this section must also apply the rules to disregard surcharges under proposed § 4211.4.

1. Determining the Numerator Using the Employer’s Plan Year 2014 Contribution Rate

Under the simplified method for determining the numerator of the

¹² Section 305(g)(5) of ERISA requires PBGC to prescribe simplified methods to disregard contribution increases in determining the allocation of unfunded vested benefits. Under section 4211(c)(2)(D) of ERISA, PBGC may permit adjustments in the denominator of the allocation fraction where such adjustment would be appropriate to ease administrative burdens of plans in calculating such denominators.

allocation fraction, a plan sponsor bases the calculation on an employer's contribution rate as of the last day of each plan year (rather than applying a separate calculation for contribution increases that occur in the middle of a plan year). The plan sponsor would start with the employer's contribution rate as of the "freeze date." The freeze date, for a calendar year plan, is December 31, 2014, and for non-calendar year plans, is the last day of the first plan year that ends on or after December 31, 2014. If, after the freeze date, the plan has a contribution rate increase that provides an increase in benefits so that the contribution increase is included, that rate increase would be added to the contribution rate for each target year that the rate increase is effective for.

Under the method, the product of the freeze date contribution rate (increased in accordance with the prior sentence, if applicable) and the withdrawn employer's contribution base units in each plan year ("target year") would be used for the numerator and the comparable amount determined for each employer would be included in the denominator (described in B.2 below), unless the plan sponsor uses the proxy group method for determining the denominator (described in B.3 below).

Example of Determining the Numerator Using the Employer's Plan Year 2014 Contribution Rate

Assume Plan X is a calendar year multiemployer plan which did not have a benefit increase after plan year 2014. In accordance with section 305(g)(3)(B)

of ERISA, the annual 5 percent contribution rate increases applicable to Employer A and other employers in Plan X after the 2014 plan year were deemed to be required to enable the plan to meet the requirement of its rehabilitation plan and must be disregarded. Employer A, a contributing employer, withdraws from Plan X in 2021. Using the rolling-5 method, Plan X has unfunded vested benefits of \$200 million as of the end of the 2020 plan year. To determine Employer A's allocable share of these unfunded vested benefits, Employer A's hourly required contribution rate and contribution base units for the 2014 plan year and each of the 5 plan years between 2016 and 2020 are identified as shown in the following table:

	2014 PY	2016 PY	2017 PY	2018 PY	2019 PY	2020 PY	5-year total
Employer A's Contribution Rate	\$5.51	n/a	n/a	n/a	n/a	n/a	.....
Contribution Base Units	800,000	800,000	800,000	900,000	900,000	900,000	4,300,000.
Contributions	\$4.41M	\$4.86M	\$5.10M	\$6.03M	\$6.33M	\$6.64M	\$28.96M.

The plan sponsor makes a determination pursuant to section 305(g)(3) of ERISA that the annual 5 percent contribution rate increases applicable to Employer A and other employers in Plan X after the 2014 plan year were required to enable the plan to meet the requirement of its rehabilitation plan and should be disregarded; benefits were not increased after plan year 2014.

Applying the simplified method, contribution rate increases that went into effect during plan years beginning after December 31, 2014 would be disregarded: The \$5.51 contribution rate in effect at the end of plan year 2014 would be held steady in computing Employer A's required contributions for the plan years included in the allocation fraction. Based on 4.3 million contribution base units, this results in total required contributions of \$23.7 million over 5 years. Absent section 305(g)(3) of ERISA, the sum of the contributions required to be made by Employer A would have been determined by multiplying Employer A's contribution rate in effect for each plan year by the contribution base units in that plan year, producing total required contributions of \$28.96 million over 5 years.

2. Determining the Denominator Using Each Employer's Plan Year 2014 Contribution Rate

Under the first simplified method for determining the denominator of the

allocation fraction, a plan sponsor would apply the same principles as for the simplified method above for determining the numerator of the allocation fraction. The plan sponsor would hold steady each employer's contribution rate as of the freeze date, except for contribution increases that provide benefit increases as described above. For each employer, the plan sponsor would multiply this rate by each employer's contribution base units in each target year.

3. Determining the Denominator Using the Proxy Group Method

Plans frequently offer multiple contribution schedules under a funding improvement or rehabilitation plan, which may have varying contribution rate increases. Under these and other circumstances, it could be administratively burdensome to require plans to identify each employer's contribution increase schedule each year to include the exact amount of the employer's contributions in the denominator.

Accordingly, the proposed regulation would provide a second simplified method to permit plan sponsors to determine total contributions in the denominator. This method, called the proxy group method, allows a plan sponsor to determine "adjusted contributions"—the amount of contributions that would have been made excluding contribution rate increases that must be disregarded for

withdrawal liability purposes—based on the exclusion that would apply for a representative "proxy" group of employers, rather than performing calculations for each of the employers in the plan. If the proxy group method applies for a plan for a plan year, then the contributions included in the denominator of the allocation fraction for that plan year are the plan's adjusted contributions for that year. The proxy group must meet certain requirements and must be identified in the plan for each plan year to which the method applies. The proxy group, as established for the first plan year to which the proxy group method applies, may change only to reflect changed circumstances, such as a new contribution schedule or the withdrawal of a large employer in the proxy group.

To use the proxy group method, a plan sponsor must identify the plan's rate schedule groups. Each rate schedule group consists of those employers that have a similar history of both total rate increases and disregarded rate increases. The plan sponsor must select a group of employers that includes at least one employer from each rate schedule group, except that the proxy group of employers does not need to include a member of a rate schedule group that represents less than 5 percent of active plan participants. The employers in the proxy group must together account for at least 10 percent of active plan participants. The proxy group is determined initially for the first plan

year beginning after the freeze date (for a calendar year plan, December 31, 2014, and for non-calendar year plans, the last day of the first plan year that ends on or after December 31, 2014).

Using the proxy group method for a plan year, the plan sponsor would first determine adjusted contributions for each employer in the proxy group. This is done by multiplying each employer's contribution base units for the plan year by what would have been the employer's contribution rate excluding contribution rate increases that are required to be disregarded in determining withdrawal liability.

Next, the plan sponsor would determine adjusted contributions for the plan year for each rate schedule group represented in the proxy group of employers. There are two parts to this step. First, for each rate schedule group represented in the proxy group, the sponsor determines the sum of the adjusted contributions for the plan year for all proxy group employers in the rate schedule group, divided by the sum of those employers' actual total contributions for the plan year, to get an adjustment factor for the rate schedule group for the year. Second, the adjustment factor for the year for each rate schedule group is multiplied by the contributions for the year of all employers in the rate schedule group (both proxy group members and non-members) to determine the adjusted contributions for the rate schedule group for the year.

Finally, the plan sponsor must perform the same steps to determine adjusted contributions at the plan level. The sum of the adjusted contributions for all the rate schedule groups represented in the proxy group is divided by the sum of the actual contributions for the employers in those rate schedule groups, and the resulting adjustment factor for the plan is multiplied by the plan's total contributions for the plan year, including contributions by employers in small rate schedule groups not represented in the proxy group. (For this purpose, "the plan's total contributions for the plan year" means the total

unadjusted plan contributions for the plan year that would otherwise be included in the denominator of the allocation fraction in the absence of section 305(g)(1) of ERISA, including any employer contributions owed with respect to earlier periods that were collected in that plan year, and excluding any amounts contributed in that plan year by an employer that withdrew from the plan during that plan year.) The result—the adjusted contributions for the whole plan—is the amount of contributions for the plan year that the plan sponsor uses to determine the denominator for the allocation fraction under the proxy group method.

This process weights contributors by the size of their contributions. Heavy contributors' rates have a greater impact on the adjusted contributions than light contributors' rates.

PBGC invites public comment on alternative bases that plan sponsors might use to define a proxy group of employers and on the determination of contributions in the denominator.

Example of Determining the Denominator of the Allocation Fraction Using the Proxy Group Method

Example 1: Plan With Two Rate Schedule Groups Included in Proxy Group

Assume a plan has three rate schedule groups, X, Y, and Z. Because rate schedule group X represents less than 5 percent of active plan participants for 2017, the plan decides to ignore it in forming the proxy group. Assume further that the plan forms a 2017 proxy group of three employers—A and B from rate schedule group Y and C from rate schedule group Z—that together represent more than 10 percent of active plan participants. Assume 2017 contributions were \$1,000,000: \$20,000 for rate schedule group X, \$740,000 for rate schedule group Y, and \$240,000 for rate schedule group Z, with A and B accounting for \$150,000 and C accounting for \$45,000 of the total contribution amounts.

Assume A's, B's, and C's 2017 contribution rates (excluding rate

increases required to be disregarded for withdrawal liability purposes) and contribution base units are 87 cents and 100,000 CBUs, 85 cents and 50,000 CBUs, and 70 cents and 60,000 CBUs, respectively, as shown in rows (1) and (2) of the table below. Thus, the three employers' adjusted contributions are \$87,000, \$42,500, and \$42,000 respectively, as shown in row (3).

Moving from the employer level to the rate schedule group level, the adjusted contributions for employers in the proxy group that are in the same rate schedule group are added together (row (4)). Those totals are then divided by total actual contributions for the proxy group employers in each rate schedule (row (6)) to derive an adjustment factor for each rate schedule group (row (7)) that is applied to the actual contributions of all employers in the rate schedule group (row (8)) to get the adjusted contributions for each rate schedule group represented in the proxy group (row (9)).

Moving from the rate schedule group level to the plan level, the same process is repeated. Adjusted employer contributions for the rate schedule group are summed (row (10)) and divided by the total contributions for all rate schedule groups represented in the proxy group (row (11)) to get an adjustment factor for the plan (row (12)). Contributions for rate schedule group X are excluded from row (11) because no employer in rate schedule X is in the proxy group. The adjustment factor for the plan is then applied to total plan contributions (row (13)) to get adjusted plan contributions (row (14)). Contributions for rate schedule group X are included in row (13) because—although X was ignored in determining the adjustment factor for the plan—the adjustment factor applies to all plan contributions (other than those by employers excluded from the plan's allocation fraction denominator). The plan will use the adjusted plan contributions in row (14) as the total contributions for 2017 in determining the denominator of any allocation fraction that includes contributions for 2017.

Row No.	Regulatory reference	Description	Schedule Y		Schedule Z
			Employer A	Employer B	Employer C
1	§ 4211.14(d)(5)(iii)	2017 contribution rate excluding increases that must be disregarded for withdrawal liability purposes.	\$0.87 per CBU	\$0.85 per CBU	\$0.70 per CBU.
2	§ 4211.14(d)(5)(i)	2017 CBUs	100,000	50,000	60,000.
3	§ 4211.14(d)(5)	Adjusted employer contributions (1) × (2)	\$87,000	\$42,500	\$42,000.
4	§ 4211.14(d)(6)(i)	Sum of adjusted employer contributions for proxy employers by rate schedule.	\$129,500		\$42,000.
5	§ 4211.14(d)(6)(ii)	Unadjusted employer contributions for proxy employers by rate schedule.	\$100,000	\$50,000	\$45,000.

Row No.	Regulatory reference	Description	Schedule Y		Schedule Z
			Employer A	Employer B	Employer C
6	§ 4211.14(d)(6)(ii)	Sum of unadjusted contributions for proxy employers by rate schedule.	\$150,000		\$45,000.
7	§ 4211.14(d)(6)	Adjustment factor by rate schedule (4)/(6)	0.86		0.93.
8	§ 4211.14(d)(6)	Total actual employer contributions by rate schedule	\$740,000		\$240,000.
9	§ 4211.14(d)(6)	Adjusted employer contributions by rate schedule (7) × (8).	\$636,400		\$223,200.
10	§ 4211.14(d)(7)(i)	Sum of adjusted employer contributions for each rate schedule group with proxy employers.	\$859,600.		
11	§ 4211.14(d)(7)(ii)	Total actual employer contributions for rate schedule groups with proxy employers (10)/(11).	\$980,000.		
12	§ 4211.14(d)(7)	Adjustment factor for plan	0.88.		
13	§ 4211.14(d)(7)	Total plan contributions	\$1,000,000.		
14	§ 4211.14(d)(7)	Adjusted plan contributions (to be used in determining allocation fraction denominators) (12) × (13).	\$880,000.		

Example 2: Plan With Two Rate Schedules That Were Updated Between the Freeze Date and the Target Year

The facts are the same as in *Example 1*, but each of the two rate schedules for employers included in the proxy group was updated effective 2016 and substantially all employers covered by schedule Y move to new schedule YZ and employers covered by schedule Z move to new schedule ZZ. This would still count as only two rate schedule groups, and the calculations would be similar to *Example 1*.

Example 3: Plan With Two Rate Schedules With Significant Movement of Employers Between the Freeze Date and the Target Year

The facts are the same as in *Examples 1 and 2*, but a group of employers (Employers D and E) have moved from schedule Y to schedule Z, and that group of employers represents more

than 5 percent of the total active plan participants. This would entail effectively a third rate-schedule group and the calculations would need to reflect three rate schedule groups. At least one of the employers in the third rate-schedule group would need to be in the proxy group and the proxy group would be changed prospectively.

Example 4: Plan With Two Rate Schedules That Merged Into One Rate Schedule

The facts are the same as in *Example 1*, but schedule Y and schedule Z were merged into one rate schedule effective in 2016. This would still entail two schedules because under the proxy group method each rate schedule group consists of those employers that have a similar history of both total rate increases and disregarded rate increases. The calculations would be similar to *Example 1*.

C. Simplified Methods After Plan Is No Longer in Endangered or Critical Status

As noted above in section III.A, changes in contributions can affect the calculation of an employer’s withdrawal liability and annual withdrawal liability payment amount. Once a plan is no longer in endangered or critical status, the “disregard” rules for contribution increases change. Under section 305(g)(4) of ERISA, plan sponsors are required to: (1) Include contribution increases in determining the allocation fraction used to calculate withdrawal liability under section 4211 of ERISA; and (2) continue to disregard contribution increases in determining the highest contribution rate used to calculate the annual withdrawal liability payment amount under section 4219(c) of ERISA, as follows:

Plans No Longer in Endangered or Critical Status: Allocation Fraction (section 4211 of ERISA)	A plan sponsor is required to include contribution increases (previously disregarded) as of the expiration date of the collective bargaining agreement in effect when a plan is no longer in endangered or critical status.
Highest Contribution Rate (section 4219(c) of ERISA)	A plan sponsor is required to continue disregarding contribution increases that applied for plan years during which the plan was in endangered or critical status.

The proposed regulation would amend § 4211.4 of PBGC’s unfunded vested benefits allocation regulation and § 4219.3 of PBGC’s notice, collection, and redetermination of withdrawal liability regulation to incorporate the requirements for contribution increases when a plan is no longer in endangered or critical status. The proposed regulation also would provide simplified methods required by section 305(g)(5) of ERISA that a plan sponsor could adopt to satisfy the requirements of section 305(g)(4).

1. Including Contribution Increases in Determining the Allocation of Unfunded Vested Benefits (§ 4211.15)

The rule to begin including contribution increases for purposes of determining withdrawal liability is based, in part, on when a plan’s collective bargaining agreements expire. Because plans may operate under numerous collective bargaining agreements with varying expiration dates, it could be burdensome for a plan sponsor to calculate the amount contributed by employers over the 5-

year periods used for the denominators of the plan’s allocation method. The plan sponsor would have to make a year-by-year determination of whether contribution increases should be included or disregarded in the denominators relative to collective bargaining agreements expiring in each applicable year. The proposed regulation would add a new § 4211.15 to PBGC’s unfunded vested benefits allocation regulation to provide two alternative simplified methods that a plan sponsor could adopt for

determining the denominators in the allocation fractions when the plan is no longer in endangered or critical status.

Under the first simplified method, a plan sponsor could adopt a rule that contribution increases previously disregarded would be included in the allocation fraction as of the expiration date of the first collective bargaining agreement requiring contributions that expires after the plan's emergence from endangered or critical status. If the plan sponsor adopts this rule, then for any withdrawals after the applicable expiration date, the plan sponsor would include the total amount contributed by employers for plan years included in the denominator of the allocation fraction determined in accordance with section 4211 of ERISA under the method in use by the plan. This would relieve plan sponsors of the burden of a year-by-year determination of whether contribution increases should be included or disregarded in the denominator under the plan's allocation method relative to collective bargaining agreements expiring in that year.

Example: A plan certifies that it is not in endangered or critical status for the plan year beginning January 1, 2021. The plan operates under several collective bargaining agreements. The plan sponsor adopts a rule providing that all contribution increases will be included in the numerator and denominator of the allocation fractions for withdrawals occurring after October 31, 2022, the expiration date of the first collective bargaining agreement requiring plan contributions that expires after January 1, 2021. A contributing employer withdraws from the plan in November 2022, after the date designated by the plan sponsor for the inclusion of all contribution rate increases in the allocation fraction. The allocation fraction used by the plan sponsor to determine the employer's share of the plan's unfunded vested benefits would include all of the employer's required contributions in the numerator and total contributions made by all employers in the denominator, including any amounts related to contribution increases previously disregarded.

Under the second simplified method, a plan sponsor could adopt a rule that contribution increases previously disregarded would be included in calculating withdrawal liability for any employer withdrawal that occurs after the first full plan year after a plan is no longer in endangered or critical status, or if later, the plan year including the expiration date of the first collective bargaining agreement requiring plan contributions that expires after the

plan's emergence from endangered or critical status.

The proposed regulation also would provide that, for purposes of these simplified methods, an "evergreen contract" that continues until the collective bargaining parties elect to terminate the agreement would have a termination date that is the earlier of—

(1) The termination of the agreement by decision of the parties.

(2) The beginning of the third plan year following the plan year in which the plan is no longer in endangered or critical status.

PBGC invites public comment on other simplified methods that a plan operating under numerous collective bargaining agreements with varying expiration dates might use to satisfy the requirement in section 305(g)(4) of ERISA.

2. Continuing To Disregard Contribution Increases in Determining the Highest Contribution Rate (§ 4219.3)

The rule for determining the highest contribution rate requires a plan sponsor of a plan that is no longer in endangered or critical status to continue to disregard increases in the contribution rate that applied for plan years during which the plan was in endangered or critical status. Because an employer's highest contribution rate is determined over the 10 plan years ending with the year of withdrawal, applying the rule would require a year-by-year determination of whether contribution increases should be included or disregarded. The proposed regulation would add a new § 4219.3 to PBGC's notice, collection, and redetermination of withdrawal liability regulation to provide a simplified method that a plan sponsor could adopt for determining the highest contribution rate.

The simplified method would provide that, for a plan that is no longer in endangered or critical status, the highest contribution rate for purposes of section 4219(c) of ERISA is the greater of—

(1) The employer's contribution rate in effect, for a calendar year plan, as of December 31, 2014, and for other plans, the last day of the plan year that ends on or after December 31, 2014, plus any contribution increases occurring after that date and before the employer's withdrawal that must be included in determining the highest contribution rate under section 305(g)(3) of ERISA, or

(2) The highest contribution rate for any plan year after the plan year that includes the expiration date of the first collective bargaining agreement of the withdrawing employer requiring plan contributions that expires after the plan

is no longer in endangered or critical status, or, if earlier, the date as of which the withdrawing employer renegotiated a contribution rate effective after a plan is no longer in endangered or critical status.

Example: A contributing employer withdraws in plan year 2028, after the 2027 expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan is no longer in critical status in plan year 2026. The plan sponsor determines that under the expiring collective bargaining agreement the employer's \$4.50 hourly contribution rate in plan year 2014 was required to increase each year to \$7.00 per hour in plan year 2025, to enable the plan to meet its rehabilitation plan. The plan sponsor determines that, over this period, a cumulative increase of \$0.85 per hour was used to fund benefit increases, as provided by plan amendment. Under a new collective bargaining agreement effective in 2027, the employer's hourly contribution rate is reduced to \$5.00. The plan sponsor determines that the employer's highest contribution rate for purposes of section 4219(c) of ERISA is \$5.35, because it is the greater of the highest rate in effect after the plan is no longer in critical status (\$5.00) and the employer's contribution rate in plan year 2014 (\$4.50) plus any increases between 2015 and 2025 (\$0.85) that were required to be taken into account under section 305(g)(3) of ERISA.

IV. Request for Comments

PBGC encourages all interested parties to submit their comments, suggestions, and views concerning the provisions of this proposed regulation. In particular, PBGC is interested in any area in which additional guidance may be needed. The specific requests for comments identified above are repeated here for your convenience. Please identify the question number in your response:

Question 1: Examples of Simplified Methods. PBGC invites public comment on whether the examples in this proposed rule are helpful and whether there are additional types of examples that would help plan sponsors with these calculations.

Question 2: III.A. Requirement to Disregard Certain Contribution Increases in Determining the Allocation of Unfunded Vested Benefits to an Employer and the Annual Withdrawal Liability Payment Amount. As discussed in section III.A., a plan sponsor would be able to include in the determination of contribution amounts a "benefit-bearing" contribution increase—a

contribution increase that funds an increase in benefits or accruals as an integral part of the plan's benefit formula. The proposed regulation would require the portion of the contribution increase (fixed amount, specific percentage, etc.) that is funding the increased future benefit accruals to be determined actuarially. PBGC invites public comment on alternative methods that plan sponsors might use to identify additional contributions used to provide an increase in benefits.

Question 3: III.B.3. Simplified Method for Determining the Denominator Using the Proxy Group Method. The proposed regulation would provide a simplified method to permit plan sponsors to determine total contributions in the denominator based on a representative proxy group of employers rather than performing calculations for all employers. PBGC invites public comment on alternative bases that plan sponsors might use to define a proxy group of employers and on the determination of contributions in the denominator.

Question 4: III.C. Simplified Methods After Plan is No Longer in Endangered or Critical Status in Determining the Allocation of Unfunded Vested Benefits. The proposed regulation would provide a simplified method for plan sponsors to comply with the requirement in section 305(g)(4) of ERISA that, as of the expiration date of the first collective bargaining agreement requiring plan contributions that expires after a plan is no longer in endangered or critical status, the allocation fraction must include contribution increases that were previously disregarded. PBGC invites

public comment on other simplified methods that a plan operating under numerous collective bargaining agreements with varying expiration dates might use to satisfy the requirement in section 305(g)(4) of ERISA.

Question 5: VI. Compliance with Rulemaking Guidelines. PBGC has estimated that plans using the simplified methods under the proposed rule would have administrative savings as shown on the chart in section VI. PBGC invites public comment on the expected savings on actuarial calculations and other costs using the simplified methods.

V. Applicability

The changes relating to simplified methods for determining an employer's share of unfunded vested benefits and an employer's annual withdrawal liability payment would be applicable to employer withdrawals from multiemployer plans that occur on or after the effective date of the final rule.

The changes relating to MPRA benefit suspensions and contribution increases for determining an employer's withdrawal liability would apply to plan years beginning after December 31, 2014, and to surcharges the obligation for which accrue on or after December 31, 2014.

VI. Compliance With Rulemaking Guidelines

Executive Orders 12866, 13563, and 13771

PBGC has determined that this rulemaking is not a "significant

regulatory action" under Executive Order 12866 and Executive Order 13771. The rule provides simplified methods, as required by section 305(g)(5) of ERISA, to determine withdrawal liability and payment amounts, which multiemployer plan sponsors may choose, but are not required, to adopt. Accordingly, this proposed rule is exempt from Executive Order 13771 and OMB has not reviewed the rule under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes retrospective review of regulations, harmonizing rules, and promoting flexibility.

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic implications of this proposed rule and has concluded that the amendments providing simplified methods for plan sponsors to comply with the statutory requirements would reduce costs for multiemployer plans by approximately \$1,476,000. Based on 2015 data, there are about 450 plans that are in endangered or critical status.¹³ PBGC estimates that a portion of these plans using the simplified methods under the proposed rule would have administrative savings, as follows:

Annual amounts	Estimated number of plans affected	Savings per plan	Total savings
Savings on actuarial calculations using simplified methods and assuming an average hourly rate of \$400:			
Disregarding benefit suspensions (Section II.B.2)	5	\$2,000	\$10,000
Exceptions to disregarding contribution increases (Section III.A)	40	4,000	160,000
Allocation fraction numerator (Section III.B.1)	200	1,200	240,000
Allocation fraction denominator using 2014 contribution rate (Section III.B.2)	160	4,000	640,000
Allocation fraction denominator using proxy group of employers (Section III.B.3)	40	8,000	320,000
Other estimated savings:			
Reduced plan valuation cost for plans that have a benefit suspension and use the static value method	3	2,000	6,000
Savings on potential withdrawal liability arbitration costs assuming an average hourly rate of \$400	5	20,000	100,000
Total savings			1,476,000

¹³ https://www.pbgc.gov/sites/default/files/2016_pension_data_tables.pdf, Table M-18.

Regulatory Flexibility Act

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the proposed regulation describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to this proposed regulation, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations¹⁴ and is consistent with certain requirements in title I of ERISA¹⁵ and the Code,¹⁶ as well as the definition of a small entity that the Department of Labor has used for purposes of the Regulatory Flexibility Act.¹⁷

Thus, PBGC believes that assessing the impact of the proposed regulation on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. PBGC therefore requests comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments.

On the basis of its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this proposed rule will

¹⁴ See, e.g., special rules for small plans under part 4007 (Payment of Premiums).

¹⁵ See, e.g., ERISA section 104(a)(2), which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

¹⁶ See, e.g., Code section 430(g)(2)(B), which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

¹⁷ See, e.g., DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66,637, 66,644 (Oct. 27, 2011).

not have a significant economic impact on a substantial number of small entities. Based on data for recent premium filings, PBGC estimates that only 38 plans of the approximately 1,400 plans covered by PBGC's multiemployer program are small plans, and that only about 14 of those plans would be impacted by this proposed rule. Furthermore, plan sponsors may, but are not required to, use the simplified methods under the proposed rule. As shown above, plans that use the simplified methods would have administrative savings. The proposed rule would not impose costs on plans. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

List of Subjects

20 CFR Part 4001

Business and industry, Employee benefit plans, Pension insurance.

20 CFR Part 4204

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

20 CFR Part 4206

Employee benefit plans, Pension insurance.

20 CFR Part 4207

Employee benefit plans, Pension insurance.

29 CFR Part 4211

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4219

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4001, 4204, 4206, 4207, 4211 and 4219 as follows:

PART 4001—TERMINOLOGY

- 1. The authority citation for part 4001 continues to read as follows:

Authority: 29 U.S.C. 1301, 1302(b)(3).

§ 4001.2 [Amended]

- 2. In § 4001.2, amend the definition of “Nonforfeitable benefit” by removing “will be considered forfeitable.” and adding in its place “are considered forfeitable.”

PART 4204—VARIANCES FOR SALE OF ASSETS

- 3. The authority citation for part 4204 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1384(c).

- 4. In § 4204.2, add in alphabetical order a definition for “Unfunded vested benefits” to read as follows:

§ 4204.2 Definitions.

* * * * *

Unfunded vested benefits means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

§ 4204.12 [Amended]

- 5. In § 4204.12:
 - a. Amend the first sentence by removing “for the purposes of section” and adding in its place “for the purposes of section 304(b)(3)(A) of ERISA and section”; and
 - b. Remove the second sentence.

PART 4206—ADJUSTMENT OF LIABILITY FOR A WITHDRAWAL SUBSEQUENT TO A PARTIAL WITHDRAWAL

- 6. The authority citation for part 4206 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1386(b).

- 7. In § 4206.2, add in alphabetical order a definition for “Unfunded vested benefits” to read as follows:

§ 4206.2 Definitions.

* * * * *

Unfunded vested benefits means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

PART 4207—REDUCTION OR WAIVER OF COMPLETE WITHDRAWAL LIABILITY

- 8. The authority citation for part 4207 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1387.

- 9. In § 4207.2, add in alphabetical order a definition for “Unfunded vested benefits” to read as follows:

§ 4207.2 Definitions.

* * * * *

Unfunded vested benefits means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

PART 4211—ALLOCATING UNFUNDED VESTED BENEFITS TO WITHDRAWING EMPLOYERS

■ 10. The authority citation for part 4211 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3); 1391(c)(1), (c)(2)(D), (c)(5)(A), (c)(5)(B), (c)(5)(D), and (f).

■ 11. In § 4211.1, amend paragraph (a) by removing the sixth, seventh, and eighth sentences and adding two sentences in their place to read as follows:

§ 4211.1 Purpose and scope.

(a) * * * Section 4211(c)(5) of ERISA also permits certain modifications to the statutory allocation methods that PBGC may prescribe in a regulation. Subpart B of this part contains the permissible modifications to the statutory methods that plan sponsors may adopt without PBGC approval. * * *

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■ 12. In § 4211.2:

- a. Amend the introductory text by removing “multiemployer plan,” and adding in its place “multiemployer plan, nonforfeitable benefit,”;
- b. Amend the definition of “Initial plan year” by removing “establishment” and adding in its place “effective date”;
- c. Remove the definition of “Nonforfeitable benefit”;
- d. Revise the definition of “Unfunded vested benefits”;
- e. Amend the definition of “Withdrawing employer” by removing “for whom” and adding in its place “for which”;
- f. Amend the definition of “Withdrawn employer” by removing “who, prior to the withdrawing employer,” and adding in its place “that, in a plan year before the withdrawing employer withdraws,”;

The revision reads as follows:

§ 4211.2 Definitions.

* * * * *

Unfunded vested benefits means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

* * * * *

■ 13. Revise § 4211.3 to read as follows:

§ 4211.3 Special rules for construction industry and Code section 404(c) plans.

(a) *Construction plans.* A plan that primarily covers employees in the building and construction industry must use the presumptive method for allocating unfunded vested benefits, except as provided in §§ 4211.11(b) and 4211.21(b).

(b) *Code section 404(c) plans.* A plan described in section 404(c) of the Code or a continuation of such a plan must use the rolling-5 method for allocating unfunded vested benefits unless the plan sponsor, by amendment, adopts an alternative method or modification.

■ 14. Revise § 4211.4 to read as follows:

§ 4211.4 Contributions for purposes of the numerator and denominator of the allocation fractions.

(a) *In general.* Subject to paragraph (b) of this section, each of the allocation fractions used in the presumptive, modified presumptive and rolling-5 methods is based on contributions that certain employers have made to the plan for a 5-year period.

(1) The numerator of the allocation fraction, with respect to a withdrawing employer, is based on the “sum of the contributions required to be made” or the “total amount required to be contributed” by the employer for the specified period.

(2) The denominator of the allocation fraction is based on contributions that certain employers have made to the plan for a specified period.

(b) *Disregarding surcharges and contribution increases.* For each of the allocation fractions used in the presumptive, modified presumptive and rolling-5 methods in determining the allocation of unfunded vested benefits to an employer, a plan in endangered or critical status must disregard:

(1) *Surcharge.* Any surcharge under section 305(e)(7) of ERISA and section 432(e)(7) of the Code.

(2) *Contribution increase.* Any contribution increase that goes into effect during plan years beginning after December 31, 2014, so that a plan may meet the requirements of a funding improvement plan under section 305(c) of ERISA and section 432(c) of the Code or a rehabilitation plan under section 305(e) of ERISA and 432(e) of the Code, except to the extent that one of the following exceptions applies:

(i) The contribution increase is due to increased levels of work, employment, or periods for which compensation is provided.

(ii) The contribution increase provides an increase in benefits, including an increase in future benefit accruals, permitted by sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA or sections 432(d)(1)(B) or section 432(f)(1)(B) of the Code, and an increase in benefit accruals as an integral part of the benefit formula. The portion of such contribution increase that is attributable to an increase in benefit accruals must be determined actuarially.

(iii) The withdrawal occurs on or after the expiration date of the employer’s collective bargaining agreement in effect in the plan year the plan is no longer in endangered or critical status, or, if earlier, the date as of which the employer renegotiates a contribution rate effective after the plan year the plan is no longer in endangered or critical status.

(c) *Simplified methods.* See §§ 4211.14 and 4211.15 for simplified methods of meeting the requirements of this section.

■ 15. Add § 4211.6 to read as follows:

§ 4211.6 Disregarding benefit reductions and benefit suspensions.

(a) *In general.* A plan must disregard the following nonforfeitable benefit reductions and benefit suspensions in determining a plan’s nonforfeitable benefits for purposes of determining an employer’s withdrawal liability under section 4201 of ERISA:

(1) *Adjustable benefit.* A reduction to adjustable benefits under section 305(e)(8) of ERISA or section 432(e)(8) of the Code.

(2) *Lump sum.* A benefit reduction arising from a restriction on lump sums or other benefits under section 305(f) of ERISA or section 432(f) of the Code.

(3) *Benefit suspension.* A benefit suspension under section 305(e)(9) of ERISA or section 432(e)(9) of the Code, but only for withdrawals not more than 10 years after the end of the plan year in which the benefit suspension takes effect.

(b) *Simplified methods.* See § 4211.16 for simplified methods for meeting the requirements of this section.

■ 16. Revise § 4211.11 to read as follows:

§ 4211.11 Plan sponsor adoption of modifications and simplified methods.

(a) *General rule.* A plan sponsor, other than the sponsor of a plan that primarily covers employees in the building and construction industry, may adopt by amendment, without the approval of PBGC, any of the statutory allocation methods and any of the modifications and simplified methods set forth in §§ 4211.12 through 4211.16.

(b) *Building and construction industry plans.* The plan sponsor of a plan that primarily covers employees in the building and construction industry may adopt by amendment, without the approval of PBGC, any of the modifications to the presumptive rule and simplified methods set forth in § 4211.12 and §§ 4211.14 through 4211.16.

■ 17. Revise § 4211.12 to read as follows:

§ 4211.12 Modifications to the presumptive, modified presumptive, and rolling-5 methods.

(a) *Disregarding certain contribution increases.* A plan amended to use the modifications in this section must apply the rules to disregard surcharges and contribution increases under § 4211.4. A plan sponsor may amend a plan to incorporate the simplified methods in §§ 4211.14 and 4211.15 to fulfill the requirements of § 4211.4 with the modifications in this section if done consistently from year to year.

(b) *Changing the period for counting contributions.* A plan sponsor may amend a plan to modify the denominators in the presumptive, modified presumptive and rolling-5 methods in accordance with one of the alternatives described in this paragraph (b). Any amendment adopted under this paragraph (b) must be applied consistently to all plan years. Contributions counted for one plan year may not be counted for any other plan year. If a contribution is counted as part of the “total amount contributed” for any plan year used to determine a denominator, that contribution may not also be counted as a contribution owed with respect to an earlier year used to determine the same denominator, regardless of when the plan collected that contribution.

(1) A plan sponsor may amend a plan to provide that “the sum of all contributions made” or “total amount contributed” for a plan year means the amount of contributions that the plan actually received during the plan year, without regard to whether the contributions are treated as made for that plan year under section 304(b)(3)(A) of ERISA and section 431(b)(3)(A) of the Code.

(2) A plan sponsor may amend a plan to provide that “the sum of all contributions made” or “total amount contributed” for a plan year means the amount of contributions actually received during the plan year, increased by the amount of contributions received during a specified period of time after the close of the plan year not to exceed the period described in section 304(c)(8) of ERISA and section 431(c)(8) of the Code and regulations thereunder.

(3) A plan sponsor may amend a plan to provide that “the sum of all contributions made” or “total amount contributed” for a plan year means the amount of contributions actually received during the plan year, increased by the amount of contributions accrued during the plan year and received during a specified period of time after the close of the plan year not to exceed the period described in section 304(c)(8)

of ERISA and section 431(c)(8) of the Code and regulations thereunder.

(c) *Excluding contributions of significant withdrawn employers.* Contributions of certain withdrawn employers are excluded from the denominator in each of the fractions used to determine a withdrawing employer’s share of unfunded vested benefits under the presumptive, modified presumptive and rolling-5 methods. Except as provided in paragraph (c)(1) of this section, contributions of all employers that permanently cease to have an obligation to contribute to the plan or permanently cease covered operations before the end of the period of plan years used to determine the fractions for allocating unfunded vested benefits under each of those methods (and contributions of all employers that withdrew before September 26, 1980) are excluded from the denominators of the fractions.

(1) The plan sponsor of a plan using the presumptive, modified presumptive or rolling-5 method may amend the plan to provide that only the contributions of significant withdrawn employers are excluded from the denominators of the fractions used in those methods.

(2) For purposes of this paragraph (c), “significant withdrawn employer” means—

(i) An employer to which the plan has sent a notice of withdrawal liability under section 4219 of ERISA; or

(ii) A withdrawn employer that in any plan year used to determine the denominator of a fraction contributed at least \$250,000 or, if less, 1 percent of all contributions made by employers for that year.

(3) If a group of employers withdraw in a concerted withdrawal, the plan sponsor must treat the group as a single employer in determining whether the members are significant withdrawn employers under paragraph (c)(2) of this section. A “concerted withdrawal” means a cessation of contributions to the plan during a single plan year—

(i) By an employer association;

(ii) By all or substantially all of the employers covered by a single collective bargaining agreement; or

(iii) By all or substantially all of the employers covered by agreements with a single labor organization.

(d) *“Fresh start” rules under presumptive method.* (1) The plan sponsor of a plan using the presumptive method (including a plan that primarily covers employees in the building and construction industry) may amend the plan to provide that—

(i) A designated plan year ending after September 26, 1980, will substitute for the plan year ending before September

26, 1980, in applying section 4211(b)(1)(B), section 4211(b)(2)(B)(ii)(I), section 4211(b)(2)(D), section 4211(b)(3), and section 4211(b)(3)(B) of ERISA; and

(ii) Plan years ending after the end of the designated plan year in paragraph (d)(1)(i) of this section will substitute for plan years ending after September 25, 1980, in applying section 4211(b)(1)(A), section 4211(b)(2)(A), and section 4211(b)(2)(B)(ii)(II) of ERISA.

(2) A plan amendment made pursuant to paragraph (d)(1) of this section must provide that the plan’s unfunded vested benefits for plan years ending after the designated plan year are reduced by the value of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that had withdrawn from the plan as of the end of the designated plan year.

(3) In the case of a plan that primarily covers employees in the building and construction industry, the plan year designated by a plan amendment pursuant to paragraph (d)(1) of this section must be a plan year for which the plan has no unfunded vested benefits.

(e) *“Fresh start” rules under modified presumptive method.* (1) The plan sponsor of a plan using the modified presumptive method may amend the plan to provide—

(i) A designated plan year ending after September 26, 1980, will substitute for the plan year ending before September 26, 1980, in applying section 4211(c)(2)(B)(i) and section 4211(c)(2)(B)(ii)(I) and (II) of ERISA; and

(ii) Plan years ending after the end of the designated plan year will substitute for plan years ending after September 25, 1980, in applying section 4211(c)(2)(B)(ii)(II) and section 4211(c)(2)(C)(i)(II) of ERISA.

(2) A plan amendment made pursuant to paragraph (e)(1) of this section must provide that the plan’s unfunded vested benefits for plan years ending after the designated plan year are reduced by the value of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that had withdrawn from the plan as of the end of the designated plan year.

§ 4211.13 [Amended]

■ 18. In § 4211.13:

■ a. Amend paragraph (a) by removing “shall” and adding in its place “must”;

■ b. Amend paragraph (b) by removing “shall be” and adding in its place “is”.

■ 19. Add § 4211.14 is to read as follows:

§ 4211.14 Simplified methods for disregarding certain contributions.

(a) *In general.* A plan sponsor may amend a plan without PBGC approval to adopt any of the simplified methods in paragraphs (b) through (d) of this section to fulfill the requirements of section 305(g)(3) of ERISA and section 432(g)(3) of the Code and § 4211.4(b)(2) in determining an allocation fraction.

(b) *Simplified method for the numerator—after 2014 plan year.* A plan sponsor may amend a plan to provide that the withdrawing employer's required contributions for each plan year (a "target year") after, for a calendar year plan, December 31, 2014, and for other than a calendar year plan, the last day of the first plan year that ends on or after December 31, 2014 (the "freeze date") is the product of—

(1) The employer's contribution rate in effect on the freeze date, plus any contribution increase in § 4211.4(b)(2)(ii) that is effective after the freeze date; times

(2) The employer's contribution base units for the target year.

(c) *Simplified method for the denominator—after 2014 plan year.* A plan sponsor may amend a plan to provide that the denominator for the allocation fraction for each plan year after the freeze date is calculated using the same principles as paragraph (b) of this section.

(d) *Simplified method for the denominator—proxy group averaging.*

(1) A plan sponsor may amend a plan to provide that, for purposes of determining the denominator of the unfunded vested benefits allocation fraction, employer contributions for a plan year beginning after the freeze date described in paragraph (d)(2)(i) of this section are calculated, in accordance with this paragraph (d), based on an average of representative contribution rates for the plan year that exclude contribution increases that are required to be disregarded in determining withdrawal liability. The amendment is effective only for plan years for which the plan provides for a proxy group that satisfies the requirements in paragraph (d)(2)(v) of this section.

(2) For purposes of this paragraph (d)—

(i) *Freeze date* means for a calendar year plan, December 31, 2014, and for other than a calendar year plan, the last day of the first plan year that ends on or after December 31, 2014.

(ii) *Base year* means the first plan year beginning after the freeze date.

(iii) *Included employer* means, for a plan for a plan year, an employer whose contributions for the plan year are to be taken into account under the plan in

determining the denominator of the unfunded vested benefits allocation fraction.

(iv) *Rate schedule group* is defined in paragraph (d)(3) of this section.

(v) *Proxy group* is defined in paragraph (d)(4) of this section.

(vi) *Adjusted* as applied to contributions for an employer, a rate schedule group, or a plan is defined in paragraphs (d)(5), (6), and (7) of this section.

(3) A rate schedule group of a plan for a plan year consists of all included employers that have, since the freeze date up to the end of the plan year, substantially the same—

(i) Total contribution rate increases; and

(ii) Contribution rate increases that are not required to be disregarded in determining withdrawal liability.

(4) A plan's proxy group for a plan year is a group of employers named in the plan and satisfying all of the following requirements—

(i) Each employer is an included employer and is a contributing employer on at least 1 day of the plan year.

(ii) On at least 1 day of the plan year, the employers in the proxy group represent at least 10 percent of active plan participants.

(iii) For each rate schedule group of the plan for the plan year that represents, on at least 1 day of the plan year, at least 5 percent of active plan participants, at least one employer in the proxy group is a member of the rate schedule group.

(iv) For a plan year that is subsequent to the base year, the proxy group is the same as the year before except for changes needed to make the proxy group satisfy the requirements under paragraphs (d)(4)(i), (ii), and (iii) of this section.

(5) The adjusted contributions of an employer under a plan for a plan year are—

(i) The employer's contribution base units for the plan year; multiplied by

(ii) The employer's contribution rate per contribution base unit at the end of the plan year, reduced by the sum of the employer's contribution rate increases since the freeze date that are required to be disregarded in determining withdrawal liability.

(6) The adjusted contributions of a rate schedule group that is represented in the proxy group of a plan for a plan year are the total contributions for the plan year by employers in the rate schedule group, multiplied by the adjustment factor for the rate schedule group. The adjustment factor for the rate schedule group is the quotient, for all

employers in the rate schedule group that are also in the proxy group, of—

(i) Total adjusted contributions for the plan year; divided by

(ii) Total contributions for the plan year.

(7) The adjusted contributions of a plan for a plan year are the total contributions for the plan year by all included employers, multiplied by the adjustment factor for the plan. The adjustment factor for the plan is the quotient, for all rate schedule groups that are represented in the proxy group, of—

(i) Total adjusted contributions for the plan year; divided by

(ii) Total contributions for the plan year.

(8) Under this method, in determining the denominator of a plan's unfunded vested benefits allocation fraction, the contributions taken into account with respect to any plan year (beginning with the base year) are the plan's adjusted contributions for the plan year.

■ 20. Add § 4211.15 to read as follows:

§ 4211.15 Simplified methods for determining expiration date of a collective bargaining agreement.

(a) *In general.* A plan sponsor may amend a plan without PBGC approval to adopt any of the simplified methods in this section to fulfill the requirements of section 305(g)(4) of ERISA and 432(g)(4) of the Code and § 4211.4(b)(2)(iii) for a withdrawal that occurs on or after the plan's reversion date.

(b) *Reversion date.* The reversion date is either—

(1) The expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan is no longer in endangered or critical status; or

(2) The date that is the later of—

(i) The end of the first plan year following the plan year in which the plan is no longer in endangered or critical status; or

(ii) The end of the plan year that includes the expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan is no longer in endangered or critical status.

(3) For purposes of paragraph (b)(2) of this section, the expiration date of a collective bargaining agreement that by its terms remains in force until terminated by the parties thereto is considered to be the earlier of—

(i) The termination date agreed to by the parties thereto; or

(ii) The first day of the third plan year following the plan year in which the plan is no longer in endangered or critical status.

■ 21. Add § 4211.16 to read as follows:

§ 4211.16 Simplified methods for disregarding benefit reductions and benefit suspensions.

(a) *In general.* A plan sponsor may amend a plan without PBGC approval to adopt the simplified methods in this section to fulfill the requirements of section 305(g)(1) of ERISA or section 432(g)(1) of the Code to disregard benefit reductions and benefit suspensions under § 4211.6.

(b) *Basic rule.* The withdrawal liability of a withdrawing employer is the sum of paragraphs (b)(1) and (2) of this section, and then adjusted by paragraphs (A)–(D) of section 4201(b)(1) of ERISA.

(1) The employer's allocable amount of unfunded vested benefits determined in accordance with section 4211 of ERISA under the method in use by the plan without regard to § 4211.6 (but taking into account § 4211.4); and

(2) The employer's proportional share of the value of each of the benefit reductions and benefit suspensions required to be disregarded under § 4211.6 determined in accordance with this section.

(c) *Benefit suspension.* This paragraph (c) applies to a benefit suspension under § 4211.6(a)(3).

(1) *General.* The employer's proportional share of the present value of a benefit suspension as of the end of the plan year before the employer's withdrawal is determined by applying paragraph (c)(2) or (3) of this section to the present value of the suspended benefits, as authorized by the Department of the Treasury in accordance with section 305(e)(9) of ERISA, calculated either as of the date of the benefit suspension or as of the end of the plan year coincident with or following the date of the benefit suspension (the "authorized value").

(2) *Static value method.* A plan may provide that the present value of the suspended benefits as of the end of the plan year in which the benefit suspension takes effect and for each of the succeeding nine plan years is the authorized value in paragraph (c)(1) of this section. An employer's proportional share of the present value of a benefit suspension to which this paragraph (c) applies using the static value method is determined by multiplying the present value of the suspended benefits by a fraction—

(i) The numerator is the sum of all contributions required to be made by the withdrawing employer for the five consecutive plan years ending before the plan year in which the benefit suspension takes effect; and

(ii) The denominator is the total of all employers' contributions for the five consecutive plan years ending before the plan year in which the suspension takes effect, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during those plan years. If a plan uses an allocation method other than the presumptive allocation method in section 4211(b) of ERISA or similar method, the denominator after the first year is decreased by the contributions of any employers that withdrew from the plan and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal.

(iii) In determining the numerator and the denominator in paragraph (c)(2) of this section, the rules under § 4211.4 (and permissible modifications under § 4211.12 and simplified methods under §§ 4211.14 and 4211.15) apply.

(3) *Adjusted value method.* A plan may provide that the present value of the suspended benefits as of the end of the plan year in which the benefit suspension takes effect is the authorized value in paragraph (c)(1) of this section and that the present value as of the end of each of the succeeding nine plan years (the "revaluation date") is the present value, as of a revaluation date, of the benefits not expected to be paid after the revaluation date due to the benefit suspension. An employer's proportional share of the present value of a benefit suspension to which this paragraph (c) applies using the adjusted value method is determined by multiplying the present value of the suspended benefits by a fraction—

(i) The numerator is the sum of all contributions required to be made by the withdrawing employer for the five consecutive plan years ending before the employer's withdrawal; and

(ii) The denominator is the total of all employers' contributions for the five consecutive plan years ending before the employer's withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during those plan years.

(iii) In determining the numerator and the denominator in this paragraph (c)(3), the rules under § 4211.4 (and permissible modifications under § 4211.12 and simplified methods under §§ 4211.14 and 4211.15) apply.

(iv) If a benefit suspension in § 4211.6(a)(3) is a temporary suspension of the plan's payment obligations as

authorized by the Department of the Treasury, the present value of the suspended benefits in this paragraph (c)(3) includes only the value of the suspended benefits through the ending period of the benefit suspension.

(d) *Benefit reductions.* This paragraph (d) applies to benefits reduced under § 4211.6(a)(1) or (2).

(1) *Value of a benefit reduction.* The value of a benefit reduction is—

(i) The unamortized balance, as of the end of the plan year before the withdrawal of;

(ii) The value of the benefit reduction as of the end of the plan year in which the reduction took effect, determined; and

(iii) Using the same assumptions as for unfunded vested benefits, and amortization in level annual installments over a period of 15 years.

(2) *Employer's proportional share of a benefit reduction.* An employer's proportional share of the value of a benefit reduction to which this paragraph (d) applies is determined by multiplying the value of the benefit reduction by a fraction—

(i) The numerator is the sum of all contributions required to be made by the withdrawing employer for the five consecutive plan years ending before the employer's withdrawal; and

(ii) The denominator is the total of all employers' contributions for the five consecutive plan years ending before the employer's withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during those plan years.

(iii) In determining the numerator and the denominator in this paragraph (d), the rules under § 4211.4 (and permissible modifications under § 4211.12 and simplified methods under §§ 4211.14 and 4211.15) apply.

§ 4211.21 [Amended]

■ 22. In § 4211.21, amend paragraph (b) by removing "§ 4211.12" and adding in its place "section 4211 of ERISA".

§ 4211.31 [Amended]

■ 23. In § 4211.31, amend paragraph (b) by removing "set forth in § 4211.12" and adding in its place "subpart B of this part".

PART 4219—NOTICE, COLLECTION, AND REDETERMINATION OF WITHDRAWAL LIABILITY

■ 24. The authority citation for part 4219 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3) and 1399(c)(6).

■ 25. In § 4219.1:

- a. Amend paragraph (a) by adding two sentences at the end of the paragraph;
- b. Amend paragraph (b)(1) by removing in the third sentence “shall” and adding in its place “does”;
- c. Amend paragraph (b)(2) by removing in the second sentence “shall cease” and adding in its place “cease”;
- d. Amend paragraph (c) by removing in the second sentence “whom” and adding in its place “which”.

The additions read as follows:

§ 4219.1 Purpose and scope.

(a) * * * Section 4219(c) of ERISA requires a withdrawn employer to make annual withdrawal liability payments at a set rate over the number of years necessary to amortize its withdrawal liability, generally limited to a period of 20 years. This subpart provides rules for disregarding certain contribution increases in determining the highest contribution rate under section 4219(c) of ERISA.

* * * * *

§ 4219.2 [Amended]

■ 26. In § 4219.2:

- a. Amend paragraph (a) by removing “multiemployer plan,” and adding in its place “multiemployer plan, nonforfeitable benefit,”;
- b. Amend the definition of “Mass withdrawal valuation date” by removing the last sentence of the definition;
- c. Amend the definition of “Reallocation record date” by removing “shall be” and adding in its place “is”;
- d. Amend the definition of “Unfunded vested benefits” by removing “a plan’s vested nonforfeitable benefits (as defined for purposes of this section)” and adding in its place “a plan’s nonforfeitable benefits”.

■ 27. Add § 4219.3 to read as follows:

§ 4219.3 Disregarding certain contributions.

(a) *General rule.* For purposes of determining the highest contribution rate under section 4219(c) of ERISA, a plan must disregard:

(1) *Surcharge.* Any surcharge under section 305(e)(7) of ERISA or section 432(e)(7) of the Code the obligation for which accrues on or after December 31, 2014.

(2) *Contribution increase.* Any contribution increase that goes into effect during a plan year beginning after December 31, 2014, so that a plan may meet the requirements of a funding improvement plan under section 305(c) of ERISA or section 432(c) of the Code or a rehabilitation plan under section 305(e) of ERISA or section 432(e) of the Code, except to the extent that one of the following exceptions applies:

(i) The contribution increase is due to increased levels of work, employment, or periods for which compensation is provided.

(ii) The contribution increase provides an increase in benefits, including an increase in future benefit accruals, permitted by sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA or sections 432(d)(1)(B) or section 432(f)(1)(B) of the Code, and an increase in benefit accruals as an integral part of the benefit formula. The portion of such contribution increase that is attributable to an increase in benefit accruals must be determined actuarially.

(b) *Simplified method for a plan that is no longer in endangered or critical status.* A plan sponsor may amend a plan without PBGC approval to use the simplified method in this paragraph (b) for purposes of determining the highest contribution rate for a plan that is no longer in endangered or critical status. The highest contribution rate is the greater of—

(1) The employer’s contribution rate, for a calendar year plan, as of December 31, 2014, and for other than a calendar year plan, as of the last day of the first plan year that ends on or after December 31, 2014 (the “freeze date”) plus any contribution increases after the freeze date, and before the employer’s withdrawal date that are determined in accordance with the rules under § 4219.3(a)(2)(ii); or

(2) The highest contribution rate for any plan year after the plan year that includes the expiration date of the first collective bargaining agreement of the withdrawing employer requiring plan contributions that expires after the plan is no longer in endangered or critical status, or, if earlier, the date as of which the withdrawing employer renegotiated a contribution rate effective after the plan year the plan is no longer in endangered or critical status.

Issued in Washington, DC.

William Reeder,

Director, Pension Benefit Guaranty Corporation.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 38 and 39

RIN 2900-AQ28

Government-Furnished Headstones, Markers, and Medallions; Unmarked Graves

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations related to the provision of government-furnished headstones, markers, and medallions. These proposed revisions would clarify eligibility for headstones, markers, or medallions, would establish replacement criteria for such headstones, markers, and medallions consistent with VA policy, would define the term “unmarked grave” consistent with VA policy, and would generally reorganize and simplify current regulatory language for ease of understanding.

DATES: Written comments must be received on or before April 8, 2019.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AQ28—Government-Furnished Headstones, Markers, and Medallions; Unmarked Graves.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kimberly Wright, Director, Office of Field Programs, National Cemetery Administration (NCA), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Telephone: (202) 461-6748 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In accordance with 38 U.S.C. 2306(a), VA must “furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of” eligible individuals as further listed in sec. 2306(a)(1)–(5). The regulations governing the provision of Government headstones and markers are found in 38 CFR part 38, specifically 38 CFR 38.600 and §§ 38.630 through 38.632. We propose to revise these regulations to conform to statutory amendments made by Public Law 114-315, 130 Stat. 1536

(2016); Public Law 115–136, 132 Stat. 343 (2018); and Public Law 115–141, 132 Stat. 348 (2018). Additional proposed changes would clarify eligibility for burial and memorial headstones and markers, as well as

medallions; would reorganize and simplify current regulatory language; and would define the term “unmarked grave” in a manner consistent with current VA policy. Because this rulemaking would reorganize a large

portion of current §§ 38.630 through 38.632, we offer the following chart to indicate where applicable provisions in the current regulations would be located (with revision in some cases) in the proposed new regulatory framework:

Current regulation	Location of applicable provisions in proposed regulation
§ 38.600(a)(1)	§ 38.630(c)(1).
§ 38.600(a)(2)	§ 38.631(c)(1).
§ 38.600(b)	§ 38.600(a)(1)–(9).
§ 38.630(a) and (b)	§§ 38.630(b)(2) and 38.631(b)(2).
§ 38.630(c)	§ 38.631(a) and (b)(2)(i)–(ii).
§ 38.630(c)(1)	§ 38.631(a).
§ 38.630(c)(1)(i)–(iii)	§ 38.631(a)(1)(i)–(iii).
§ 38.630(c)(2)	§ 38.631(c)(2).
§ 38.630(c)(3)(i)–(ii)	§ 38.631(a)(1)(i)–(ii).
§ 38.631(a)	§ 38.630(a)(2)(i) and (b)(1)(iii)(A)–(B).
§ 38.631(b)(1)	§ 38.630(a)(2)(ii)(A).
§ 38.361(b)(2)	§ 38.630(a)(2)(i).
§ 38.631(b)(3)	§ 38.630(a)(2)(i)(A)–(F).
§ 38.631(c) and (d)	§§ 38.630(b)(4)(i) and 38.631(b)(4).
§ 38.631(e)	§ 38.630(b)(1)(iii)(C).
§ 38.631(f)	§ 38.630(b)(2)(ii).
§ 38.632(a)	§§ 38.630(b)(1), 38.631(b)(1), and 38.632(a).
§ 38.632(b)	§ 38.632(b).
§ 38.632(c)	§§ 38.630(b)(1) and 38.631(b)(1).
§ 38.632(d)	§ 38.632(c).
§ 38.632(e)	§ 38.632(d).
§ 38.632(f)	§ 38.632(e).
§ 38.632(g)	§ 38.632(f).
§ 38.632(h)	§ 38.632(g).

§ 38.600 Definitions

Current § 38.600 defines terms that apply throughout 38 CFR part 38, related to the provision of headstones, markers, and medallions as well as the provision of other burial or memorialization benefits. We would remove definitions of the term “applicant” from current § 38.600(a)(1) and (2) and relocate them to proposed §§ 38.630(c)(1) and 38.631(c)(1), respectively. The definition of “applicant” in current § 38.600(a)(1) relates to burial headstones and markers, and its relocation to proposed § 38.630(c)(1) would be consistent with the proposed reorganization and revision of § 38.630 to address burial headstones and markers as explained later in this rulemaking. The definition of “applicant” in current § 38.600(a)(2) relates to memorial headstones and markers, and its relocation to proposed § 38.631(c)(1) would be consistent with the proposed reorganization and revision of § 38.631 to address memorial headstones and markers as explained later in this rulemaking.

With the proposed removal and relocation of the definitions of “applicant” in current § 38.600(a)(1) and (2), proposed § 38.600(a) would state that the definitions in proposed § 38.600 apply to 38 CFR part 38. The

definitions in current § 38.600(b) would then be numbered in proposed § 38.600(a)(1)–(9) without any proposed revisions, and we would revise § 38.600(b) to clarify that other terms not defined in proposed § 38.600(a)(1)–(9) may be defined in and be applicable to other sections of 38 CFR part 38, as this is presently the case (*see, e.g.*, definitions of “outer burial receptacle” in § 38.629(a) and “emblem of belief” in § 38.632(b)(2)). The authority citation for § 38.600 would also be revised.

§ 38.620 Persons Eligible for Burial

Section 2402 of title 38, U.S.C., establishes eligibility for burial in national cemeteries. Section 251 of Public Law 115–141, Div. J, enacted on March 23, 2018, amended 38 U.S.C. 2402(a) to establish such eligibility for individuals, or spouses of individuals, naturalized pursuant to sec. 2(1) of the Hmong Veterans’ Naturalization Act of 2000 (Pub. L. 106–207, 114 Stat. 316 (2000)) (*i.e.*, certain refugees from Laos who served with a special guerilla unit, or irregular forces, operating from a base in Laos in support of the U.S. military from February 28, 1961, to September 18, 1978) and were residing in the United States at the time of the individual’s death. Section 251 of Public Law 115–141 further limits this eligibility to those individuals whose

deaths occurred on or after the date of the law’s enactment on March 23, 2018. We propose to add a new paragraph (j) to current § 38.620 to reflect this expanded eligibility for interment in a national cemetery, consistent with 38 U.S.C. 2402(a)(10).

§ 38.630 Burial Headstones and Markers; Medallions

VA provides burial headstones and markers (headstones or markers provided for placement at the graves of eligible individuals) in accordance with applicable authority under 38 U.S.C. 2306(a). We propose to unite all pertinent information regarding such headstones or markers into proposed § 38.630, with the new title “Burial headstones and markers; medallions.”

New proposed § 38.630(a)(1) would articulate eligibility for burial headstones and markers for the unmarked graves of certain eligible individuals as provided under 38 U.S.C. 2306(a), and proposed § 38.630(a)(1)(i)–(iv) would list those eligible individuals in accordance with sec. 2306(a)(1)–(5).

Proposed § 38.630(a)(1)(i) would restate from sec. 2306(a)(1) the eligibility for a burial headstone or marker for an individual buried in a national cemetery or in a post cemetery, and would make a non-substantive clarification that a post cemetery is a

“military” post cemetery. Proposed paragraph (a)(1)(i) would additionally provide that when more than one individual is buried in a single gravesite in a national cemetery, VA will, if feasible, include inscription information for all such individuals on a single headstone or marker, rather than furnishing a separate headstone or marker for each buried individual. This additional language related to multiple interments would primarily account for VA’s practice (since assuming jurisdiction over most national cemeteries in 1973) to inter more than one eligible individual in a single gravesite, such as when a veteran is buried in the same gravesite as a spouse or dependent child. The use of a single headstone or marker to identify multiple interred individuals in a single gravesite is an administrative necessity for national cemeteries.

Proposed § 38.630(a)(1)(ii) would establish, consistent with sec. 2306(a)(2), the eligibility for a burial headstone or marker for certain individuals who are eligible for burial in a national cemetery, but who are buried elsewhere (e.g., are buried in a state, tribal, private, or local government cemetery). There are certain individuals that meet this criterion, but are nevertheless excluded by sec. 2306(a)(2): Namely, persons or classes of persons enumerated in sec. 2402(a)(4), (5), and (6). Therefore, proposed § 38.630(a)(1)(ii)(A)–(F) would establish eligibility for a headstone or marker outside of a national cemetery in accordance with sec. 2306(a)(2), by only including the persons or classes of persons enumerated in sec. 2402(a)(1), (2), (3), (7), (8), and (10). (We note that eligibility for burial under sec. 2402(a)(9) is necessarily in a national cemetery, and therefore is not included in proposed § 38.630(a)(1)(ii)). Proposed § 38.630(a)(1)(ii)(A)–(F) would additionally reference relevant VA regulations related to eligibility for burial in a national cemetery in current § 38.620, as well as in proposed § 38.620(j). Finally, proposed § 38.630(a)(1)(ii) would clarify that the unmarked graves for such burial headstones and markers may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government cemetery), as there is no limiting language regarding location of graves for those individuals who are eligible under sec. 2306(a)(2).

Proposed § 38.630(a)(1)(iii) would restate from sec. 2306(a)(3) the eligibility for a burial headstone or marker for soldiers of the Union and Confederate Armies of the Civil War, and would additionally state that the

unmarked graves for such headstones or markers may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government cemetery), as there is no limiting language regarding location of graves for individuals who are eligible under sec. 2306(a)(3).

Proposed § 38.630(a)(1)(iv) would restate from sec. 2306(a)(4) the eligibility for a burial headstone or marker for certain spouses and dependents not buried in a national cemetery, but only to be placed in cemeteries owned by a State, as sec. 2304(a)(4) does have this specific limiting language regarding location of the unmarked graves. We note that these same spouses and dependents are eligible for burial in a national cemetery, and therefore such unmarked graves in a national cemetery may also receive upon request a headstone or marker under sec. 2306(a)(1) and proposed § 38.630(a)(1)(i).

Proposed § 38.630(a)(2) would address the provision of burial headstones, markers, or medallions for the graves of certain individuals, notwithstanding that such graves may already be marked by a headstone or marker furnished at private expense, in accordance with 38 U.S.C. 2306(d). Proposed § 38.630(a)(2) would move and revise information that is located in current § 38.631 related to the provision of headstones and markers for marked graves located in private cemeteries. By moving language from current and standalone § 38.631, to proposed § 38.630(a)(2), we would clarify that headstones and markers provided for the marked graves of certain individuals are a type of burial headstone and marker and, by using the header “marked graves” for proposed § 38.630(a)(2), would distinguish it from the burial headstones and markers provided for “unmarked graves” in proposed § 38.630(a)(1). Proposed § 38.630(a)(2)(i)(A)–(F) would expressly list those individuals eligible for a headstone or marker for marked graves in accordance with 38 U.S.C. 2306(d).

We note that VA interprets the term “private cemetery,” in the context of headstones and markers provided for marked graves under sec. 2306(d), to mean any non-national cemetery in which a privately purchased marker has been placed. We reviewed the legislative history of sec. 2306(d) and we do not believe that Congress intended to limit the sec. 2306(d) benefit to only those cemeteries that are strictly privately owned. Moreover, the applicability date in proposed § 38.630(a)(2)(ii) (i.e., date of death on or after November 1, 1990) accords with

the date prescribed by Congress in sec. 8041 of Public Law 101–508, 104 Stat. 1388 (1990), when it eliminated the option for families to request and receive a monetary allowance to purchase their own headstone or marker, in lieu of requesting and receiving a Government-furnished headstone or marker. This option to receive a monetary allowance in lieu of a Government-furnished headstone or marker had formerly been available from 1978–1990 (see sec. 203, Pub. L. 95–476, 92 Stat. 1497 (1978)). From November 1, 1990, through December 27, 2001, VA was not authorized to provide a Government-furnished headstone or marker for an already marked grave in a private cemetery. Section 502 of Public Law 107–103, 115 Stat. 976 (2001), first authorized VA to provide Government-furnished headstones or markers for graves that were already marked with privately purchased headstones or markers, for Veterans who died on or after the date Public Law 107–103 was effective, which was December 27, 2001. VA colloquially refers to these Government-furnished headstones and markers for already marked graves as “second markers.” Section 203 of Public Law 107–330, 116 Stat. 2820 (2002), changed the applicability date for Government-furnished second markers for veterans who died on or after September 11, 2001, and sec. 203 of Public Law 110–157, 121 Stat. 1831 (2007), further changed the applicability date to include veterans who died on or after November 1, 1990. In changing the applicability date for the second marker to November 1, 1990, Congress intended to make the sec. 2306(d) authority “retroactive to cover the 11-year gap” so that veterans who died in the time period from November 1, 1990, to September 11, 2001, (who previously were only able to receive Government-furnished headstones or markers if their graves were unmarked) would receive the same benefits as veterans who died on or after September 11, 2001 (see 153 Cong. Rec. S13736 (daily ed. Nov. 2, 2007) (statement by Sen. Akaka). By making the general applicability date for the second marker authority in sec. 2306(d) retroactive to November 1, 1990, Congress intended to provide parity between groups of veterans. We do not believe that Congress intended to limit this spirit of parity by only authorizing the second marker for strictly privately owned cemeteries, versus any non-national cemetery where privately purchased markers may be placed. VA has been administering the second marker benefit in sec. 2306(d)

under this broader interpretation and does not intend to apply a more restrictive interpretation in this proposed rule. Proposed § 38.630(a)(2)(i) would therefore clarify that burial headstones and markers for marked graves may be provided for certain eligible individuals in non-national cemeteries and would parenthetically include examples of such cemeteries (e.g., state, tribal, private, or local government cemetery).

Proposed § 38.630(a)(2)(ii)(A) would restate from current § 38.631(b)(1) the eligibility criterion that the eligible individual's date of death must have been on or after November 1, 1990. Proposed § 38.630(a)(2)(ii)(B) would establish additional eligibility criteria for a Medal of Honor recipient. Proposed paragraph (a)(2)(iii) would establish eligibility for a medallion, in lieu of a headstone or marker, for a marked grave. These latter two provisions are consistent with Public Law 114–315, sec. 301. *See also* 38 U.S.C. 2306(d)(4) and (5). We note that VA has been providing these memorial benefits as applicable under Public Law 114–315 since its enactment and that proposed § 38.630(a)(2)(ii)(B) and (iii) would merely conform VA regulation to VA authority and practice.

Proposed § 38.630(b) would create a “general” paragraph to move, combine, or newly establish regulatory language related to administrative aspects of VA's provision of burial headstones and markers, to include the ordering or application process, styles and types, and criteria for replacement. Proposed § 38.630(b)(1)(i) and (ii) would move and revise language that is currently located in § 38.632(c) related to the ordering and application process for Government-furnished headstones and markers, as 38 U.S.C. 2306(a) (burial headstones and markers for unmarked graves) and sec. 2306(d) (burial headstones and markers for marked graves) both provide that such headstones and markers are only furnished “when requested.” Proposed § 38.630(b)(1)(i) would relocate the process in current § 38.632(c)(1) related to ordering headstones and markers, as part of the burial or memorialization arrangements, to be placed in those cemeteries that use NCA's electronic ordering system. Proposed § 38.630(b)(1) would make non-substantive language changes from current § 38.632(c)(1) to improve readability, and would parenthetically note for clarity those types of cemeteries other than national cemeteries that are known to use NCA's electronic ordering system (e.g., a State veterans cemetery or military post cemetery). Proposed § 38.630(b)(1)(ii)

would relocate the process in current § 38.632(c)(2) related to individuals applying for headstones and markers to be placed in those cemeteries that do not use NCA's electronic ordering system. Proposed § 38.630(b)(1)(ii)(A) would restate the requirement from current § 38.632(c)(2) that applicants must complete and submit VA Form 40–1330, Claim for Standard Government Headstone or Marker, to order a headstone or marker for placement in a cemetery that does not use NCA's electronic ordering system.

Proposed § 38.630(b)(1)(ii)(B) would newly state in regulation the requirement to complete and submit VA Form 40–1330M, Claim for Government Medallion for Placement in a Private Cemetery, for an applicant to order a medallion to be affixed to a privately purchased headstone or marker, in accordance with VA's authority under 38 U.S.C. 2306(d)(4) to furnish, upon request, a medallion to signify the deceased individual's status as a veteran. Because a medallion must also be requested under sec. 2306(d)(4) (as with a second marker), the same application process applies for a medallion as for a second marker, albeit a different form (VA Form 40–1330M) is used to apply for a medallion.

Proposed § 38.630(b)(1)(iii) would relocate and simplify language in current § 38.632(c)(2) regarding where to locate and how to complete VA Form 40–1330, and would newly provide the same information for VA Form 40–1330M.

Proposed § 38.630(b)(1)(iii)(A) would newly establish in regulation the VA practice that a Government-furnished headstone and marker that is requested for an unmarked grave is only to be provided for placement on or at that grave. This is a reasonable current practice, as 38 U.S.C. 2306(a) provides that a headstone or marker shall be furnished upon request “for the unmarked graves of” eligible individuals, which indicates Congressional intent that such headstones or markers be furnished for placement on or at such graves (versus, for instance, statutory language that would provide the headstone or marker “for” the eligible individuals themselves). We believe this current practice is well known to the public, as VA Form 40–1330 currently states, under the submission instructions, that “[h]eadstones and markers furnished remain the property of the United States Government and may not be used for any purpose other than to be placed at an eligible individual's grave or in a memorial section within a cemetery.” Proposed § 38.630(b)(1)(iii)(A) would

conform regulations to this known practice, by requiring an applicant for a burial headstone or marker provided for an unmarked grave to certify on VA Form 40–1330 that such headstone or marker will be placed on or at the grave for which it is requested.

Proposed § 38.630(b)(1)(iii)(B) would move and revise language from current § 38.631(a), which requires that individuals requesting a burial headstone or marker for a marked grave in a private cemetery must certify on VA Form 40–1330 that it will be placed on the grave for which it is requested or, if placement on the grave is impossible or impracticable, as close to the grave as possible within the grounds of the private cemetery where the grave is located. We note that current § 38.631(a) is essentially a restatement of the statutory certification requirement in 38 U.S.C. 2306(d)(1).

Both proposed paragraphs (b)(1)(iii)(A) and (B) would further require these certifications when placement would occur in a local government cemetery (the definition of “local government” is discussed later in this rulemaking) as well as private cemeteries. Additionally, applying these certification requirements to local government cemeteries is reasonable, because VA does not know with certainty whether or how such cemeteries' administrative procedures might dictate the placement of burial headstones or markers. For instance, these certification requirements for placement of burial headstones and markers need not apply to national cemeteries, because national cemeteries must mark every grave in accordance with 38 U.S.C. 2404(c). Similarly, VA knows from experience that State and tribal cemeteries (particularly those that are established and improved through VA State cemetery grants) do not accept Government-furnished burial headstones and markers for purposes other than to place on or at a grave. Therefore, the applicant's certifications regarding placement of the burial headstone or marker in proposed paragraph (b)(1)(iii)(A) and (B) would apply to private and local government cemeteries only. Proposed paragraphs (b)(1)(iii)(A) and (B) would require revisions to VA Form 40–1330, which is explained in the section of this rulemaking related to the Paperwork Reduction Act.

Proposed § 38.630(b)(1)(iii)(C) would move and revise language from current § 38.631(e), which requires that applicants requesting a burial headstone or marker for a marked grave in a private cemetery must obtain certification on VA Form 40–1330, from

a cemetery representative, that the type and placement of the headstone or marker requested adheres to the policies and guidelines of the selected private cemetery. This is not a statutory requirement, but an administrative requirement in current VA regulation to ensure that VA does not provide a headstone or marker that is of a type or style that a private cemetery would not accept (for instance, if a private cemetery only accepts flat markers, VA would not approve an application for an upright marble headstone to be placed in such a cemetery). Proposed paragraph (b)(1)(iii)(C) would essentially restate current § 38.631(e), except that the proposed language would apply to burial markers for unmarked graves as well as marked graves. We do not see a logical reason to apply this requirement to marked graves (as is the case in current § 38.631(e)) but not unmarked graves, and we believe the public is aware that this requirement applies to unmarked graves because there is a requirement on current VA Form 40–1330 for a cemetery representative to certify that the Government-furnished headstone or marker is the correct type for the designated cemetery, without distinguishing between marked versus unmarked graves. Proposed paragraph (b)(1)(iii)(C) would also require revisions to VA Form 40–1330, which is explained in the section of this rulemaking related to the Paperwork Reduction Act.

Proposed § 38.630(b)(2) would establish a paragraph related to the styles and types of Government-furnished headstones and markers, as well as their inscriptions, and would move and revise language from current § 38.630(a) and (b). Current § 38.630(a) and (b) are somewhat duplicative and confusing regarding the scope of current VA policies concerning headstone and marker styles, types, and inscriptions, and confusing regarding which VA official is responsible for establishing that policy. For instance, current § 38.630(a) relates to the Secretary of Veterans Affairs establishing policy for headstone and marker materials as well as inscriptions, whereas current § 38.630(b) relates to the Under Secretary for Memorial Affairs establishing policy only for inscriptions and further seems to apply VA's inscription policies to private monuments. To reduce this duplication and confusion, proposed § 38.630(b)(2) would state that the styles and types of headstones and markers, as well as the inscriptions thereon to include an emblem of belief, will be provided in accordance with VA policy as well as in

a manner consistent with 38 U.S.C. 2306(c) and 2404(c). We note that NCA has established policy related to the styles, types, and inscriptions available for Government-furnished headstones and markers, to include emblems of belief (examples of styles, types, inscriptions, and available emblems of belief can be found on VA Forms 40–1330 and 40–1330M). Proposed § 38.630(b)(2) would further newly reference applicable VA statutes related to allowable materials for Government headstones and markers under 38 U.S.C. 2306(c), and related to certain inscription and style criteria for headstones and markers in national cemeteries under 38 U.S.C. 2404(c). These statutory criteria would not be newly implemented, but merely newly referenced in regulation.

Proposed § 38.630(b)(2)(i) would newly establish in regulation that the styles and types of burial headstones and markers, as well as the inscriptions thereon, may be limited in accordance with certain requirements including aesthetic and administrative requirements of the cemetery in which the headstone or marker will be placed. This provision is new in regulation but is not a new criterion or restriction concerning VA's provision of headstones and markers, as the style of headstone and marker is presently determined by a veteran's era of service (*e.g.*, Civil War era versus current era), and the types of headstones and markers can be further determined by size, space, or other restrictions of a cemetery prior to installation (such as when a flat bronze marker must be placed instead of an upright marble headstone).

Proposed § 38.630(b)(2)(ii) would move and revise language from current § 38.631(f), to implement the requirement in 38 U.S.C. 2306(d)(3) that headstones and markers provided for marked graves in private cemeteries (for certain eligible individuals under sec. 2306(d)) be among those that VA makes available for selection generally. We interpret sec. 2306(d)(3) to require VA to make available the same types of headstones and markers for both unmarked and marked graves under sec. 2306(a) and 2306(d), respectively, and proposed § 38.630(b)(2)(ii) would clarify this interpretation.

Proposed § 38.630(b)(2)(iii) would establish in regulation the current VA practice of providing a headstone or marker that indicates a deceased's status as a Medal of Honor recipient as applicable. Proposed § 38.630(b)(2)(iii) would expressly apply to headstones and markers for both unmarked graves and marked graves. We interpret 38 U.S.C. 2306(d)(5)(A), which requires VA

to provide, upon request, a headstone or marker for a marked grave (for certain eligible individuals) that signifies the deceased's status as a Medal of Honor recipient, applies similarly to unmarked graves. Proposed § 38.630(b)(2)(iii) would clarify this interpretation.

Proposed § 38.630(b)(2)(iv) would restate the portion of current § 38.632(c)(2) related to requirements for requesting an emblem of belief that is not offered in VA's inventory of images for emblems of belief (a "new" emblem of belief) to be inscribed on a headstone or marker, and would cross reference current § 38.632 that describes the process for requesting a new emblem of belief. VA's current inventory of images for emblems of belief can be found on VA Form 40–1330.

Proposed § 38.630(b)(3) would newly establish in regulation the criteria that exist in current VA policy, more specifically NCA Notice 2004–06 (Dec. 21, 2004), regarding replacement of Government-furnished headstones, markers, and medallions because they warrant replacement. Although the governing statutes do not clearly provide that VA's authority to furnish headstones, markers, or medallions includes authority to furnish replacements as needed, the function of these benefits is to memorialize veterans and other eligible individuals in perpetuity, and therefore we believe it is reasonable and necessary to interpret a general replacement authority. To ensure that these benefits continue to fulfill their intended function of marking a veteran's grave, VA interprets that it may replace Government-furnished headstones, markers, or medallions if they cease to be serviceable (*i.e.*, they no longer reasonably function to identify the decedent), or for other administrative reasons related to ensuring that the correct style and type of headstone or marker has been provided or related to changing or adding inscription information if required.

Proposed § 38.630(b)(3)(i) would establish that replacements would occur upon request, as for any headstone, marker, or medallion that may be provided under 38 U.S.C. 2306, if one of the specified bases for replacement is satisfied. Proposed paragraphs (b)(3)(i)(A)–(E) would state the primary reasons currently found in NCA Notice 2004–06 that VA considers a Government-furnished headstone or marker to warrant replacement. Proposed paragraphs (b)(3)(i)(A)–(C) are self-explanatory as listed and relate to the serviceability of a headstone or marker, where VA would replace a Government-furnished headstone or

marker if: It is damaged beyond repair; it has deteriorated to the extent it no longer serves to identify the buried decedent (*e.g.*, identifying elements of an inscription are not legible, such as a decedent's name or a grave number for an unknown decedent), or, in the case of a medallion, no longer serves to identify the buried decedent as a veteran or as a Medal of Honor recipient if applicable; or it has been stolen or vandalized.

Proposed paragraph (b)(3)(i)(D) relates to ensuring the correct headstone or marker style or type is provided, where VA would provide a replacement if the incorrect style or type for the veteran's era of service was initially provided.

Proposed paragraph (b)(3)(i)(E) relates to ensuring that the Government-furnished headstone or marker conveys accurate and requested inscription information, where VA would provide a replacement to correct or add inscription information for the reasons in proposed paragraphs (b)(3)(i)(E)(1)–(5), all of which are current VA practice unless otherwise noted below. We note that these reasons apply to inscription information for headstones and markers but not necessarily medallions, as medallions are only inscribed with the word “Veteran” in accordance with the purpose of a medallion to identify the deceased's status as a veteran under 38 U.S.C. 2306(d)(4)(A). Therefore, we will only refer to headstones and markers in explaining the proposed replacement reasons related to adding or correcting inscription information.

Proposed paragraph (b)(3)(i)(E)(1) would provide for a replacement headstone or marker to correct errors in factual information that was provided to VA as part of the initial application process. The most common types of factual errors for which VA receives replacement requests relate to a decedent's name or dates of birth or death, so proposed paragraph (b)(3)(i)(E)(1) would include a non-exhaustive parenthetical example to that effect.

We note that proposed paragraph (b)(3)(i)(E)(1) is written to capture factual errors in information provided to VA, meaning VA was a party to the initial provision of the Government-furnished headstone or marker. Because VA took control of Government-furnished headstones or markers when it assumed jurisdiction over a majority of national cemeteries in 1973 (*see* Pub. L. 93–43, sec. 2, 87 Stat. 75 (1973)), proposed paragraph (b)(3)(i)(E)(1) would not apply to those Government-furnished headstones or markers provided prior to 1973. VA is currently examining how to best address possible

replacement of Government-furnished headstones or markers that were provided prior to 1973, when the reason for replacement is the assertion of a factual inscription error. Present NCA Notice 2015–01 (July 23, 2015) provides some guidance for replacement of older Government-furnished headstones or markers (those 50 years or older as of the date of the replacement request) due to assertions of factual inscription errors, where NCA examines primary source documentation from the requestor, as well as other available information, to determine whether it is more likely than not that the existing inscription has factual errors (and if so, to provide a replacement). However, a 50-year time frame to apply this “more likely than not” standard does not fully coincide with when VA took control of the headstone and marker program. Further, NCA has received requests to replace historic headstones and markers (primarily from the Civil War era) based on a desire to correct inscriptions (or inscription practices) from the 19th century or add new information found through modern research, where such corrections or additions might make an inscription more accurate but would not necessarily correct critical inaccuracies related to identifying the buried individual. With Government-furnished headstones or markers provided prior to 1973, particularly those that are approaching or are older than 100 years, VA must weigh requests to correct inscriptions for factual errors against considerations that such inscriptions were based on information that was then available, and that such headstones and markers may be part of a larger, collective historic landscape. VA therefore invites comments on this proposed rule on whether or how VA should establish distinct replacement criteria to correct factual errors for Government-furnished headstones and markers provided prior to 1973.

Proposed paragraph (b)(3)(i)(E)(2) would provide for a replacement headstone or marker to indicate information related to the deceased's military service that is provided to VA after the initial application. Changes to an inscription for this reason are most often requested when additional information becomes available regarding the deceased's posthumous receipt of a military award, so proposed paragraph (b)(3)(i)(E)(2) would include a non-exhaustive parenthetical example to that effect.

Proposed paragraph (b)(3)(i)(E)(3) would provide for a replacement headstone or marker to identify on a single headstone or marker multiple decedents who are each eligible for a

Government-furnished headstone or marker and are buried in the same gravesite in a cemetery. Proposed paragraph (b)(3)(i)(E)(3) would primarily account for VA's longstanding practice (since assuming jurisdiction over most national cemeteries in 1973) to inter more than one eligible individual in a single gravesite, such as when a veteran is buried in the same gravesite as a spouse or dependent child. Replacement of a headstone or marker to identify multiple interments in a gravesite is an administrative necessity for national cemeteries. Proposed paragraph (b)(3)(i)(E)(3) would not be limited to only national cemeteries, however, to ensure parity if this same practice of multiple interments might occur in non-national cemeteries. Proposed paragraph (b)(3)(i)(E)(3) would specifically indicate that this type of replacement may occur only if the multiple decedents are each eligible for a Government-furnished headstone or marker, to ensure it is clear that we would not be expanding eligibility for headstones and markers for non-national cemeteries in a manner that is not consistent with 38 U.S.C. 2306. Proposed paragraph (b)(3)(i)(E)(3) would include replacing a Government-furnished burial headstone and marker to add a memorial inscription for that individual's surviving spouse or eligible dependent child, rather than furnishing a separate burial headstone or marker for that individual's surviving spouse or eligible dependent child, in accordance with sec. 2306(g)(1).

Proposed paragraph (b)(3)(i)(E)(4) would provide for a replacement headstone or marker to indicate the deceased's status as a Medal of Honor recipient if applicable, for a headstone or marker provided for a marked grave in accordance with 38 U.S.C. 2306(d)(5)(B). This is a relatively new authority that was added to sec. 2306 by sec. 301 of Public Law 114–315, and would be included in this proposed rule to implement a specific replacement reason under statute.

Proposed paragraph (b)(3)(i)(E)(5) would allow the decedent's next of kin as indicated in NCA's records systems to request that VA replace a headstone or marker to add or correct inscription information for any reason not listed in proposed paragraphs (b)(3)(i)(E)(1)–(4), if the request is received by VA within six months after the initial headstone or marker was provided. We would establish this broad authority for replacement, with a time-limited duration to make the request, primarily because family members may not visit a gravesite for an extended period of time after a burial or after a headstone or

marker is installed (most often due to travel difficulties or grief-related reasons). In such cases, we want to ensure that family members get the memorialization benefit that they consider satisfactory to memorialize the decedent, within the bounds of what VA provides generally for all those eligible for the headstone or marker benefit. In general, VA has received requests from family members to add or change inscription information that does not affect the factual accuracy of a headstone or marker (such as adding a decedent's middle initial, or adding terms of endearment, to the inscription). Although VA would want to provide a headstone or marker that a decedent's family ultimately finds satisfactory, we must balance the family's interest in that regard with VA's interest of not unnecessarily replacing a Government-furnished headstone or marker that is serviceable to reasonably identify the decedent. Therefore, we would impose a time limit of six months in which replacement could be requested under this proposed provision. In addition, proposed paragraph (b)(3)(i)(E)(5) would require that such a replacement request must come from the deceased's next of kin as indicated in NCA's records systems, to prevent multiple and possibly contradictory family requests for inscription changes. Proposed paragraph (b)(3)(i)(E)(5) would implement in regulation a replacement reason similar to that contained in current NCA policy, although NCA Directive 2004-06 does not impose the six-month limitation or the next of kin of record requirement. We interpret these additional criteria in proposed paragraph (b)(3)(i)(E)(5) to be reasonable and necessary to assist VA in properly managing the headstone and marker benefit.

In keeping with current NCA policy, proposed § 38.630(b)(3)(ii) would state that replacement headstones and markers to be provided will be of the same style and type, to include inscription information, as those being replaced—NCA refers to this practice as “in-kind” replacement. Proposed § 38.630(b)(3)(ii) would provide for exceptions to this “in-kind” replacement to permit replacements to be of a different style or type, or have different inscription information, if the reason for replacement is related to type, style, or inscription under proposed paragraph (b)(3)(i)(D) or (E), and the replacement would necessarily have to differ in style, type, or inscription information.

Proposed § 38.630(b)(3)(iii) would establish in regulation the process for requesting replacement headstones,

markers, or medallions, which is essentially the same as the process of requesting Government-furnished headstones, markers, or medallions initially. As in proposed § 38.630(b)(1)—related to application for Government-furnished headstones, markers, and medallions—proposed paragraph (b)(3)(iii)(A) would restate the process of ordering a replacement through NCA's electronic ordering systems (where the replacement will be installed in a cemetery that uses such systems), and proposed paragraph (b)(3)(iii)(B) would restate the process of completing and submitting VA Form 40-1330 or 40-1330M (where the replacement will be installed in a cemetery that does not use NCA's electronic ordering systems).

We reiterate that the reasons for replacement in proposed paragraphs (b)(3)(i)(A)–(E), the “in-kind” replacement policy in proposed paragraph (b)(3)(ii), and the process of requesting replacements in proposed paragraph (b)(3)(iii), are all based on NCA Notice 2004-06, and reflect current practice except where otherwise indicated.

Proposed § 38.630(b)(4) would newly establish a “limitations” paragraph in regulation, and proposed paragraph (b)(4)(i) would relocate language from current § 38.631(c) and (d), which state that VA does not pay for the cost of installing a headstone or marker in a non-national cemetery, although VA does deliver the headstone or marker directly to such cemetery or to a receiving agency for delivery to the cemetery. Although current § 38.631(c) and (d) apply to only burial headstones and markers for marked graves under 38 U.S.C. 2306(d) (specifically, see limiting language in sec. 2306(d)(2)), and only “private” cemeteries are technically referenced in sec. 2306(d) and in current § 38.631, proposed § 38.630(b)(4) would apply the same cost limitation and delivery procedure to headstones and markers for unmarked graves, and for all non-national cemeteries and not just those that are privately owned. We would establish these requirements in regulations for burial headstones and markers for unmarked graves consistent with current practice. The cost limitation for both unmarked and marked graves is already established through a VA Form 40-1330 certification that the headstone or marker “will be installed in the cemetery listed in block 27 at no expense to the Government.” Proposed § 38.630(b)(4)(ii) would newly establish for Government-furnished medallions the same cost limitation as for burial headstones and markers in proposed

paragraph (b)(4)(i), but proposed paragraph (b)(4)(ii) would provide for delivery directly to the applicant for the medallion as opposed to the cemetery where the privately purchased marker is located (and upon which the medallion is to be affixed), as this is current VA practice.

Proposed § 38.630(b)(5) would newly establish in regulation the existing NCA policy related to ownership, alteration, and disposition of Government-furnished headstones, markers, and medallions, in accordance with NCA Notice 2011-05 and applicable Federal statutes. Proposed § 38.630(b)(5) would provide that all Government-furnished headstones, markers, and medallions remain the property of the Government in perpetuity and should not be defaced or altered in any way, and that knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping, or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641. These would not be new requirements, but would merely make VA regulations consistent with VA policy in NCA Notice 2011-05 and would cross reference otherwise applicable Federal statute. Proposed § 38.630(b)(5)(ii) would provide that, under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited (with an associated fine of \$500) and that, under 18 U.S.C. 1361, willful depredation of any property of the United States (e.g., a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18, U.S.C. This would also not be a new policy requirement, and further would not be a new regulatory requirement (as it is already enforceable under § 1.218(b)(5)), but we find it appropriate to include it as part of the general reorganization of these regulations in this proposed rule. Proposed § 38.630(b)(5)(iii) would establish that when a Government-furnished burial headstone, marker, or medallion is removed from a gravesite area in any cemetery (due to it warranting replacement under paragraph (b)(3) of this section, or in cases of disinterment where the headstone or marker will not be placed at a new gravesite), it should be properly disposed. Proposed § 38.630(b)(5)(iii) would further establish that unless such a headstone or marker would be maintained by NCA for historic purposes, if the headstone or marker was stone, it must be physically

broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and if it was bronze must be returned to VA for recycling. These would not be new requirements, but would merely make VA regulations consistent with VA policy in NCA Notice 2011-05 (May 19, 2011).

Proposed § 38.630(c) would establish a definitions paragraph to relocate and revise current regulatory definitions, and newly define terms related to burial headstones and markers. As stated previously in this rulemaking, the definition of the term “applicant” in current § 38.600(a)(1) would be moved to proposed § 38.630(c)(1). We would also propose a minor revision to the current definition of “applicant” in § 38.600(a)(1) to remove the phrase “that will mark the gravesite or burial site of” an eligible individual, to account for the provision of burial headstones and markers for marked graves under proposed § 38.630(a)(2) (as the provision of a headstone or marker for an already marked grave under 38 U.S.C. 2306(d) does not, in effect, mark the grave again). Proposed § 38.630(c)(1) would read that “[a]n applicant for a burial headstone or marker for an eligible deceased individual, or an applicant for a medallion to be affixed to a privately purchased headstone or marker, may be” certain eligible individuals, and proposed paragraph (c)(1)(i)–(vi) would restate the eligible individuals listed in current § 38.600(a)(1)(i)–(vi).

Proposed § 38.630(c)(2) would newly define in regulation the term “ascertainable,” to clarify how that term would be interpreted in the newly proposed definition of “unmarked grave” that will be explained in proposed § 38.630(c)(6); the proposed definition of “ascertainable” will be explained in the portion of this rulemaking devoted to the proposed definition of “unmarked grave.”

Proposed § 38.630(c)(3) would newly define “local government” to mean the administrative body of a local geographic area that is not a state, such as a county, city, or town. This definition would be relevant in the few places that “local government” is used in proposed § 38.630(a) and (b), and proposed § 38.631(a), related to where headstones and markers might be placed, as well as related to administrative components of the application process for headstones and markers.

Proposed § 38.630(c)(4) would newly define in regulation the term “Medal of Honor recipient” in a manner consistent with 38 U.S.C. 2306(d)(5)(D), where this

definition is relevant for eligibility for headstones and markers under proposed § 38.630(a)(2).

Proposed § 38.630(c)(5) newly would define “privately purchased and durable headstone or marker” to mean a headstone or marker that was not purchased or provided by the Government, and that is made of material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed. We believe this proposed definition of “privately purchased and durable headstone or marker” is self-explanatory and would capture those types of headstones and markers that are not purchased by the Government, and that are placed by families or others in non-national cemeteries with the intent of lasting memorialization of decedents. This proposed definition of “privately purchased and durable headstone or marker” would be relevant to the proposed definition of “unmarked grave” in proposed 38.360(c)(6).

Because the definition of “unmarked grave” in proposed § 38.630(c)(6) would affect whether VA could provide a burial headstone or marker under proposed § 38.630(a), we explain the proposed definition of “unmarked grave” more fully below.

The Proposed Definition of “Unmarked Grave”

In accordance with 38 U.S.C. 2306(a), VA must “furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of” certain individuals listed in sec. 2306(a)(1)–(5). The term “unmarked grave” is not defined in sec. 2306 or elsewhere in VA statute. The term “unmarked grave” was similarly not defined in Federal statutes pertaining to national cemeteries prior to VA assuming control over such cemeteries through the National Cemeteries Act of 1973 (Pub. L. 93-43). Although not defined in Federal statute, the term “unmarked grave” was interpreted in relevant regulations of the Department of the Army, which applied to national cemeteries prior to 1973 (see former Army regulation 32 CFR 536.57(b)(3) (1961); § 536.57 was last updated in 1964, 29 FR 16986). The definition of “unmarked grave” in Army regulations was adopted by VA in 1982, in an NCA policy (see VA Department of Memorial Affairs Headstone and Marker Manual M40-3 (Dec. 1, 1982), para. 2.04) (hereinafter referred to as the “policy” or as “Manual M40-3”), although VA did not, until now, seek to revise its regulations to be consistent with this

policy. Proposed § 38.630(c)(6) would define “unmarked grave” consistent with NCA’s policy definition of “unmarked grave” in its Manual M40-3, as well as in a manner consistent with former Army regulation and consistent with VA’s current statutory authorities, as further explained below.

Former Army regulation at 32 CFR 536.57(b)(3) established that a grave in a private cemetery is considered unmarked if: (1) A Government headstone or Government marker has not been furnished, or a private monument has not been erected; or (2) the condition of a previously furnished Government or private headstone or marker is such as to warrant replacement. This regulation was first promulgated in 1959 (24 FR 4595, June 5, 1959), and remained substantively unchanged from 1959–1972 (see 26 FR 2643, Mar. 29, 1961; 29 FR 16986, Dec. 11, 1964). In 1982, VA adopted the definition of “unmarked grave” from that regulation in Manual M40-3, paragraph 2.04.b. VA’s policy definition of “unmarked grave” provides that “the grave of a deceased military member or veteran in other than a Federal cemetery is considered unmarked if: (1) A Government headstone or marker has not been furnished or a privately purchased monument has not been erected at the grave. (2) The condition of a previously furnished Government or private headstone or marker is such as to warrant replacement.” See Manual M40-3, para. 2.04.b.

Under former 32 CFR 536.57(b)(3)(i) and current paragraph 2.04.b.(1) of Manual M40-3, the first criterion for considering whether a grave is “unmarked” is whether a Government headstone or marker or privately purchased monument has been erected on a grave, without consideration of specific characteristics such as style, type, or inscription information. A plain reading of this criterion means that, if a grave in a non-national cemetery has any existing monument, headstone or marker, then such a grave could not be considered “unmarked” and a Government-furnished headstone or marker could not be provided. This criterion is straight-forward in its assessment of whether a grave is considered “unmarked”—either there is, or is not, a headstone, monument, or marker erected at the grave.

Under former 32 CFR 536.57(b)(3)(ii) and current paragraph 2.04.b.(2) of Manual M40-3, the second criterion for considering whether a grave is “unmarked” is whether the condition of a Government or privately purchased headstone or marker is such as to warrant replacement. This criterion is

not as straight-forward. In terms of a Government-furnished headstone or marker, we reiterate from previous discussion in this rulemaking that VA has established in policy (and would seek to establish in regulation) the reasons that Government-furnished headstones and markers might warrant replacement. In terms of a private headstone or marker, we similarly interpret former 32 CFR 536.57(b)(3)(ii) and paragraph 2.04.b.(2) of Manual M40-3 to mean that, if a privately purchased headstone or marker erected or installed on a grave ceases to be serviceable (*i.e.*, it no longer reasonably functions to identify the decedent), the grave would be considered unmarked; and, if the decedent is otherwise eligible for a Government-furnished headstone or marker, the Government may then for the first time provide, upon request, a Government-furnished headstone or marker for that unmarked grave. (We do not technically consider this a “replacement” of a privately purchased headstone or marker because the Government did not originally furnish such a headstone or marker.)

Based on this interpretation of former regulation 32 CFR 536.57(b)(3)(ii) and paragraph 2.04.b.(2) of Manual M40-3 that the Government would newly provide a headstone or marker if the existing privately purchased headstone or marker no longer functioned to reasonably identify a decedent (such that the grave would be considered unmarked), we would seek to establish in regulation two primary criteria by which to assess whether the privately purchased marker functioned to reasonably identify the decedent. First, we would assess whether the headstone or marker was durable, or made of a material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed (in accord with the definition of “privately purchased and durable headstone or marker” in proposed § 38.630(c)(5), which would characterize “durable” in this manner). The assessment of only the durability of a privately purchased headstone or marker, without further considering the specific styles, types, or specific inscription information, would establish a clear criterion that would permit VA to consistently evaluate a myriad of privately purchased markers. Second, we would assess whether a decedent’s name, if known, was ascertainable from the headstone or marker. Whether a decedent’s name was ascertainable would similarly provide a clear criterion for evaluating a myriad of privately

purchased headstones and markers, as we believe that a name is adequate information to identify a buried decedent. Particularly, the assessment of whether a decedent’s name was “ascertainable” from a privately purchased headstone or marker would mean that the headstone or marker could be considered as marking a grave, even if the name was not inscribed on the headstone or marker itself (for instance, if instead a numerical or other indicator is inscribed on the marker, where that indicator then corresponds to a burial ledger). To ensure this interpretation of the term “ascertainable” is clear, we would further define “ascertainable” in proposed § 38.630(c)(2) to mean that a decedent’s name is “inscribed on the headstone or marker or discoverable from some inscription on the headstone or marker that corresponds to information that is reasonably accessible by the public (*e.g.*, a corresponding burial ledger at the cemetery, or publicly available burial information accessible on the internet).” We clarify that both criteria would need to be met for a grave not to be considered “unmarked”—the privately purchased headstone or marker would have to be durable and the decedent’s name would have to be ascertainable from the headstone or marker. If either of these criteria were not met, the grave could be considered “unmarked.”

Based on the rationale stated above, the current policy definition of “unmarked grave” in paragraph 2.04.b. of Manual M40-3 would accordingly be revised by proposed § 38.630(c)(6), and proposed § 38.630(c)(6) would read as set out in the regulatory text below. The portion of the definition of “unmarked grave” in proposed § 38.630(c)(6)(i), related to a Government-furnished headstone or marker, is substantively the same as paragraphs 2.04.b.(1) and b.(2) in Manual M40-3, and proposed § 38.630(c)(6)(i) would additionally cross reference proposed § 38.360(b)(3) for ease in locating the applicable proposed replacement criteria for Government-furnished headstones and markers that were discussed earlier in this rulemaking. The portion of the definition of “unmarked grave” in proposed § 38.630(c)(6)(ii), to include paragraphs (c)(6)(ii)(A)–(D) related to assessing the condition of a privately purchased marker to determine whether a grave could be considered “unmarked,” would provide more detail than paragraph 2.04.b. in Manual M40-3. Because proposed § 38.630(c)(6)(ii) would clarify and modify current VA policy, we invite comments on those

proposed provisions particularly, and offer commenters the following two alternatives to proposed § 38.630(c)(6)(ii) that VA considered but ultimately did not propose.

One alternative to proposed § 38.630(c)(6)(ii) is that VA would assess whether a grave is unmarked by applying the minimal inscription criteria for headstones and markers in national cemeteries under 38 U.S.C. 2404(c)(1) to privately purchased headstones or markers, where the absence of such minimal inscription information on a privately purchased marker would mean a grave could be considered unmarked. Section 2404(c)(1) requires that each marker placed in a national cemetery “shall bear the name of the person buried, the number of the grave, and such other information as the Secretary shall by regulation prescribe.” We considered whether we could infer that the existence of these statutory criteria for national cemeteries meant that Congress intended for all graves of individuals who are eligible for Government-furnished headstones and markers should be marked with the same inscription information, regardless of the location of such graves.

VA rejected this alternative for two reasons. First, Congress has only legislated inscription requirements for headstones and markers in VA national cemeteries. The lack of similar inscription requirements for the graves of individuals eligible for a Government-furnished headstone or marker that are located outside national cemeteries tends to indicate that Congress did not intend to apply these standards regardless of the location of such graves. *See Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc) (the expression of one thing in statute implies the exclusion of others). Indeed, the Government does not have jurisdiction over any non-national cemeteries.

Second, Congress has consistently limited the provision of headstones and markers to only “unmarked graves,” first in appropriations language from 1887 through 1925, and then in statutory language beginning in 1925 that has remained consistent through the present day. (*See, e.g.*, appropriations language that has applied the “unmarked grave” limitation at 24 Stat. 534, 25 Stat. 538, 26 Stat. 400, 27 Stat. 377, 28 Stat. 405, 29 Stat. 443, 30 Stat. 634, 31 Stat. 630, 32 Stat. 463, 33 Stat. 495; *see, e.g.*, statutory language that applied the “unmarked grave” limitation at 38 Stat. 630, 39 Stat. 286, 40 Stat. 130, 41 Stat. 183, 42 Stat. 756, 43 Stat. 511, 43 Stat.

926.) If Congress intended for the provision of Government headstones or markers for the graves of eligible individuals with private headstones or markers that lacked certain inscription information, it could have expressly stated as much, for instance by defining the term “unmarked grave” to include a grave whose headstone or marker does not convey certain identifying information about the buried decedent. Instead, VA interprets that Congress has consistently intended for the term “unmarked grave” to be an administrative limitation of the Government headstones and marker benefit, as this term was used in appropriations language prior to statute, as stated above. *See Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 101 (2011) (presuming that Congress chose language that accurately express its legislative purpose). As an administrative limitation on a Government benefit, the term “unmarked grave” would have no practical effect if it permitted the provision of a Government headstone or marker for a grave where a privately purchased headstone or marker already existed, merely because such a headstone or marker fails to convey the same inscription information as a Government headstone or marker. Because it would undermine Congress’s selected language to interpret the term “unmarked grave” in a manner that would negate its function as a limitation on the headstone and marker benefit, VA does not believe that the term “unmarked grave” may be interpreted to encompass graves with privately purchased headstones or markers that merely do not convey the same inscription information as Government headstones and markers.

For the reasons expressed above, VA does not believe that the existence of inscription requirements for national cemeteries under 38 U.S.C. 2404(c) creates the inference that such requirements should apply to graves located outside of national cemeteries, and we therefore believe that the definition of “unmarked grave” in proposed § 38.630(c)(6) would be more appropriate than this first alternative. We reiterate that the definition of “unmarked grave” in proposed § 38.630(c)(6) would require an assessment of whether a privately purchased headstone or marker reasonably serves to identify the buried decedent, such that VA would not find the mere existence of any privately purchased headstone or marker to mean that a grave could not be considered unmarked.

A second alternative to proposed § 38.630(c)(6)(ii) that VA considered was that VA would assess whether a grave is unmarked by examining the past efforts surrounding the placement of privately purchased headstones and markers, and determining if those efforts evidenced an intent to permanently memorialize decedents. If there was such evidence of intent to permanently memorialize decedents, VA would not consider the grave to be unmarked because VA would not seek to disturb those past efforts through the provision of Government-furnished headstone or markers. Under this alternative, VA would examine historical or other information that would tend to indicate whether the existing privately purchased headstones or markers were placed to serve as lasting memorials to decedents. VA has not chosen to propose this alternative for multiple reasons. First, we do not interpret that there is a basis in applicable statute that a third party’s intent to permanently memorialize a decedent can extinguish that decedent’s eligibility for a headstone or marker under 38 U.S.C. 2306. Next, such intent would seem to be too subjective of a standard to evaluate, and therefore would not support consistent administration of benefits. For instance, would intent be evaluated based on consideration of all past memorialization efforts, or just the most recent efforts? Would the past memorialization efforts of certain groups of individuals (such as family members) be given deference over the efforts of other individuals? Even if such intent were to be a consideration, it would seem that VA would have to, in any case, assess whether an existing privately purchased headstone or marker was actually durable to serve as a lasting memorialization of the decedent. Because the durability of an existing privately purchased marker would be considered in any assessment of whether a grave was “unmarked,” we believe that the definition of “unmarked grave” in proposed § 38.630(c)(6)(ii) (in conjunction with the definition of “privately purchased and durable marker” in proposed § 38.630(c)(5)) is more appropriate than this second alternative.

We would lastly revise the statutory authority citation for proposed § 38.630. This revision would include sec. 203(b) of Public Law 110–157, which establishes the general applicability date (*i.e.*, date of death on or after November 1, 1990) for the second marker authorized under 38 U.S.C. 2306(d).

§ 38.631 Memorial Headstones and Markers

Proposed § 38.631 would address the provision of memorial headstones and markers for certain individuals whose remains are unavailable for burial, in accordance with 38 U.S.C. 2306(b). Proposed § 38.631 would move and revise information that is located in current § 38.630(c) to ensure that memorial headstones and markers are in a distinct section from burial headstones and markers, because eligibility differs for these two types of benefits. The title would be revised to “Memorial headstones and markers.”

Proposed § 38.631(a) would restate from current § 38.630(c)(1) that VA will provide upon request a memorial headstone or marker for certain eligible individuals, and proposed § 38.631(a)(1)(i)–(iii) would list those eligible individuals in accordance with 38 U.S.C. 2306(b)(2)(A)–(C). Section 2306(b)(2) was recently amended by Public Law 115–136, 132 Stat. 343 (2018) to establish a consistent eligibility date for the provision of memorial headstones and markers to spouses, surviving spouses, and dependent children of veterans, where such spouses and children must have died on or after November 11, 1998. We note that VA has been providing these memorial benefits as applicable under Public Law 115–136 since its enactment, and that proposed § 38.631(a)(1)(ii)–(iii) would merely conform VA regulation to VA authority and practice.

Proposed § 38.631(a)(2) would newly establish in regulation that when VA has furnished a burial headstone or marker (under proposed 38 CFR 38.630(a)(1)), VA would, if feasible, add a memorial inscription to that burial headstone or marker (or provide a replacement headstone or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(1). Proposed § 38.631(a)(3) would newly establish in regulation that when VA has furnished a memorial headstone or marker (under proposed § 38.631(a)(1)), VA would, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstones or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(2). Both proposed § 38.631(a)(2) and (3) would

be added in this eligibility section because they would be exceptions to providing a new and separate memorial headstone or marker for a veteran's spouse or dependent child, consistent with sec. 2306(g)(1) and (2). We note that the "if feasible" language in both proposed § 38.631(a)(2) and (3), consistent with sec. 2306(g)(1) and (2), respectively, would allow but not mandate VA to follow this practice.

As with proposed § 38.630(b) for burial headstones and markers, proposed § 38.631(b) would create a "general" paragraph for memorial headstones and markers to move, combine, or newly establish regulatory language related to administrative aspects of providing Government-furnished memorial headstones and markers, to include the application process, styles and types, and criteria for replacement. The structure of proposed § 38.631(b)(1)–(5) generally mirrors that of proposed § 38.630(b)(1)–(5). Rather than reiterating here all of the rationale provided to explain proposed § 38.630(b)(1)–(5), we affirm instead that, where the criteria in proposed § 38.631(b)(1)–(5) are substantively identical to those in proposed § 38.630(b)(1)–(5), even if they do not share the exact same numbering, the same rationale provided for proposed § 38.360(b)(1)–(5) applies to § 38.631(b)(1)–(5).

The differences between the criteria in proposed §§ 38.360(b)(1)–(5) and 38.361(b)(1)–(5) are the result of the key differences between burial and memorial headstones and markers, as memorial headstones and markers may only be provided when remains are unavailable for burial (resulting in no grave where a burial headstone or marker may be placed) in accordance with 38 U.S.C. 2306(b)(1). For instance, the application process in proposed § 38.631(b)(1) has only one option for requesting headstones and markers through VA Form 40–1330, unlike in proposed § 38.630(b)(1) where the application can be made either as part of burial arrangements or by request through VA Form 40–1330 or VA Form 40–1330M. Similarly, the certification requirement in proposed § 38.630(b)(1)(iii)(A)–(B) (regarding headstone or marker placement on or near a veteran's grave in private or local government cemeteries) is not established in proposed § 38.631(b)(1), as there is no grave in the context of a Government-furnished memorial headstone or marker. Additionally, there are no criteria related to medallions in proposed § 38.631 generally, including paragraph (b)(1)–(5), as medallions are only related to the

provision of burial headstones and markers under 38 U.S.C. 2306(d)(4). The differences between proposed §§ 38.631(b)(1)–(5) and 38.630(b)(1)–(5) also reflect any particular statutory or regulatory requirements that exist for memorial but not for burial headstones and markers. For instance, proposed § 38.631(b)(2)(ii) and (b)(3)(i)(E)(1) would move and restate the requirement in current § 38.630(c) related to the mandatory inscription of "In Memory Of," which applies only to memorial headstones and markers.

Similar to proposed § 38.630(c) for burial headstones and markers, proposed § 38.631(c) would establish a definitions paragraph to relocate from current regulations, as well as newly define, those terms related to memorial headstones and markers. The definition of the term "applicant" for memorial headstones and markers in current § 38.600(a)(2) would be moved to proposed § 38.631(c)(1) without substantive change. Proposed § 38.631(c)(2) would move the definition of "unavailable remains" from current § 38.630(c)(2) without substantive change.

Finally, the authority citation for proposed § 38.631 would be revised in accordance with the changes noted above.

§ 38.632 Emblems of Belief

As stated previously in this rulemaking, information related to the application process for a Government-furnished headstone or marker would be removed from current § 38.632(a) and (c), and placed in proposed § 38.630 (related to burial headstones and markers) and in proposed § 38.631 (related to memorial headstones and markers). With the proposed removal from current § 38.632 of information related to the application process for a Government-furnished headstone or marker, we would further propose to rename the § 38.632 header to read "Emblems of belief," as the remainder of § 38.632 after the proposed removal of application information would only relate to the process for requesting the approval of an emblem of belief to be inscribed on a Government-furnished headstone or marker.

Proposed § 38.632(a) would remain a "general" paragraph, but—with the proposed removal of the application information for Government-furnished headstones and markers—would read, "This section contains procedures for requesting the inscription of new emblems of belief on Government-furnished headstones and markers."

Proposed § 38.632(b) would remain a "definitions" paragraph with no changes.

With the proposed removal of all language in current § 38.632(c) pertaining to application for Government-furnished headstones and markers, and relocation of that language to proposed §§ 38.630 and 38.631, current § 38.632(c) would be removed and § 38.632(d)–(h) would be redesignated as § 38.632(c)–(g), respectively, with some conforming amendments that update cross-references, but no substantive changes. We note a non-substantive change to add a paragraph designation for language that immediately follows current § 38.632(h)(2)(ii) (see language immediately following § 38.632(h)(2)(ii), related to a 60-day timeframe in the emblem of belief process). This language related to the 60-day timeframe would be designated as proposed § 38.632(g)(3), and current § 38.632(h)(3) and (4) would be redesignated to proposed § 38.632(g)(4) and (5), respectively. No other substantive changes are proposed for current § 38.632.

Conforming Amendments

To conform to the above changes, we would remove the last sentence of current § 38.633(a)(2), which states that group memorial monuments "will be selected in accordance with policies established under 38 CFR 38.630," as proposed § 38.630 would not relate to the selection of group memorial monuments. We would delete this sentence instead of proposing to update the cross reference to § 38.630, as none of the proposed regulatory changes in this rulemaking would relate to the selection of group memorial monuments (although VA does plan to propose such criteria in a separate future rulemaking). Additionally, cross-references in § 39.10 will be updated accordingly to reflect the proposed changes to § 38.600 in this rulemaking.

Lastly, the authority citation for part 39 currently cites to, among other statutes, 25 U.S.C. 450b(l). This citation was included because the statute includes definitions relevant to tribal authorities to whom VA may make grants for veterans' cemeteries. However, 25 U.S.C. 450b(l) has been transferred to 25 U.S.C. 5304(l). In addition, the pertinent definition is established under 38 U.S.C. 3765, which is among the other statutes cited in this authority citation, making the additional reference to title 25 unnecessary. This final rule amends the authority citation for part 39 by removing the citation to 25 U.S.C. 450b(l).

Effect of Rulemaking

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

Paperwork Reduction Act

This proposed rule includes provisions that would amend a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that is currently approved by the Office of Management and Budget (OMB) under OMB control number 2900–0222. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking to OMB for review.

Proposed § 38.630(b)(1)(iii)(A)–(C) would require revision of two existing certification statements on VA Form 40–1330, titled “Claim for Standard Government Headstone or Marker,” related to placement of a headstone or marker and related to following the receiving cemetery’s guidelines and procedures. The existing certifications on VA Form 40–1330 are broad enough to encompass proposed § 38.630(b)(1)(iii)(A)–(C), but are not fully consistent. We note that the language in proposed § 38.630(b)(1)(iii)(A)–(C) would merely move language from current § 38.631(a) and (e) without substantive change. The current certifications on VA Form 40–1330 are in a check-box format, which would not be changed—only the language in the certifications would be revised to be more consistent with the corresponding certification requirements in current and proposed regulations. The proposed revisions to the certifications further do not affect eligibility for a headstone, marker, or medallion, and would not increase or decrease the number of applicants using VA Form 40–1330. Therefore, these proposed revisions would not result in any increase or decrease in respondents, respondent burden hours, or respondent burden costs.

Comments on the revisions to the approved collection of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, or by email to oir_submission@omb.eop.gov, with copies sent by mail

or hand delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; fax to (202) 273–9026; or through www.Regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900–AQ28—Government-Furnished Headstones, Markers, and Medallions; Unmarked Graves.”

OMB is required to make a decision concerning the revision of the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule. Notice of OMB approval for this revised information collection will be published in a future **Federal Register** document. Until VA receives approval from OMB to revise the information collection, only the version of VA Form 40–1330 as a currently approved collection under OMB control number 2900–0222 will be used.

Regulatory Flexibility Act

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

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the OMB, unless OMB waives such review, as any regulatory action that is

likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been reviewed, and it has been determined not to be a significant regulatory action under E.O. 12866.

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

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.201, National Cemeteries; 64.202, Procurement of Headstones and Markers and/or Presidential Memorial Certificates; and 64.203, State Cemetery Grants.

List of Subjects

38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Crime, Veterans.

38 CFR Part 39

Cemeteries, Grant programs-veterans, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the

Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on January 11, 2019, for publication.

Dated: January 11, 2019.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR parts 38 and 39 are proposed to be amended as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C 107, 501, 512, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

■ 2. Revise § 38.600 to read as follows:

§ 38.600 Definitions.

(a) The following definitions apply to this part:

(1) *Appropriate State official* means a State attorney general or other official with statewide responsibility for law enforcement or penal functions.

(2) *Clear and convincing evidence* means that degree of proof which produces in the mind of the fact-finder a firm belief regarding the question at issue.

(3) *Convicted* means a finding of guilt by a judgment or verdict or based on a plea of guilty, by a Federal or State criminal court.

(4) *Federal capital crime* means an offense under Federal law for which a sentence of imprisonment for life or the death penalty may be imposed.

(5) *Interment* means the burial of casketed remains or the placement or scattering of cremated remains.

(6) *Life imprisonment* means a sentence of a Federal or State criminal court directing confinement in a penal institution for life.

(7) *Memorialization* means any action taken to honor the memory of a deceased individual.

(8) *Personal representative* means a family member or other individual who has identified himself or herself to the National Cemetery Administration as the person responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual.

(9) *State capital crime* means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which a

sentence of imprisonment for life or the death penalty may be imposed.

(b) Other terms not defined in paragraphs (a)(1) through (9) of this section may be defined within and be applicable to other sections throughout this part.

(Authority: 38 U.S.C. 2404, 2411).

■ 3. Amend § 38.620 by adding paragraph (j) to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

(j) Any individual who:

(1) Was naturalized pursuant to section 2(1) of the Hmong Veterans' Nationalization Act of 2000 (Pub. L. 106–207, 114 Stat. 316; 8 U.S.C. 1423 note); and

(2) At the time of the individual's death resided in the United States; and

(3) Died on or after March 23, 2018.

* * * * *

■ 4. Revise § 38.630 to read as follows:

§ 38.630 Burial headstones and markers; medallions.

(a) *Eligibility*—(1) *Unmarked graves.* VA will furnish, when requested under paragraph (b)(1)(i) or (ii) of this section, a burial headstone or marker for the unmarked grave of the following individuals:

(i) Any individual buried in a national cemetery or in a military post cemetery. When more than one individual is buried in a single gravesite in a national cemetery, VA will, if feasible, include inscription information for all such individuals on a single headstone or marker, rather than furnishing a separate headstone or marker for each buried individual.

(ii) The following individuals eligible for burial in a national cemetery but who are buried elsewhere, where such graves may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government such as town or city cemetery):

(A) Veterans as described in § 38.620(a).

(B) Members of a Reserve component of the Armed Forces, or members of the Army National Guard or the Air National Guard, whose deaths occurred under the conditions described in § 38.620(b).

(C) Members of the Reserve Officers' Training Corps of the Army, Navy, or Air Force, whose deaths occurred under the conditions described in § 38.620(c).

(D) Individuals who separated from military service and were entitled to retired pay under chapter 1223 of title 10 [10 U.S.C. 12731 *et seq.*], as described in and subject to § 38.620(g).

(E) Individuals who served in the organized military forces of the

Government of the Commonwealth of the Philippines, or who served in the New Philippine Scouts, as described in and subject to § 38.620(h).

(F) Individuals, or spouses of such individuals, who were naturalized pursuant to sec. 2(1) of the Hmong Veterans' Nationalization Act of 2000, as described in and subject to § 38.620(j).

(iii) Soldiers of the Union and Confederate Armies of the Civil War, whose graves may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government cemetery).

(iv) Spouses, surviving spouses, and dependent children, as described in and subject to § 38.620(e), whose graves are located in a veterans' cemetery owned by a State.

(2) *Marked graves.* (i) Subject to paragraphs (a)(2)(ii) and (iii) of this section, VA will furnish, when requested under paragraph (b)(1)(ii) of this section, a burial headstone or marker for the graves of the following individuals who are buried in a non-national cemetery (e.g., state, tribal, private, or local government cemetery), notwithstanding that such graves are already marked by a privately purchased headstone or marker.

(A) Veterans as described in § 38.620(a).

(B) Members of a Reserve component of the Armed Forces, or members of the Army National Guard or the Air National Guard, whose deaths occurred under the conditions described in § 38.620(b).

(C) Members of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose deaths occurred under the conditions described in § 38.620(c).

(D) Individuals who separated from military service and were entitled to retired pay under chapter 1223 of title 10 [10 U.S.C. 12731 *et seq.*], as described in and subject to § 38.620(g).

(E) Individuals who served in the organized military forces of the Government of the Commonwealth of the Philippines, or who served in the New Philippine Scouts, as described in and subject to § 38.620(h).

(F) Individuals, or spouses of such individuals, who were naturalized pursuant to sec. 2(1) of the Hmong Veterans' Nationalization Act of 2000, as described in and subject to § 38.620(j).

(ii) An individual described in paragraph (a)(2)(i) of this section is eligible for a headstone or marker provided under paragraph (a)(2) of this section if:

(A) The individual died on or after November 1, 1990; or

(B) They were a Medal of Honor recipient and served in the Armed Forces on or after April 6, 1917.

(iii) In lieu of a headstone or marker provided under paragraph (a)(2) of this section, veterans described in paragraph (a)(2)(i)(A) of this section are eligible for a medallion to be affixed to their privately purchased headstone or marker if they served in the Armed Forces on or after April 6, 1917.

(b) *General*—(1) *Application*. (i) When burial occurs in a cemetery that uses the National Cemetery Administration (NCA) electronic ordering system (e.g., national cemetery, State veterans' cemetery, or military post cemetery), the headstone or marker provided under paragraph (a)(1) or (a)(2) of this section will be ordered by the applicable cemetery as part of the process of arranging burial.

(ii) When burial occurs in a cemetery that does not use NCA's electronic ordering system (e.g., private or local government cemetery), an applicant, as defined in paragraph (c)(1) of this section, may either:

(A) Request a burial headstone or marker provided under paragraph (a)(1) or (2) of this section by completing and submitting VA Form 40–1330, Claim for Standard Government Headstone or Marker; or

(B) Request a medallion provided under paragraph (a)(2)(iii) of this section to be affixed to a privately purchased headstone or marker, by completing and submitting VA Form 40–1330M, Claim for Government Medallion for Placement in a Private Cemetery.

(iii) VA Forms 40–1330 and 40–1330M include application and submission instructions as well as additional information related to emblems of belief, and are accessible through the following links: <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>, and <https://www.va.gov/vaforms/va/pdf/VA40-1330M.pdf>.

(A) An applicant for a burial headstone or marker for an unmarked grave provided under paragraph (a)(1) of this section, for placement in a private cemetery or a local government cemetery, must certify on VA Form 40–1330 that such headstone or marker will be placed on or at the grave for which it is requested.

(B) An applicant for a burial headstone or marker for a marked grave provided under paragraph (a)(2) of this section, for placement in a private cemetery or a local government cemetery, must certify on VA Form 40–1330 that such headstone or marker will be placed on the grave for which it is requested, or if such placement is not possible or practicable, as close as

possible to the grave within the grounds of the cemetery in which the grave is located.

(C) A representative of a private cemetery or local government cemetery that accepts delivery of a burial headstone or marker provided under paragraph (a)(1) or (2) of this section must certify on VA Form 40–1330 that placement of the headstone or marker adheres to the policies or guidelines of the cemetery in which the grave is located.

(2) *Styles, types, and inscriptions*. The styles and types of burial headstones and markers provided under paragraphs (a)(1) and (2) of this section, as well as the inscriptions thereon to include an emblem of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c) and 2404(c).

(i) The styles and types of burial headstones and markers made available for selection, as well as the inscriptions thereon, may be limited in accordance with certain requirements, including but not limited to aesthetic or administrative requirements of the cemetery in which the headstone or marker will be placed.

(ii) The same styles and types of headstones and markers made available for selection by requestors of headstones and markers provided for unmarked graves under paragraph (a)(1) of this section shall be made available for requestors of headstones or markers for marked graves provided under paragraph (a)(2) of this section.

(iii) Upon request under paragraph (b)(1)(i) or (ii) of this section, a headstone, marker, or medallion provided under paragraph (a)(1) or (2) of this section shall signify the deceased's status as a Medal of Honor recipient as applicable.

(iv) If an emblem of belief is requested that is not offered in VA's inventory of images for emblems of belief, additional requirements apply under § 38.632.

(3) *Replacement*. (i) Upon request, VA will replace a Government-furnished burial headstone, marker, or medallion, if the previously furnished headstone, marker, or medallion:

(A) Is damaged beyond repair; or

(B) Has deteriorated to the extent it no longer serves to identify the buried decedent (e.g., identifying elements of an inscription are not legible, such as a decedent's name or a grave number for an unknown decedent) or, in the case of a medallion, no longer serves to identify the buried decedent as a veteran or as a Medal of Honor recipient if applicable; or

(C) Has been stolen or vandalized; or

(D) Is the incorrect style or type for the veteran's era of service; or

(E) Requires changing or adding inscription information for the following reasons:

(1) To correct errors in factual information (such as name or dates of birth or death) provided to VA as part of the initial application process;

(2) To indicate information related to the deceased's military service that is provided to VA after the initial application process (such as the deceased's posthumous receipt of military awards);

(3) To identify on a single headstone or marker multiple decedents who are each eligible for a headstone or marker and who are buried in the same gravesite in a cemetery, to include identification of a spouse or dependent in accordance with 38 U.S.C. 2306(g)(1); or

(4) To indicate the deceased's status as a Medal of Honor recipient if applicable, for a headstone or marker provided for a marked grave under paragraph (a)(2) of this section, in accordance with 38 U.S.C. 2306(d)(5)(B).

(5) For any reason not listed in paragraphs (b)(3)(i)(E)(1) through (4) of this section, if the request to change or add inscription information is received from the decedent's next of kin as indicated in NCA's records systems, within six months of the initial headstone or marker being provided.

(ii) To the extent practicable, replacement burial headstones and markers will be of the same style and type (to include inscription information) as those headstones or markers being replaced, except that style, type, or inscription information may differ for replacements if the reason for replacement is correction of the style, type, or inscription under one of the criteria in paragraphs (b)(3)(i)(D) and (E) of this section.

(iii) Requests to replace Government-furnished burial headstones, markers, or medallions are made as follows:

(A) Through NCA's electronic ordering systems, when the headstone, marker, or medallion to be replaced is located in a cemetery that uses NCA electronic ordering systems; or

(B) By completing and submitting VA Form 40–1330 or VA Form 40–1330M, when the headstone, marker, or medallion to be replaced is located in a cemetery that does not use NCA's electronic ordering systems.

(4) *Limitations*. (i) VA will not pay costs associated with installing a burial headstone or marker provided under this section for placement in a non-national cemetery, but VA will deliver

such headstone or marker directly to the non-national cemetery where the grave is located or to a receiving agent for delivery to the cemetery.

(ii) VA will not pay costs associated with affixing a medallion provided under paragraph (a)(2) of this section to a privately purchased headstone or marker in a non-national cemetery, but VA will deliver such medallion directly to the applicant.

(5) *Ownership, alteration, and disposition.* (i) All Government-furnished headstones, markers, and medallions remain the property of the United States Government in perpetuity and should not be defaced or altered in any way. Knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping, or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641.

(ii) Under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited, with an associated fine of \$500. Under 18 U.S.C. 1361, willful depredation of any property of the United States (*i.e.*, a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18, U.S.C.

(iii) When a Government-furnished burial headstone, marker, or medallion is removed from any cemetery it should be properly disposed. Unless a headstone or marker that has been removed from a cemetery would be maintained by NCA for historic purposes, or in cases of disinterment would be relocated to a different gravesite, such headstones or markers made of stone must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and those made of bronze must be returned to VA for recycling.

(c) *Definitions*—(1) *Applicant.* An applicant for a burial headstone or marker for an eligible deceased individual, or an applicant for a medallion to be affixed to a privately purchased headstone or marker, may be:

(i) A decedent's family member, which includes the decedent's spouse or individual who was in a legal union as defined in 38 CFR 3.1702(b)(1)(ii) with the decedent; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent;

(ii) A personal representative, as defined in § 38.600(a)(8);

(iii) A representative of a congressionally chartered Veterans Service Organization;

(iv) An individual employed by the relevant state or local government whose official responsibilities include serving veterans and families of veterans, such as a state or county veterans service officer;

(v) Any individual who is responsible, under the laws of the relevant state or locality, for the disposition of the unclaimed remains of the decedent or for other matters relating to the interment or memorialization of the decedent; or

(vi) Any individual, if the dates of service of the veteran to be memorialized, or on whose service the eligibility of another individual for memorialization is based, ended prior to April 6, 1917.

(2) *Ascertainable.* Ascertainable means inscribed on the headstone or marker or discoverable from some inscription on the headstone or marker that corresponds to information that is reasonably accessible by the public (*e.g.*, a corresponding burial ledger at the cemetery, or publicly available burial information accessible on the internet).

(3) *Local government.* Local government means the administrative body of a geographic area that is not a state, such as a county, city, or town.

(4) *Medal of Honor recipient.* Medal of Honor recipient means an individual who is awarded the Medal of Honor under sec. 3741, 6241, or 8741 of title 10 or sec. 491 of title 14, United States Code.

(5) *Privately purchased and durable headstone or marker.* Privately purchased and durable headstone or marker means a headstone or marker that was not purchased or provided by the Government, and that is made of a material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed.

(6) *Unmarked grave.* Unmarked grave means a grave in a cemetery where:

(i) A Government-furnished headstone or marker has not been erected or installed at the grave, or the condition of a Government-furnished headstone or marker erected or installed at the grave warrants replacement under paragraph (b)(3) of this section; and

(ii) A privately purchased and durable headstone or marker, from which the buried individual's name (if known) is ascertainable:

(A) Has not been erected or installed at the grave; or

(B) Is damaged beyond repair; or

(C) Has deteriorated to the extent it no longer serves to identify the buried

decedent (*e.g.*, identifying elements of an inscription are not legible); or

(D) Has been stolen or vandalized.

(Authority: 38 U.S.C. 2306, 2402, 2404; sec. 203(b), Pub. L. 110-157, 121 Stat. 1831).

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0222.)

■ 5. Revise § 38.361 to read as follows:

§ 38.631 Memorial headstones and markers.

(a) *Eligibility.* (1) VA will furnish, when requested under paragraph (b)(1) of this section, a memorial headstone or marker to commemorate the following individuals whose remains are unavailable:

(i) A veteran (which includes an individual who dies in the active military, naval, or air service), where the headstone or marker may be provided for a national cemetery, State veterans cemetery, a private cemetery, or local government cemetery;

(ii) A veteran's spouse or surviving spouse (which includes a surviving spouse who had a subsequent remarriage) who died on or after November 11, 1998, where the headstone or marker may be provided for a national cemetery or a State veterans cemetery;

(iii) A veteran's dependent child who died on or after November 11, 1998, where that headstone or marker may be provided for a national cemetery or a State veterans cemetery, if that dependent child is:

(A) Under the age of 21 years;

(B) Under the age of 23 years if pursuing a course of instruction at an approved educational institution; or

(C) Unmarried and became permanently physically or mentally disabled and incapable of self-support before reaching the age of 21 years, or before reaching the age of 23 years if pursuing a course of instruction at an approved educational institution.

(2) When VA has furnished a burial headstone or marker under § 38.630(a)(1), VA will, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstone or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(1).

(3) When VA has furnished a memorial headstone or marker under paragraph (a)(1) of this section for purposes of commemorating a veteran or an individual who died in the active

military, naval, or air service, VA will, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstone or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(2).

(b) *General*—(1) *Application*. (i) An applicant, as defined in paragraph (c)(1) of this section, may request a memorial headstone or marker by completing and submitting VA Form 40–1330, Claim for Standard Government Headstone or Marker. VA Form 40–1330 includes application and submission instructions and is accessible through the following link: <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>.

(ii) A representative of a private cemetery or local government cemetery that accepts delivery of a memorial headstone or marker must certify on VA Form 40–1330 that placement of the headstone or marker adheres to the policies or guidelines of the cemetery in which the grave is located.

(2) *Styles, types, and inscriptions*. The styles and types of memorial headstones and markers provided under this section, as well as the inscriptions thereon to include emblems of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c).

(i) The styles and types of memorial headstones and markers made available for selection, as well as the inscriptions thereon, may be limited in accordance with certain requirements, including but not limited to aesthetic or administrative requirements of a cemetery.

(ii) All inscriptions for memorial headstones and markers must be preceded by the phrase “In Memory Of”.

(iii) If an emblem of belief is requested that is not offered in VA’s inventory of images for emblems of belief, additional requirements apply under § 38.632.

(3) *Replacement*. (i) Upon request, VA will replace a Government-furnished memorial headstone or marker, if the previously furnished headstone or marker:

- (A) Is damaged beyond repair; or
- (B) Has deteriorated to the extent it no longer serves to identify the decedent (e.g., identifying elements of an inscription are not legible, such as a decedent’s name); or
- (C) Has been stolen or vandalized; or
- (D) Is the incorrect style or type for the veteran’s era of service; or

(E) Requires changing or adding inscription information for the following reasons:

(1) The inscription is not preceded by the phrase “In Memory Of”; or

(2) To correct errors in factual information (such as name or dates of birth or death) provided to VA as part of the initial application process; or

(3) To indicate information related to the deceased’s military service that is provided to VA after the initial application process (such as the deceased’s posthumous receipt of military awards); or

(4) To identify a spouse or dependent in accordance with 38 U.S.C. 2306(g)(2); or

(5) For any reason not listed in paragraphs (b)(3)(i)(E)(1) through (4) of this section, if the request to add or change inscription information is received from the decedent’s next of kin as indicated in NCA’s records systems, within six months of the headstone or marker initially being provided.

(ii) To the extent practicable, replacement memorial headstones and markers will be of the same style and type (to include inscription information) as those being replaced, except that style, type, or inscription content may differ for replacement headstones and markers if one of the criteria under paragraphs (b)(3)(i)(D) and (E) of this section is the reason for replacement.

(iii) Requests to replace Government-furnished memorial headstones and markers are made as follows:

(A) Through NCA’s electronic ordering systems, when the headstone or marker to be replaced is located in a cemetery that uses NCA electronic ordering systems; or

(B) By completing and submitting VA Form 40–1330, when the headstone or marker to be replaced is located in a cemetery that does not use NCA’s electronic ordering systems.

(4) *Limitations*. VA will not pay the cost of installing a memorial headstone or marker provided under this section for placement in any cemetery that is not a national cemetery, but will deliver the headstone or marker directly to such cemetery or to a receiving agent for delivery to the cemetery.

(5) *Ownership, alteration, and disposition*. (i) All Government-furnished memorial headstones and markers remain the property of the United States Government in perpetuity, and should not be defaced or altered in any way. Knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping, or offering such items for

sale) is a violation of Federal law under 18 U.S.C. 641.

(ii) Under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited, with an associated fine of \$500. Under 18 U.S.C. 1361, willful depredation of any property of the United States (i.e., a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18, U.S.C.

(iii) When a Government-furnished memorial headstone or marker is removed from any cemetery (due to it warranting replacement under paragraph (b)(3) of this section), it should be properly disposed. Unless a memorial headstone or marker that has been removed from a cemetery would be maintained by NCA for historic purposes, such headstones and markers made of stone must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and those made of bronze must be returned to VA for recycling.

(c) *Definitions*—(1) *Applicant*. An applicant for a memorial headstone or marker, to commemorate an eligible individual under paragraph (a)(1) of this section, must be a member of the decedent’s family, which includes: The decedent’s spouse or individual who was in a legal union as defined in 38 CFR 3.1702(b)(1)(ii) with the decedent; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent.

(2) *Unavailable remains*. An individual’s remains are considered unavailable if they:

- (i) Have not been recovered or identified; or
- (ii) Were buried at sea, whether by the individual’s own choice or otherwise; or
- (iii) Were donated to science; or
- (iv) Were cremated and the ashes scattered without interment of any portion of the ashes.

(Authority: 38 U.S.C. 2306, 2402, 2404).

- 6. Amend § 38.632 by:
 - a. Revising the section heading and paragraph (a).
 - b. Removing paragraph (c).
 - c. Redesignating paragraphs (d) through (h) as paragraphs (c) through (g), respectively.
 - d. In newly redesignated paragraph (c), revising the table.
 - e. In newly redesignated paragraph (f), revising paragraphs (f)(2) and (5).
 - f. In newly redesignated paragraph (g):

- i. Revising paragraphs (g)(1) and (2).
- ii. Redesignating paragraphs (g)(3) and (4) as paragraphs (g)(4) and (5), respectively.
- iii. Adding new paragraph (g)(3).

The revisions and addition read as follows:

§ 38.632 Emblems of belief.

(a) *General.* This section contains procedures for requesting the

inscription of new emblems of belief on Government-furnished headstones and markers.

* * * * *
(c) * * *

If the burial or memorialization of an eligible individual is in a:	The applicant must:
(1) Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system.	(i) Submit a written request to the director of the cemetery where burial is requested indicating that a new emblem of belief is desired for inscription on a Government-furnished headstone or marker; and (ii) Provide the information specified in paragraph (d) of this section to the NCA Director of Memorial Programs Service.
(2) Private cemetery (deceased eligible veterans only), Federally-administered cemetery, or a State veterans cemetery that does not use the NCA electronic ordering system.	(i) Submit a completed VA Form 40–1330 to the NCA Director of Memorial Programs Service, indicating in the REMARKS section of the form that a new emblem of belief is desired; and (ii) Provide the information specified in paragraph (d) of this section to the NCA Director of Memorial Programs Service.

* * * * *
(f) * * *

(2) The applicant has submitted a certification concerning the emblem that meets the requirements of paragraph (d)(1) of this section.

(i) In the absence of evidence to the contrary, VA will accept as genuine an applicant’s statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual. If a factual dispute arises concerning whether the requested emblem represents the sincerely held religious or functionally equivalent belief of the decedent, the Director will evaluate whether the decedent gave specific instructions regarding the appropriate emblem during his or her life and the Under Secretary will resolve the dispute on that basis.

(ii) In the absence of such instructions, the Under Secretary will resolve the dispute in accordance with the instructions of the decedent’s surviving spouse. If the decedent is not survived by a spouse, the Under Secretary will resolve the dispute in accordance with the agreement and written consent of the decedent’s living next-of-kin. For purposes of resolving such disputes under this section, next-of-kin means the living person(s) first listed as follows:

(A) The decedent’s children 18 years of age or older, or if the decedent does not have children; then

(B) The decedent’s parents, or if the decedent has no surviving parents; then

(C) The decedent’s siblings.

* * * * *

(5) The emblem meets the technical requirements for inscription specified in paragraph (d)(2) of this section.

(g) * * * (1) A decision will be made on all complete applications. A request to inscribe a new emblem on a Government-furnished headstone or marker shall be granted if the Under

Secretary for Memorial Affairs finds that the request meets each of the applicable criteria in paragraph (f) of this section. In making that determination, if there is an approximate balance between the positive and negative evidence concerning any fact material to making that determination, the Under Secretary shall give the benefit of the doubt to the applicant. The Under Secretary shall consider the recommendation of the Director of NCA’s Office of Field Programs and may consider information from any source.

(2) If the Under Secretary for Memorial Affairs determines that allowing the inscription of a particular proposed emblem would adversely affect the dignity and solemnity of the cemetery environment or that the emblem does not meet the technical requirements for inscription, the Under Secretary shall notify the applicant in writing and offer to the applicant the option of either:

(i) Omitting the part of the emblem that is problematic while retaining the remainder of the emblem, if this is feasible; or

(ii) Choosing a different emblem to represent the religious or functionally equivalent belief that does not have such an adverse impact.

(3) Applicants will have 60 days from the date of the notice to cure any adverse impact or technical defect identified by the Under Secretary. Only if neither option is acceptable to the applicant, the applicant’s requested alternative is also unacceptable, or the applicant does not respond within the 60-day period, will the Under Secretary ultimately deny the application.

* * * * *

§ 38.633 [Amended]

■ 7. Amend § 38.633 by removing the last sentence in paragraph (a)(2).

PART 39—AID FOR THE ESTABLISHMENT, EXPANSION, AND IMPROVEMENT, OR OPERATION AND MAINTENANCE, OF VETERANS CEMETERIES

■ 8. The authority citation for part 39 is revised to read as follows:

Authority: 38 U.S.C. 101, 501, 2408, 2411, 3765.

Subpart A—General Provisions

§ 39.10 [Amended]

■ 9. Amend § 39.10 by removing “38 CFR 38.600(b)” every place it currently appears and adding “38 CFR 38.600(a)” in its place.

[FR Doc. 2019–00375 Filed 2–5–19; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2018–0301; FRL–9988–99–Region 4]

Air Plan Approval; NC: Readoption of Air Quality Rules and Removal of Oxygenated Gasoline Rules

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve several State Implementation Plan (SIP) revisions submitted by the North Carolina Department of Environmental Quality, Division of Air Quality (DAQ), on March 21, 2018, readopting and amending several air quality rules, and requesting to remove the rules for the oxygenated gasoline program. One of these SIP revisions also contains a non-interference demonstration, which

concludes that removing the oxygenated gasoline rules would not interfere with attainment or maintenance of the National Ambient Air Quality Standards (NAAQS). EPA has preliminarily determined that North Carolina's March 21, 2018, SIP revisions are consistent with the applicable provisions of the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2018-0301 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Kelly Sheckler, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9222. Ms. Sheckler can also be reached via electronic mail at sheckler.kelly@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Overview

EPA is proposing to approve several SIP revisions submitted by North Carolina on March 21, 2018, seeking to readopt and amend various air quality rules, and to remove the rules for the oxygenated gasoline program from North Carolina's SIP. To support the request to remove the rules for the oxygenated gasoline program from the SIP, North Carolina's March 21, 2018, SIP revision contains technical support materials to demonstrate that the removal of the rules will not interfere

with attainment or maintenance of any NAAQS or with any other applicable requirement of the CAA. Specifically, these SIP revisions address State regulations amended or readopted in 15A North Carolina Administrative Code (NCAC) 02D Sections .0100, *Definitions and References*, .0200, *Air Pollution Sources*, .0300, *Air Pollution Emergencies*, and .0400, *Ambient Air Quality Standards*, and the removal of rules in 15A NCAC 02D Section .1300, *Oxygenated Gasoline Standard* (hereinafter referred to as the oxygenated gasoline program).¹ The March 21, 2018, SIP revision also includes changes to the Transportation Conformity Rules in 15A NCAC 02D Section .2000, however, in this action, EPA will not be addressing those amendments.

EPA's analysis of North Carolina's March 21, 2018, SIP revisions that are the subject of this proposed rule is organized into three parts under Section II. Part A provides the background, analysis, and the non-interference demonstration for the removal of North Carolina's oxygenated gasoline program; Part B contains information regarding rules submitted for readoption only; and Part C contains information regarding rules submitted for amendment.

II. Analysis of North Carolina's March 21, 2018, SIP Revisions

A. Removal of the Oxygenated Gasoline Program

1. Background

Under section 211(m) of the CAA, states with areas designated nonattainment for carbon monoxide (CO) with certain design values were required to submit revisions to their SIPs and implement oxygenated gasoline programs by no later than November 15, 1992.² For North Carolina, the Raleigh-Durham and Winston-Salem areas were designated as nonattainment for the 8-hour CO standard with design values triggering the requirements of CAA section 211(m) for oxygenated gasoline. *See* 56 FR 56694 (November 6, 1991); 57 FR 56762 (November 30, 1992).³ As a result, the

¹ In the table of North Carolina regulations federally approved into the SIP at 40 CFR 52.1770(c), 15A NCAC 02D is referred to as "Subchapter 2D Air Pollution Control Requirements."

² Oxygenates are fuel additives that contain oxygen, usually in the form of alcohol or ether. Oxygenates can enhance fuel combustion and thereby reduce exhaust emissions. Some oxygenates also boost gasoline octane. Because CO emissions from gasoline-fueled vehicles tend to increase in cold weather, the control period for oxygenated gasoline programs is during the winter months.

³ Under CAA section 211(m), the triggering CO design value is 9.5 parts per million (ppm) or above.

State submitted, and EPA approved, an oxygenated gasoline program for the areas of Raleigh-Durham and Winston-Salem. North Carolina included the Charlotte CO nonattainment area in the program's coverage in its SIP, although it was not required to implement such a program for that area. *See* 59 FR 33683 (June 30, 1994).

The CAA established an attainment date of December 31, 1995, for all CO areas triggering the CAA section 211(m) requirements such as the Raleigh-Durham and Winston-Salem areas, and areas below that trigger, such as Charlotte, had to attain by November 15, 1995. Section 107(d)(3)(E) of the CAA sets out the requirements that an area must meet in order to be redesignated from nonattainment to attainment, including that the area must have a fully-approved maintenance plan pursuant to section 175A of the CAA. A maintenance plan, as defined in section 175A(a) of the CAA, is a revision to the SIP to provide for the maintenance of the NAAQS for the air pollutant in question in the area concerned for at least 10 years after the redesignation. CAA section 175A(d) requires that such plans include contingency provisions, as necessary, to promptly correct any violation of the NAAQS that occurs after redesignation of an area; this includes implementation of controls measures that were contained in the SIP prior to redesignation. In 1994, EPA approved North Carolina's request to redesignate the Winston-Salem area to attainment for the CO NAAQS and approved the initial 10-year maintenance plan for the area. *See* 59 FR 48399 (September 21, 1994). In 1995, EPA approved the redesignation of the Charlotte and Raleigh-Durham areas to attainment for the CO NAAQS and approved the initial 10-year maintenance plans for those areas as well. *See* 60 FR 39258 (August 2, 1995). The initial 10-year maintenance plans included the continued use of the oxygenated gasoline program for the Raleigh-Durham area. For the Charlotte and Winston-Salem areas, the initial 10-year maintenance plans included the oxygenated gasoline program as a contingency measure.

Subsequently, on October 19, 1995, North Carolina submitted a proposed SIP revision requesting that the

Raleigh-Durham had a design value of 10.9 ppm, and Winston-Salem had a design value of 9.7 ppm (based on 1988 and 1989 data). The Charlotte area was a pre-1990 nonattainment area and was designated by operation of law, but the area had a design value of 8.4 ppm (based on 1988 and 1989 data), which is below the 9.5 ppm. *See* 56 FR 56694 (November 6, 1991) and 57 FR 56762 (November 30, 1992).

oxygenated gasoline program for the Raleigh-Durham CO maintenance area be moved from the maintenance plan to the contingency measures portion of the maintenance plan. The request was based on a revised vehicle miles traveled analysis which demonstrated that the CO NAAQS could be maintained without the continued use of the oxygenated gasoline program. See 60 FR 56127 (November 7, 1995).⁴

Eight years after redesignation of an area to attainment, CAA section 175A(b) requires the state to submit an update to the original maintenance plan to provide for the maintenance of the NAAQS for another 10 years after the initial 10-year period has expired (this is known as the second 10-year maintenance plan). North Carolina's second 10-year maintenance plan for the Charlotte, Raleigh-Durham and Winston-Salem areas was approved by EPA on March 24, 2006 (71 FR 14817). The plan included the oxygenated gasoline program as a contingency measure for all three areas.⁵ In 2015, the 20-year maintenance plan periods (covering the initial 10-year maintenance period and the second 10-year maintenance period) expired for all three areas. Specifically, the end date for the 20-year maintenance plan period for the Charlotte and Raleigh-Durham (Wake and Durham counties) areas was September 18, 2015, and the end date for the 20-year maintenance plan period for the Winston-Salem area (Forsyth county) was May 23, 2015.⁶

⁴ EPA analyzed this request and proposed to approve the revision in 1995. See 60 FR 56127, November 7, 1995. EPA received no comments on its proposed action. On June 20, 2007, EPA clarified that it ultimately finalized its approval in 2006. See 72 FR 33692.

⁵ On June 20, 2013, (78 FR 37118), EPA approved North Carolina's request to convert the second 10-year maintenance plans to limited maintenance plans. A limited maintenance plan generally includes all the elements for a full section 175A maintenance plan except that a limited maintenance plan is not required to include motor vehicle emissions budgets for transportation conformity purposes. See the October 6, 1995, Memorandum from Joseph W. Praise to the Air Branch Chiefs, Regions I–X, entitled "Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas."

⁶ While these areas have all reached the end of their 20-year maintenance period, the second 10-year maintenance plan does not cease to be effective. Rather, the terms of the maintenance plan (including all measures and requirements) remain in effect until the State submits, and EPA approves, a revision to the plan consistent with the anti-backsliding requirements of CAA section 110(l) and

2. What are the CAA requirements for the removal of the oxygenated gasoline program in North Carolina?

One of North Carolina's March 21, 2018, SIP revisions seeks to remove the State's oxygenated gasoline program from the North Carolina SIP. As noted above, that program is included as a contingency measure in the State's second 10-year maintenance plan for the Charlotte, Raleigh-Durham, and Winston-Salem CO maintenance areas pursuant to the requirements of CAA section 175A(d). However, the requirement in section 175A(d) for contingency measures to include all control measures contained in the SIP prior to redesignation does not preclude the removal of contingency measures from the maintenance plan once the second 10-year maintenance plan period has expired. Here, the Charlotte, Raleigh-Durham, and Winston-Salem areas' second 10-year maintenance plan periods expired in 2015, as described above. Thus, section 175A(d) does not preclude the removal from the SIP of the oxygenated gasoline program for these areas. North Carolina's March 21, 2018, SIP revision seeking such a removal must, however, still comply with the requirements of CAA sections 110(l) and 193, where applicable.⁷

Section 110(l) requires that a revision to the SIP not interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of the Act. EPA's criterion for determining the approvability of North Carolina's March 21, 2018, SIP revision is whether the non-interference demonstration associated with the removal of the oxygenated gasoline program for the Charlotte, Raleigh-Durham, and Winston-Salem areas satisfies section 110(l).

EPA evaluates each section 110(l) non-interference demonstration on a case-by-case basis considering the circumstances of each SIP revision. EPA interprets 110(l) as applying to all

CAA section 193, if applicable. North Carolina's March 21, 2018, SIP revision is such a request and the analysis of that request for consistency with the CAA's anti-backsliding requirements follows in Section II.A.2 below.

⁷ CAA section 193 is not applicable to the instant SIP revision because the oxygenated gasoline program was not a control measure required to be adopted into the SIP by North Carolina for these areas prior to November 15, 1990.

NAAQS that are in effect, including those that have been promulgated but for which EPA has not yet made designations. The degree of analysis focused on any NAAQS in a non-interference demonstration varies depending on the nature of the emissions associated with the proposed SIP revision. With regards to the removal of the oxygenated gasoline program in North Carolina, the most relevant pollutant to consider is CO. EPA's analysis of North Carolina's March 21, 2018, SIP revision pursuant to section 110(l) is provided below.

3. What is EPA's analysis of North Carolina's non-interference demonstration?

a. Overall Preliminary Conclusions

On March 21, 2018, DAQ submitted a revision to North Carolina's SIP-approved oxygenated gasoline program, along with a non-interference demonstration to support the State's request to remove the program from the North Carolina SIP. This demonstration includes an evaluation of the impact that the removal of the oxygenated gasoline program for Charlotte (Mecklenburg county), Raleigh-Durham (Wake and Durham counties) and Winston-Salem (Forsyth county) would have on North Carolina's ability to attain or maintain the NAAQS in the State. The demonstration and EPA's analysis of the potential impact of the removal of the program is below.

i. Non-interference Analysis for the CO NAAQS

EPA promulgated the CO NAAQS in 1971 and has retained the standards since its last review of the standard in 2011. The primary NAAQS for CO includes: (1) an 8-hour standard of 9.0 ppm, measured using the annual second highest 8-hour concentration for two consecutive years as the design value; and (2) a 1-hour average of 35 ppm, using the second highest 1-hour average within a given year. The counties subject to this proposed action have monitored data below the CO NAAQS for over 20 years.

Table 1 shows air quality data from monitoring sites in North Carolina, for the 8-hour CO NAAQS in the three areas for 2010 through 2017. The design values are all well below the CO NAAQS (see Tables 1, 2 and 3).

TABLE 1—8-HOUR CO AIR QUALITY DATA FOR MONITORING SITES IN CHARLOTTE AREA

Year	Annual 2nd highest 8-hour concentration (ppm)	Design value (ppm)	Percent of the standard of 9 ppm
2010	1.7		
2011	1.5	1.7	19
2012	1.5	1.5	17
2013	1.6	1.6	18
2014	1.3	1.6	18
2015	1.2	1.3	14
2016	1.0	1.2	13
2017	1.3	1.3	14

TABLE 2—8-HOUR CO AIR QUALITY DATA FOR MONITORING SITES IN RALEIGH-DURHAM AREA

Year	Annual 2nd highest 8-hour concentration (ppm)	Design value (ppm)	Percent of the standard of 9 ppm
2010	1.3		
2011	1.4	1.4	16
2012	1.3	1.4	16
2013	1.2	1.3	14
2014	1.2	1.2	13
2015	1.2	1.2	13
2016	1.5	1.5	17
2017	1.2	1.2	13

TABLE 3—8-HOUR CO AIR QUALITY DATA FOR MONITORING SITES IN WINSTON-SALEM AREA

Year	Annual 2nd highest 8-hour concentration (ppm)	Design value (ppm)	Percent of the standard of 9 ppm
2010	1.9		
2011	2.1	2.1	23
2012	1.2	2.1	23
2013	1.7	1.7	19
2014	1.5	1.7	19
2015	1.3	1.5	17
2016	Monitor shut down in 2015.		

For the 1-hour CO standard of 35 ppm, all three areas have recent design values that range from 4 percent to 6.6 percent of the standard. For the Charlotte area, ambient monitoring data for 2016 and 2017 show design values of 1.4 and 1.5 ppm, respectively. For the Raleigh-Durham area, ambient monitoring data for 2016 and 2017 show design values of 2.3 and 1.6 ppm, respectively. For the Winston-Salem area, the design value was 1.9 ppm for 2015. The monitor was approved to be and was shut down after 2015 monitoring season.

It is important to also note, that emissions from vehicles have dramatically been reduced through federal legislative and regulatory actions. At the time when areas were experiencing violations of the CO

NAAQS in the 1970–1990, typical new cars were emitting nearly 13 grams per mile hydrocarbons (HC), 3.6 grams per mile nitrogen oxides (NO_x), and 87 grams per mile CO. Since then, EPA has set standards to bring down levels of these pollutants, and the auto industry has responded by developing new emission control technologies. As a result, new passenger vehicles are 98–99 percent cleaner for most tailpipe pollutants compared to the 1960s, fuels are much cleaner—lead has been eliminated, and sulfur levels are more than 90 percent lower than they were prior to regulation. U.S. cities have much improved air quality, despite ever increasing population and increasing vehicle miles traveled, standards have sparked technology innovation from industry. Today, no areas in the United

States are violating the CO NAAQS primarily due to the cleaner vehicle fleet.

As stated above, North Carolina’s oxygenated gasoline program, which was designed to control CO from vehicles, was moved into the contingency portion of the Charlotte, Raleigh-Durham and the Winston-Salem areas’ maintenance plans, to be used only if needed. The State has never needed to trigger implementing the oxygenated gasoline program. Monitoring from 2008–2011 show that all three areas continue to be well below (85 percent) the 8-hour CO NAAQS. For these reasons, EPA proposes to agree with North Carolina’s technical demonstration that removal of the oxygenated gasoline program from the State’s implementation plan would not

interfere with maintenance of the CO NAAQS in the State or with any other applicable requirement of the CAA.⁸

ii. Non-interference Analysis for the Fine Particulate Matter (PM_{2.5}) NAAQS

Over the course of several years, EPA has reviewed and revised the PM_{2.5} NAAQS several times. On July 16, 1997, EPA established an annual PM_{2.5} NAAQS of 15.0 micrograms per cubic meter (µg/m³), based on a 3-year average of annual mean PM_{2.5} concentrations, and a 24-hour PM_{2.5} NAAQS of 65 µg/m³, and based on a 3-year average of the 98th percentile of 24-hour concentrations. *See* 62 FR 36852 (July 18, 1997). On September 21, 2006, EPA retained the 1997 Annual PM_{2.5} NAAQS of 15.0 µg/m³ but revised the 24-hour PM_{2.5} NAAQS to 35 µg/m³, based again on a 3-year average of the 98th percentile of 24-hour concentrations. *See* 71 FR 61144 (October 17, 2006). On December 14, 2012, EPA retained the 2006 24-hour PM_{2.5} NAAQS of 35 µg/m³ but revised the annual primary PM_{2.5} NAAQS to 12.0 µg/m³, based again on a 3-year average of annual mean PM_{2.5} concentrations. *See* 78 FR 3086 (January 15, 2013).

EPA promulgated designations for the 1997 Annual PM_{2.5} NAAQS on January 5, 2005 (70 FR 944), and April 14, 2005 (70 FR 19844). On November 13, 2009 (74 FR 58699), and on January 15, 2015 (80 FR 2206), EPA published notices determining that the entire state of North Carolina was unclassifiable/attainment for the 2006 daily PM_{2.5} NAAQS and the 2012 Annual PM_{2.5} NAAQS, respectively.

In North Carolina's March 21, 2018, SIP revision, the State concluded that the removal of the oxygenated gasoline program would not interfere with attainment or maintenance of the PM_{2.5} NAAQS. The oxygenated gasoline program is not designed to reduce emissions for PM_{2.5}; therefore, removing it from the North Carolina SIP will not have any impact on ambient concentrations of PM_{2.5}. EPA has evaluated the State's analysis and proposes to agree with North Carolina's technical demonstration that removal of the oxygenated gasoline program from the State's implementation plan would

⁸CAA section 211(m) is an applicable requirement of the CAA for certain CO nonattainment areas and areas that have been redesignated to attainment (to the extent necessary for maintenance of the standard). However, following the expiration of the 20-year maintenance period (that is, at the end of the second 10-year maintenance plan period), the area is in attainment for CO and pursuant to CAA section 211(m)(6), an oxygenated gasoline program is no longer required by the Act.

not interfere with maintenance of the PM_{2.5} NAAQS in the State.

iii. Non-Interference Analysis for the 2010 Nitrogen Dioxide (NO₂) NAAQS

The 2010 NO₂ NAAQS is set at 100 parts per billion (ppb), based on the 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations. The annual standard of 53 ppb is based on the annual mean concentration. On February 17, 2012 (77 FR 9532), EPA designated all counties in North Carolina as unclassifiable/attainment for the 2010 NO₂ NAAQS.

Based on the technical analysis in North Carolina's March 21, 2018, SIP revision, all NO₂ monitors in the State are measuring below the annual NO₂ standard, and all near road monitors are measuring well below the 1-hour NO₂ standard. The oxygenated gasoline program is not designed to reduce emissions for NO₂; therefore, removing it from the North Carolina SIP will not have any impact on ambient concentrations of NO₂. Given the current unclassifiable/attainment designation and the results of North Carolina's emissions analysis, EPA proposes to agree with North Carolina's technical demonstration that removal of the oxygenated gasoline program from the State's implementation plan would not interfere with maintenance of the 2010 NO₂ NAAQS in the State.

iv. Non-Interference Analysis for the Ozone NAAQS

On July 18, 1997, EPA promulgated a revised 8-hour ozone standard of 0.08 ppm. This standard was more stringent than the 1-hour ozone standard that was promulgated in 1979. On March 12, 2008, EPA revised both the primary and secondary NAAQS for ozone to a level of 0.075 ppm to provide increased protection of public health and the environment. *See* 73 FR 16436 (March 27, 2008). The 2008 ozone NAAQS retains the same general form and averaging time as the 0.08 ppm NAAQS set in 1997, but is set at a more protective level. Under EPA's regulations at 40 CFR part 50, the 2008 8-hour ozone NAAQS is attained when the 3-year average of the annual fourth highest daily maximum 8-hour average ambient air quality ozone concentrations is less than or equal to 0.075 ppm. *See* 40 CFR 50.15. On October 26, 2015 (80 FR 65292), EPA published a final rule lowering the level of the 8-hour ozone NAAQS to 0.070 ppm.

North Carolina is currently designated attainment statewide for the all the ozone NAAQS. On November 6, 2017

(82 FR 54232), EPA designated the entire state of North Carolina attainment/unclassifiable for the 2015 8-hour ozone NAAQS. Additionally, all the counties subject to this proposed rulemaking were designated "unclassifiable/attainment" for the 2008 8-hour ozone NAAQS on May 21, 2012. *See* 77 FR 30088.

Given the current unclassifiable/attainment designation and the results of North Carolina's emissions analysis, EPA proposes to agree with North Carolina's technical demonstration that removal of the oxygenated gasoline program from the State's implementation plan would not interfere with maintenance of the ozone NAAQS in the State.

v. Non-Interference Analysis for the Sulfur Dioxide (SO₂) NAAQS

On June 22, 2010 (75 FR 35520), EPA revised the 1-hour SO₂ NAAQS to 75 ppb which became effective on August 23, 2010. On August 5, 2013 (78 FR 47191), EPA initially designated nonattainment only in areas with violating 2009–2011 monitoring data. EPA did not designate any county in North Carolina for the 2010 1-hour SO₂ NAAQS as part of the initial designation. On March 2, 2015, a Consent Decree was entered by order of the United States District Court for the Northern District of California requiring EPA to complete designations for the remaining areas in the Country by three specific deadlines according to a court-ordered schedule.⁹ For North Carolina, EPA designated the entire state attainment/unclassifiable for SO₂ on December 21, 2017 (effective April 9, 2018 <https://www.gpo.gov/fdsys/pkg/FR-2018-01-09/pdf/2017-28423.pdf>) except for the following townships/counties: Beaverdam Township (Haywood County); Limestone Township (Buncombe County); and Cunningham Township (Person County). Counties listed above deployed monitors which EPA is required to designate by December 31, 2020. Also, a portion of Brunswick County was designated unclassifiable effective in August 2016.

Based on the technical analysis in North Carolina's March 21, 2018, SIP revision, the State concluded that removal of the oxygenated gasoline program would not interfere with attainment or maintenance of the SO₂ NAAQS. The sulfur content in fuel has been significantly decreased through EPA's Tier 2 and Tier 3 rulemakings

⁹Copy of the Consent Decree—<http://www.epa.gov/so2designations/pdfs/201503FinalCourtOrder.pdf>.

which tightened engine standards and required that fuel formulations contain reduced levels of sulfur. See 65 FR 6698 (February 10, 2000) and 81 FR 23641 (April 22, 2016). Further, the oxygenated gasoline program is not designed to reduce emissions for SO₂, therefore, removing it from the North Carolina SIP will not have any impact on ambient concentrations of SO₂. For these reasons, EPA proposes to agree with North Carolina's technical demonstration that removal of the oxygenated gasoline program from the State's implementation plan would not interfere with maintenance of the 2010 SO₂ NAAQS in the State.

vi. Non-Interference Analysis for 2008 Lead NAAQS

On November 12, 2008 (73 FR 66964), EPA promulgated a revised primary and secondary lead NAAQS of 0.15 µg/m³. Under EPA's regulations at 40 CFR part 50, the 2008 lead NAAQS are met when the maximum arithmetic 3-month mean concentration for a 3-year period, as determined in accordance with Appendix R of 40 CFR part 50, is less than or equal to 0.15 µg/m³. See 40 CFR 50.16. On November 8, 2011 (76 FR 72907), EPA designated the entire State of North Carolina as unclassifiable/attainment for that NAAQS. North Carolina's ambient lead levels have remained well below the standard. The oxygenated gasoline program is not designed to reduce emissions for lead, therefore, removing it from the North Carolina SIP will not have any impact on ambient concentrations of lead. For these reasons, EPA proposes to agree with North Carolina's technical demonstration that removal of the oxygenated gasoline program from the State's implementation plan would not interfere with maintenance of the 2008 lead NAAQS in the State.

B. Rules Submitted for Readoption Only

On November 9, 2017, the North Carolina Environmental Management Commission amended and readopted various air quality rules in 15A NCAC 02D.¹⁰ The rules that were submitted for readoption with no changes are contained in Section .0200, *Air Pollution Sources* as follows:¹¹

- .0201, *Classification of Air Pollution Sources*
- .0202, *Registration of Air Pollution Sources*

Because these readopted rules contain no changes to the current SIP-approved version, EPA is proposing to approve the readopted rules into the North Carolina SIP.

C. Amended Rules

As noted above, on November 9, 2017, the North Carolina Environmental Management Commission amended and readopted various air quality rules in 15A NCAC 02D. The rules that were amended are contained in Sections .0100, *Definitions and References*, .0200, *Air Pollution Sources*, .0300, *Air Pollution Emergencies*, and .0400, *Ambient Air Quality Standards*. More specifically, the following rules were amended and updated:

- .0101, *Definitions*
- .0103, *Copies of Referenced Federal Regulations*
- .0104, *Incorporation by Reference*
- .0105, *Mailing List*
- .0302, *Episode Criteria*
- .0303, *Emission Reduction Plans*
- .0304, *Preplanned Abatement Program*
- .0305, *Emission Reduction Plan: Alert Level*
- .0306, *Emission Reduction Plan: Warning Level*
- .0307, *Emission Reduction Plan: Emergency Level*
- .0401, *Purpose*
- .0402, *Sulfur Oxides*
- .0404, *Carbon Monoxide*
- .0407, *Nitrogen Dioxide*
- .0408, *Lead*
- .0409, *PM₁₀ Particulate Matter*
- .0410, *PM_{2.5} Particulate Matter*

Section .0100, *Definitions* is amended to update the format of units and references and Sections .0103, .0104, and .0105 are amended to update agency name, addresses and to include web referenced documents and costs.

Section .0300, *Air Pollution Emergencies* addresses the prevention of buildup of air contaminants during an air pollution episode to prevent a public health emergency. Section .0302 is amended to update the format of units, to update who proclaims air quality alerts and warnings and declarations of emergency at various pollutant levels requiring abatement actions from the Director to the Secretary's level with concurrence of the Governor, to remove obsolete pollutant levels triggering such proclamations or declarations and to renumber the subsections as a result of the aforementioned changes. The amendments to Sections .0303 and .0304 update the format of references for air pollution alerts, warnings and emergencies. Sections .0305, .0306, and .0307 are amended to eliminate redundant language in paragraph 4 for open burning requirements.

Section .0400, *Ambient Air Quality Standards* contains the ambient air quality standards and associated monitoring methodologies for the State that reflect the NAAQS. Specifically, Sections .0401 and .0409, and .0410 are amended to update the format of references and acronym changes were made to .0402, .0404, .0407, and .0408.

EPA views all of the above amendments as minor or ministerial and is proposing to approve these rules, as amended, into the North Carolina SIP.

III. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the following air quality rules under Subchapter 2D Air Pollution Control Requirements, Sections .0101, *Definitions*, .0103, *Copies of Referenced Federal Regulations*, .0104, *Incorporation by Reference*, .0105, *Mailing List*, .0201, *Classification of Air Pollution Sources*, .0202, *Registration of Air Pollution Sources*, .0302, *Episode Criteria*, .0303, *Emission Reduction Plans*, .0304, *Preplanned Abatement Program*, .0305, *Emission Reduction Plan: Alert Level*, .0306, *Emission Reduction Plan: Warning Level*, .0307, *Emission Reduction Plan: Emergency Level*, .0401, *Purpose*, .0402, *Sulfur Oxides*, .0404, *Carbon Monoxide*, .0407, *Nitrogen Dioxide*, .0408, *Lead*, .0409, *PM₁₀ Particulate Matter*, and .0410, *PM_{2.5} Particulate Matter*, state effective January 1, 2018. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Proposed Action

For the reasons explained above, EPA is proposing to approve North Carolina's March 21, 2018, SIP revisions seeking to readopt and amend various air quality rules, and to remove the oxygenated gasoline program from North Carolina's SIP. With regard to the oxygenated gasoline program, EPA is proposing to agree with North Carolina's technical demonstration that removal of the program from the State's implementation plan will not interfere with continued attainment or maintenance of any applicable NAAQS or with any other applicable requirement of the CAA, and that the requirements of CAA section 110(l) have been satisfied. Specifically, EPA is

¹⁰ This was done pursuant to the requirements of North Carolina's General Statute (G.S. 150B-21.3A), adopted by the State in 2013.

¹¹ While these readopted rules contain no changes, the aforementioned review and readoption made pursuant to G.S. 150B-21.3A, revises the state effective date of the rules to January 1, 2018.

proposing to remove oxygenated gasoline rules under Subchapter 2D, Sections .1300, .1301, .1302, .1303, .1304 and .1305 in their entirety from the North Carolina SIP.

EPA is also proposing to approve North Carolina's March 21, 2018, SIP revision for the readoption without changes of the rules identified in Supchapter 2D, Section .0200 and for the minor amendments to rules identified in Sections .0100, .0300, .0400.

V. Statutory and Executive Order Reviews

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

- Are not significant regulatory actions subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Are not Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory actions because SIP approvals are exempted under Executive Order 12866;
 - Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
 - Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
 - Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
 - Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
 - Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
 - Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
 - Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because

application of those requirements would be inconsistent with the CAA; and

- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

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

Dated: December 17, 2018.

Mary S. Walker,

Acting Regional Administrator, Region 4.

[FR Doc. 2019-01112 Filed 2-5-19; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 174 and 180

[EPA-HQ-OPP-2018-0577; FRL-9987-08]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- **Mail:** OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

- **Hand Delivery:** To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

Michael Goodis, Registration Division (7505P), main telephone number: (703) 305-7090, email address:

RDFRNotices@epa.gov; or Robert McNally, Biopesticides and Pollution

Prevention Division (7511P), main telephone number: (703) 305-7090, email address: BPPDFRNotices@epa.gov.

The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each pesticide petition summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT** for the division listed at the

end of the pesticide petition summary of interest.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the Agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated

the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available at <http://www.regulations.gov>.

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petitions so that the public has an opportunity to comment on these requests for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petitions may be obtained through the petition summaries referenced in this unit.

Amended Tolerances for Non-Inerts

PP 8F8679. (EPA-HQ-OPP-2018-0526). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419, proposes upon the establishment of the tolerances references in this document under “New Tolerances” for *PP 8F8679* to remove existing tolerances in 40 CFR part 180.665 for residues of the fungicide sedaxane in or on soybean, seed at 0.01 parts per million (ppm) and pea and bean, dried shelled, except soybean, subgroup 6C at 0.01ppm. Contact: RD.

New Tolerance Exemptions for Inerts (Except PIPS)

PP IN-11130. (EPA-HQ-OPP-2018-0613). SciReg, Inc. 12733 Director’s Loop, Woodbridge, VA 22192, on behalf of Bayer CropScience Biologics GmbH, Lukaswiese 4, 23970 Wismar, Germany, requests to establish an exemption from the requirement of a tolerance for residues of 2-hydroxypropyl starch (CAS Reg. No. 9049-76-7) when used as an inert ingredient in pesticide formulations applied to growing crops only under 40 CFR 180.920. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. Contact: RD.

New Tolerance Exemptions for Non-Inerts (Except PIPS)

PP 8F8698. (EPA-HQ-OPP-2018-0686). Plant Health Care, Inc., 2626 Glenwood Ave., Suite 350, Raleigh, NC 27608, requests to establish an

exemption from the requirement of a tolerance in 40 CFR part 180 for residues of the plant regulator Ea Peptide 91398 in or on all food commodities. The petitioner believes no analytical method is needed because of the lack of effects in toxicological studies. Contact: BPPD.

New Tolerances for Inerts

PP 8F8679. (EPA-HQ-OPP-2018-0526). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419, requests to establish a tolerance in 40 CFR part 180.665 for residues of the fungicide sedaxane in or on vegetable, legume, group 6 at 0.01 parts per million (ppm). The high-performance liquid chromatography with triple quadrupole mass spectrometry method is used to measure and evaluate the chemical sedaxane. Contact: RD.

New Tolerances for Non-Inerts

PP 8G8702. (EPA-HQ-OPP-2018-0680). Valent BioSciences LLC, 870 Technology Way, Libertyville, IL 60048, requests to establish temporary tolerances in 40 CFR part 180 for residues of the plant regulator aminoethoxyvinylglycine in or on apple at 0.065 parts per million (ppm) and pear at 0.065 ppm. The high-performance liquid chromatography analytical method is used to measure and evaluate the chemical aminoethoxyvinylglycine. Contact: BPPD.

Authority: 21 U.S.C. 346a.

Dated: December 17, 2018.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2019-01108 Filed 2-5-19; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA-HQ-SFUND-1999-0010; FRL-9988-92-Region 8]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the Vasquez Boulevard and I-70 Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 8 is issuing a Notice of Intent to Delete Operable Unit 1 (OU1) of the Vasquez Boulevard and

I-70 Superfund Site (Site) located in the City and County of Denver, CO, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA and the State of Colorado (State), through the Colorado Department of Public Health and the Environment (CDPHE), have determined that all appropriate response actions under CERCLA, other than operation and maintenance and five-year reviews (FYR), have been completed. However, this deletion does not preclude future actions under Superfund.

This partial deletion pertains only to OU1, the residential portion of the Site. Operable Unit 2 (OU2) and Operable Unit 3 (OU3) will remain on the NPL and are not being considered for deletion as part of this proposed action.

DATES: Comments must be received by March 8, 2019.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA-HQ-SFUND-1999-0010 by one of the following methods:

- <https://www.regulations.gov>. Follow on-line instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa2.gov/dockets/commenting-epa-dockets>.

- Email: aviles.jesse@epa.gov.

- Mail: Jesse Avilés, Remedial Project Manager, U.S. EPA, Region 8, Mail Code 8EPR-SR, 1595 Wynkoop Street, Denver, CO 80202-1129.

Instructions: Direct your comments to Docket ID no. EPA-HQ-SFUND-1999-0010. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <https://www.regulations.gov> or email. The <https://www.regulations.gov> website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <https://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <https://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <https://www.regulations.gov> or in hard copy at: U.S. Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, CO, (303) 312-7279, Monday to Friday, 9:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jesse Avilés, Remedial Project Manager, U.S. Environmental Protection Agency, Region 8, EPR-SR, Denver, CO 80202, email: aviles.jesse@epa.gov.

SUPPLEMENTARY INFORMATION:

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 IV. Basis for Intended Partial Site Deletion

I. Introduction

EPA announces its intent to delete OU1 of the Vasquez Boulevard and I-70 Superfund Site (Site) from the National Priorities List (NPL) and requests public comment on this proposed action. OU1 is the residential portion of the Site. The NPL constitutes Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended. EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). This partial deletion of OU1 of the Site is proposed in accordance with 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List. 60 FR 55466 (Nov. 1, 1995). As described in section 300.425(e)(3) of the NCP, a portion of a site deleted from the NPL remains eligible for Fund-financed remedial action if future conditions warrant such actions.

EPA will accept comments on the proposal to partially delete this Site for thirty (30) days after publication of this document in the **Federal Register**.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the OU1 of the Site and demonstrates how it meets the deletion criteria.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the State, whether any of the following criteria has been met:

- (1) Responsible parties or other persons have implemented all appropriate response actions required;
- (2) All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

(3) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Pursuant to CERCLA section 121(c) and the NCP, EPA conducts five-year reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. EPA conducts such five-year reviews even if a site is deleted from the NPL. EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Deletion Procedures

The following procedures apply to deletion of OU1 of the Vasquez Boulevard and I-70 Superfund Site:

(1) EPA consulted with the State before developing this Notice of Intent for Partial Deletion.

(2) EPA has provided the State 30 working days for review of this notice prior to publication of it today.

(3) In accordance with the criteria discussed above, EPA has determined that no further response is appropriate.

(4) The State of Colorado, through the CDPHE, has concurred with deletion of OU1 of the Site, from the NPL.

(5) Concurrently with the publication of this Notice of Intent for Partial Deletion in the **Federal Register**, a notice is being published in the Denver Post. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent for Partial Deletion of the Site from the NPL.

(6) EPA placed copies of documents supporting the proposed partial deletion in the deletion docket, made these items available for public inspection, and copying at the Site information repositories identified above.

If comments are received within the 30-day comment period on this document, EPA will evaluate and respond to the comments before making a final decision to delete OU1. If necessary, EPA will prepare a Responsiveness Summary to address any significant public comments received. After the public comment period, if EPA determines it is still appropriate to delete OU1 of the Site, the Regional Administrator will publish a final Notice of Partial Deletion in the

Federal Register. Public notices, public submissions and copies of the Responsiveness Summary, if prepared, will be made available to interested parties and included in the site information repositories listed above.

Deletion of a portion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a portion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Intended Partial Site Deletion

The following information provides EPA's rationale for deleting the OU1 of the Vasquez Boulevard and I-70 Superfund Site from the NPL:

Site Background and History

The Vasquez Boulevard and I-70 Superfund Site (CO0002259588) covers approximately 4.5 square miles located in the north-central section of the City and County of Denver, Colorado. Historically, the Site and the area around the Site was a major smelting center for the Rocky Mountain West. The Omaha & Grant Smelter, the Argo Smelter, and the ASARCO Globe Smelter all previously operated in the area refining gold, silver, copper, lead, and zinc.

The Site was placed on the NPL in 1999 due to metal contamination associated with historical smelter operations. The proposed listing occurred on January 19, 1999 (64 FR 2950) and the final listing occurred on July 22, 1999 (64 FR 39878). The primary contaminants of concern are lead and arsenic. Subsequent investigations revealed that arsenic contamination might also be present as a result of application of lawn care products.

EPA divided the Site into Operable Units. OU1 is OU-Facility (Residential) Soils of Site. There are approximately 4,470 residential properties (most of which are single-family homes), 10 schools and 7 parks located in OU1. However, multifamily and commercial/industrial properties also exist in OU1. According to the 2010 census, approximately 16,262 people live within OU1, including approximately 2,700 children under the age of 6.

OU1 encompasses approximately four largely residential neighborhoods in north-central Denver: Swansea, Elyria, Clayton, and Cole. OU1 also includes the southwest portion of the Globeville neighborhood and the northern portion of the Curtis Park Neighborhood. These neighborhoods are located to the east of the former Argo Smelter (OU3) and the former Omaha and Grant Smelter (OU2), as well as the ASARCO Globe Smelter (AGS) Site. The AGS site is adjacent to OU1 and was addressed under a State consent decree with the ASARCO Multi-State trust and encompasses all of the Globeville neighborhood except the southwest portion of the neighborhood which was included in OU1 instead. The AGS site is currently addressed, since 2014, under an agreement with Globeville I, LLC.

OU2 is defined as the area where the former Omaha & Grant Smelter operated. OU2 is located between 42nd Avenue and St. Vincent Street, north of Brighton Boulevard and south of Interstate 70 and the existing Denver Coliseum, in Denver Colorado. OU3 is defined as the area where the former Argo Smelter operated and is bounded by 48th Avenue on the north, 46th Avenue on the south, Broadway Street on the east, and Huron Street on the west. Each operable unit has a unique physical location and historic operation. Thus, actions at one operable unit have been taken independently of actions at other portions of the Site. EPA has not selected remedies for OU2 and OU3, and the remedial investigations for these operable units are still in progress.

Remedial Investigation and Feasibility Study (RI/FS)

In 1997, CDPHE began a limited soil sampling program for OU1 in the Elyria and Swansea neighborhoods, located just east of the Globeville neighborhood, across the South Platte River. These results indicated that high concentrations of arsenic and lead in soil extended beyond the Globeville neighborhood. Accordingly, CDPHE requested EPA's assistance in immediately responding to the elevated levels of arsenic and lead in soil found in the Elyria and Swansea neighborhoods.

In 1998, EPA mobilized a team under its Emergency Response Program to conduct an extensive soil sampling effort and time-critical removal action for the houses in OU1 where soil concentrations posed immediate health risks to residents. The response action consisted of 3 phases. Phase I sampling occurred during March and April 1998. A minimum of 3 grab samples were collected from each property where EPA

obtained access; 2 samples from the surface and 1 from the subsurface. EPA also collected soil samples from all schools and parks located within the initial study area. Samples were collected from locations judged to present a high potential for exposure relative to other areas of the property (for example, at bare spots within the yard) and were analyzed for arsenic, lead, cadmium, and zinc. From the Phase I data, EPA identified 37 properties as potentially requiring a time-critical removal action.

The Phase II sampling occurred in July and August 1998. Additional soil samples were collected from any residential properties that had a maximum surface soil concentration equal to or greater than 450 parts per million (ppm) for arsenic or 2,000 ppm for lead (*i.e.*, time-critical removal action candidates). EPA's removal team revisited these residential properties and collected a 5-point composite sample from the front yard and a second 5-point composite sample from the backyard of each property. Arsenic and lead levels in these samples were measured, and any property with one or more composite samples exceeding the removal action levels for either arsenic or lead was identified for soil removal. In all, EPA sampled 1,393 properties as part of the Phase I and II programs. From the Phase II sampling results, EPA identified 143 properties as requiring a soil cleanup.

Based on the results of the Phase I and Phase II sampling programs, EPA determined that numerous residential properties within the Site contained concentrations of arsenic or lead at levels that could present unacceptable health risks to residents with long-term exposures. EPA placed the Site on the NPL on July 22, 1999 (64 FR 39878).

EPA began Phase III/RI activities in August 1998 while time-critical removal action activities were in progress. During the public comment period on the proposed NPL listing of the Site, the potentially responsible party, ASARCO, submitted information stating that the source of the arsenic in residential soil may be lawn care products that were readily available for residential use in the Rocky Mountain Region and elsewhere in the west in the 1950s and 1960s. These products were legally formulated with arsenic trioxide and lead arsenate to be effective in controlling crabgrass. ASARCO specifically identified PAX 3-year Crabgrass Control, available from the 1950s until the early 1970s. The product is no longer available commercially. Also, efforts began to investigate the source of the arsenic and lead in

residential soils. Toward that end, EPA used its CERCLA section 104(e) information gathering authority to acquire a 6-ounce sample of the PAX 3-year Crabgrass Control product from Martin Resources, a company that acquired the company that had manufactured PAX. Tests on the PAX sample formulation provided by Martin Resources were helpful to EPA, but by themselves proved inconclusive to determine whether all arsenic and lead found in the VB/I-70 residential soils derived from pesticides or smelter emissions, or both.

To assess ASARCO's concerns, EPA's Phase III/RI activities focused on collecting necessary information to accurately characterize exposure and risk to residents at the Site to support a quantitative baseline human health risk assessment and remedial risk management decisions. EPA Phase III concluded remedial investigation activities in November 2000. This sampling program supported the physio-chemical characterization of soils, the baseline human health risk assessment, and soil sampling of additional properties. During Phase III, 3,007 properties were sampled, including the re-sampling of properties sampled during Phases I and II. As part of the Phase III remedial investigation, sampling was conducted at discreet soil depths to evaluate where the highest soil concentrations occurred. The evaluation determined that soil concentrations were highest in the uppermost 2 inches of the soil profile, and supported soil removal down to a 1-foot depth limit. Based on the phase III data, 30 additional properties were identified for time-critical soil removal.

Response Actions

Soil removals in residential yards began with the time-critical removal action in 1998, continued with the subsequent non-time-critical removal action in 2003, then the remedial action began in 2004. In September 1998, EPA issued an Action Memorandum that established the basis for conducting a time-critical removal action. The Action Memorandum required that soil be removed and replaced at any property with an average arsenic soil concentration greater than 450 ppm and/or lead soil concentration greater than 2000 ppm. These removal "action levels" were chosen to protect young children from adverse health effects related to short-term (sub-chronic) exposure. EPA conducted soil removals at 18 properties in October and November of 1998.

On March 6, 2003, EPA issued an Action Memorandum that established

the basis for conducting a non-time-critical removal action. The Action Memorandum required the removal and replacement of soil at any property that had an arsenic soil level greater than 240 ppm and/or lead soil levels greater than 540 ppm. These "action levels" were determined from the baseline risk assessment to address the properties that presented the highest risk of adverse health effects to children and adult residents. From the Phase III sampling results, EPA identified 143 properties as requiring a soil cleanup, and in 2003, EPA conducted cleanups at 133 of these properties. The properties not addressed by this non-time-critical removal action were included in the list of properties to be addressed by the remedial action under the OU1 record of decision (ROD).

Selected Remedy

EPA and CDPHE signed the ROD (2003 OU1 ROD) detailing the final remedy for OU1 on September 25, 2003. The selected remedy for OU1 consisted of 3 components to address lead and arsenic contamination in residential soils: Soil sampling, soil removal, and a community health program. Additionally, the 2003 OU1 ROD provided an informational institutional control through the community health program. The community health program ended in 2008. An explanation of significant differences (2014 ESD) modifying the selected remedy for OU1 was signed on September 30, 2014. The 2014 ESD added institutional controls for the residential properties where EPA was unable to secure access for sampling and/or soil removal.

As identified in the 2003 OU1 ROD, the remedial action objectives (RAOs) for arsenic in soil are:

- For all residents of the Site, prevent exposure to soil containing arsenic in levels predicted to result in an excess lifetime cancer risk associated with ingestion of soil which exceeds 1×10^{-4} , using reasonable maximum exposure assumptions.
- For all residents of the Site, prevent exposure to soil containing arsenic in levels predicted to result in a chronic or sub-chronic hazard quotient (HQ) associated with ingestion of soil that exceeds a HQ of 1, using reasonable maximum exposure assumptions.
- For children with soil pica behavior who reside in the Site, reduce the potential for exposures to arsenic in soil that result in acute effects.

The RAOs for lead in soil are:

- Limit exposure to lead in soil such that no more than 5 percent of young children (72 months or younger) who live within the Site are at risk for blood

lead levels higher than 10 micrograms per deciliter ($\mu\text{g}/\text{dL}$) from such exposure. This provides 95% confidence that children exposed to lead in soil will be protected.

In 2016, EPA published a memorandum titled "Updated Scientific Considerations for Lead in Soils Cleanups." A recent EPA review, which included review of the 2016 memorandum, concluded that the cleanup level for lead in OU1 remains appropriate.

The 2003 OU1 ROD adjusted the action levels identified for conducting the non-time-critical removal actions from 240 ppm to 70 ppm for arsenic and from 540 ppm to 400 ppm for lead. This change was based on results of public comment on the initial Proposed Plan, which suggested that the cleanup levels for OU1 should be the same as those adopted by the State of Colorado for the Asarco Globe Smelter Site. The adjusted ROD action levels were within the range of preliminary remediation goals identified in the Feasibility Study Report based on results of the Baseline Risk Assessment.

The major portions of the remedy were implemented from 2003 through 2006 with a few residential properties being remediated in 2008 and, as explained below, a few more residential properties were remediated between 2012 and 2015. In the summer of 2013, a last call letter was sent to owners of properties not previously sampled. In the period from 1999 to 2015, 4,445 properties were sampled with 814 properties being remediated. Soil removals occurred at properties that had arsenic soil concentrations greater than 70 ppm or that had lead soil concentrations greater than 400 ppm consistent with the 2003 OU1 ROD. For properties where soil removal was conducted, all accessible soils were removed to a depth of 12 inches. Since the contamination was only found in the top 3–6 inches, EPA considered excavation to 12 inches to be adequate for removing all lead and arsenic contamination in the soils. The excavated areas were backfilled with clean soil, and pre-remediation yard features were restored to the extent practicable, in consultation with the property owner. At the homeowner's request, flower beds and vegetable gardens were sampled individually. If the concentrations of lead and arsenic in the flower beds or vegetable gardens were found to be below the action levels, then soil removal was not required in these areas. This was the only situation where a partial soil removal occurred at a property. If

sprinkler systems were present, the system was removed and reinstalled.

During the 2003 through 2008 period, all excavated soils were transported to the ASARCO Globe Plant where they were used as capping and fill material in implementing the selected remedy at the ASARCO Globe Plant Site. The ASARCO Globe Plant Site is managed by CDPHE under a program similar to Superfund. The remedy at that site included managing the soils from OU1 at the onsite repository. The repository was later capped.

EPA considered the construction phase of the OU1 remedy complete in 2008. The Remedial Action Report Addendum that covered soil sampling and removal activities as part of the remedial action was produced in August 2008. However, as part of the "last call effort," more sampling and residential cleanups were performed between 2012 and 2015; a final Remedial Action Report was signed on February 22, 2017 to include this work. Maps of the operable unit boundaries and information on the cleanup activities can be found in this report.

The community health program was developed to raise awareness in the community about lead and arsenic hazards and was designed to complement the soil cleanups. The community health program was a unique program designed by local, federal and state government representatives and community leaders. It was developed in consultation with an advisory stakeholder group for the Site and implemented by the City and County of Denver. Funded by EPA and the State, the City and County of Denver administered the program, which included door-to-door visits from community members trained to provide education to area residents on the hazards of lead, arsenic and other environmentally-related topics. The program provided opportunities for parents to have their children tested for lead or arsenic exposure. The community health program consisted of two activities, providing biomonitoring services for children and conducting community outreach.

Biomonitoring: The primary goal of the biomonitoring program was to test young children and pregnant women to determine if they had been exposed to lead and/or arsenic. This was accomplished through the following tasks:

- Establishing and staffing periodic testing clinics in each neighborhood
- Collection and analysis of biomonitoring samples
- Reporting results to each participant

- Recommendations to parents for environmental and medical follow-up actions, if needed.

Thirty-eight clinics were held between November 2004 and October 2006. During this time, 661 individuals participated in the biomonitoring program. Health officials identified twenty children with elevated blood lead above 10 $\mu\text{g}/\text{dL}$, and 94 children were identified with elevated blood lead concentrations; *i.e.*, concentrations ranging from 5–10 $\mu\text{g}/\text{dL}$. The 10 $\mu\text{g}/\text{dL}$ value was adopted from EPA's OSWER Directive 9355.4–12, July 14, 1994, which determined that, in Superfund site cleanups, EPA will attempt to limit exposure to soil lead levels such that a typical (or hypothetical) child or group of similarly exposed children would have an estimated risk of no more than 5% of exceeding a blood lead level of 10 $\mu\text{g}/\text{dL}$. The parents of children found with elevated blood lead concentrations were referred to organizations that were able to follow-up with the family on environmental and medical issues.

In addition, in accordance with the Community Health Program requirements in the ROD for lead, exterior lead-based paint assessments were conducted at all properties where soil was removed due to elevated lead concentrations. A total of 297 properties met the criteria for lead-based paint assessments. During the assessment, all structures including garages, fences, and sheds with chipping and peeling paint were tested for lead-based paint. If EPA determined that there was peeling lead-based paint on the property sufficient to cause recontamination of the soil above the action level, then EPA performed an exterior lead-based paint abatement at the property. As a result of the assessments conducted, 120 homes received exterior lead-based paint abatements. This work was performed in accordance with the Colorado "Regulation No. 19, Lead-Based Paint Abatement."

Community Outreach: The City and County of Denver conducted community outreach using a door-to-door canvassing outreach model, utilizing community health workers to provide individual health education. The community health workers were members of the Site's community that the City and County of Denver trained to provide health information concerning lead and arsenic exposure. The community health workers provided information on the following:

- Health effects of lead
- Health effects of arsenic
- Soil pica behavior

- Soil sampling and soil removal aspects of the remedy
- Biomonitoring program.

Community health workers conducted home visits at 94% of the homes within the site boundaries. In addition to home visits, outreach was conducted to realtors and contractors that live or work within the site communities by mailing them relevant information. The community health program concluded in 2008 with completion of the soil sampling and soil removal components of the OU1 remedy.

Operation and Maintenance

Operation and maintenance activities are required for the institutional controls provided in the 2014 ESD. O&M activities include monitoring the ICs, reviewing property records for the properties that have either a recorded Notice of Potential Environmental Conditions or a recorded Notice of Environmental Conditions and preparing and mailing the annual informational letter. CDPHE sends the annual letters to the properties with a Notice of Environmental Conditions and works with the property owners that want to remove the notice of environmental conditions.

Institutional controls were implemented in the summer of 2014 for 69 residential properties within OU1 where the property owner denied EPA access to sample and/or remove soil. The ICs were incorporated into the OU1 remedy through the issuance of the 2014 ESD. The IC for OU1 is an informational IC consisting of 2 parts. The first part is either a Notice of Potential Environmental Conditions, for residential properties where EPA did not sample, or a Notice of Environmental Conditions for properties where EPA has sampling results showing lead or arsenic levels above the action levels established in the ROD but where cleanup was not conducted. These notices were filed with the City and County of Denver Clerk and Recorders Office in the title records and serve to notify present, prospective, and future owners of the potential for elevated levels of lead or arsenic in the properties' soils.

The second part of the informational IC for OU1 is an informational letter that is sent annually to the owner of record and to the property address to make sure that any tenants are informed. This annual informational letter provides the specific information EPA has on the property and provides information on how to minimize exposure to potentially contaminated soil. ICs were implemented in June 2014, when EPA filed either a Notice of Environmental

Conditions or a Notice of Potential Environmental Conditions in each properties' title file at the City and County of Denver Clerk and Recorder's Office for 69 unaddressed properties. A copy of the filed notice was sent to the property owner of record. Since January 2015, annual informational letters are sent to each owner as well as to the property address.

Five-Year Review

Statutory Five-Year Reviews (FYRs) of the Site are required because hazardous substances remain on-Site above levels which allow for unlimited use and unrestricted exposure. The last FYR Report was signed on September 30, 2014 and found that the remedy implemented at OU1 of the Site is protective of human health and the environment. The 2014 FYR did not identify any issues or make any recommendations.

The next FYR is scheduled to be completed by September 2019. FYRs will continue every 5 years thereafter.

Community Involvement

Due to the high degree of public interest, the large population impacted by OU1, and the cultural differences among the OU1 neighborhoods, EPA and CDPHE expanded community involvement to provide for extensive public input throughout the remedial process. Expanded public involvement included conducting a stakeholder assessment, establishment of a stakeholders working group, providing funding for a technical assistance grant, and additional public meetings and fact sheet mailings. All materials were provided in both Spanish and English and all meetings were conducted with Spanish translation services. In August 1998, EPA formed a Working Group of stakeholders to provide an open forum for discussing all technical aspects of EPA's RI/FS, risk assessment, ROD remedial design and remedial action. The Working Group addressed the Environmental Justice concern of having the community participate in decision making by providing direct access to decision makers. Through the Working Group, data and issues were discussed, allowing for community input into decision-making throughout the Superfund process.

The stakeholders attending the Working Group meetings included representatives from all parties that had an interest in OU1. The Working Group included representatives of the City and County of Denver; CDPHE; the Agency for Toxic Substances and Disease Registry (ATSDR); ASARCO; and representatives from the four Denver

neighborhoods included in OU1. Stakeholders also included the Clayton, Elyria, and Swansea Environmental Coalition (CEASE), the recipient of a Technical Assistance Grant from EPA.

During the period 2012 to 2014, EPA made a concerted effort through letters, phone calls and neighborhood canvassing to reach the owners of the unaddressed properties to offer them the opportunity to have their properties sampled and/or cleaned up. More recently, a community advisory group formed to discuss response activities at OU2.

Determination That the Site Meets the Criteria for Deletion

In accordance with the NCP at 40 CFR 300.425(e), EPA has determined that the response activities at OU1 are complete and the operable unit poses no unacceptable risk to human health or the environment. EPA also has determined that the implemented remedies achieve the degree of cleanup and protection specified in the 2003 OU1 ROD and the 2014 ESD. Moreover, EPA has determined that all selected removal and remedial action objectives and associated cleanup goals for OU1 are consistent with agency policy and guidance. Therefore, EPA has determined that no further response is necessary at OU1. EPA consulted with and has the concurrence of the State of Colorado on this partial deletion action.

As such, this partial deletion meets the deletion requirements as specified in the National Contingency Plan at 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List (60 FR 55466 (Nov. 1, 1995) and OSWER Directive 9320.2-22, Close Out Procedures for National Priority List Sites.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(d), 42 U.S.C. 9601-9657; E.O. 12580, E.O. 12777, E.O. 13626, 52 FR 29233, 56 FR 54757, 77 FR 56749, 3 CFR 2013 Comp., p. 306; 3 CFR, 1991 Comp., p. 351; 3 CFR, 1987 Comp., p. 193.

Dated: December 20, 2018.

Douglas H. Benevento,

Regional Administrator, Region 8.

[FR Doc. 2019-01318 Filed 2-5-19; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA-HQ-SFUND-2002-0008; FRL-9988-91-Region 8]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the OU2 of the Libby Asbestos Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 8 is issuing a Notice of Intent to Delete Operable Unit 2 (OU2), Former Screening Plant, of the Libby Asbestos Superfund Site (Site), located in Lincoln County, Montana, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Montana (State), through the Department of Environmental Quality (DEQ), have determined that all appropriate response actions at OU2 under CERCLA, other than operation and maintenance and five-year reviews (FYR), have been completed. However, this partial deletion does not preclude future actions under Superfund.

This partial deletion pertains only to OU2. Operable Unit 1 (OU1), Former Export Plant; Operable Unit 3 (OU3), Former Vermiculite Mine; Operable Unit 4 and Operable Unit 7 (OU4/OU7), Residential/Commercial Properties of Libby and Troy; Operable Unit 5 (OU5), Former Stimson Lumber Mill; Operable Unit 6 (OU6), BNSF Rail Corridor; and Operable Unit 8 (OU8), Highways and Roadways, are not being considered for deletion as part of this proposed action and will remain on the NPL.

DATES: Comments must be received by March 8, 2019.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA-HQ-SFUND-2002-0008 by one of the following methods:

- <https://www.regulations.gov>. Follow on-line instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you

consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa2.gov/dockets/commenting-epa-dockets>.

- **Email:** Dania Zinner, zinner.dania@epa.gov

- **Mail:** Dania Zinner, Remedial Project Manager, U.S. EPA, Region 8, Mail Code 8EPR-SR, 1595 Wynkoop Street, Denver, CO 80202-1129

Instructions: Direct your comments to Docket ID no. EPA-HQ-SFUND-2002-0008. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <https://www.regulations.gov> or email. The <https://www.regulations.gov> website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through <https://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the [https://](https://www.regulations.gov)

www.regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available electronically in <http://www.regulations.gov>; by calling EPA Region 8 at (303) 312-7279 and leaving a message; and at the EPA Info Center, 108 E 9th Street, Libby, MT 59923, (406) 293-6194, Monday through Thursday from 8:00 a.m.-4:00 p.m.

FOR FURTHER INFORMATION CONTACT:

Dania Zinner, Remedial Project Manager, U.S. Environmental Protection Agency, Region 8, Mailcode EPR-SR, 1595 Wynkoop Street, Denver, CO 80202-1129, (303) 312-7122, email zinner.dania@epa.gov.

SUPPLEMENTARY INFORMATION:

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- I. Introduction
- II. NPL Deletion Criteria
- III. Deletion Procedures
- IV. Basis for Intended Partial Site Deletion

I. Introduction

EPA announces its intent to delete all of Operable Unit 2 (OU2), Former Screening Plant, of the Libby Asbestos Superfund Site (Site) from the NPL and requests public comment on this proposed action. The NPL constitutes Appendix B of 40 CFR part 300 which is the NCP, which the EPA promulgated pursuant to section 105 of the CERCLA of 1980, as amended. The EPA maintains the NPL as those sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). This partial deletion of OU2 of the Libby Asbestos Superfund Site is proposed in accordance with 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List. 60 FR 55466 (Nov. 1, 1995). As described in section 300.425(e)(3) of the NCP, a portion of a site deleted from the NPL remains eligible for Fund-financed remedial action if future conditions warrant such actions.

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Libby Asbestos Superfund Site and demonstrates how it meets the deletion criteria.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), the EPA will consider, in consultation with the State, whether any of the following criteria have been met:

- i. Responsible parties or other persons have implemented all appropriate response actions required;
- ii. All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or
- iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Pursuant to CERCLA section 121(c) and the NCP, the EPA conducts five-year reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. The EPA conducts such five-year reviews even if a site is deleted from the NPL. The EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Deletion Procedures

The following procedures apply to deletion of OU2 of the Libby Asbestos Superfund Site:

- (1) The EPA consulted with the State before developing this Notice of Intent for Partial Deletion.
- (2) The EPA has provided the State 30 working days for review of this notice prior to publication of it today.
- (3) In accordance with the criteria discussed above, EPA has determined that no further response is appropriate;
- (4) The State of Montana, through the DEQ, has concurred with deletion of OU2 of the Libby Asbestos Superfund Site, from the NPL.
- (5) Concurrently with the publication of this Notice of Intent for Partial Deletion in the **Federal Register**, notices are being published in the Western

News, the Kootenai Valley Record, and the Montanian. The newspaper notices announce the 30-day public comment period concerning the Notice of Intent for Partial Deletion of the Site from the NPL.

(6) The EPA placed copies of documents supporting the proposed partial deletion in the deletion docket, made these items available for public inspection, and copying at the Site information repositories identified above.

If comments are received within the 30-day comment period on this document, the EPA will evaluate and respond to the comments before making a final decision to delete OU2. If necessary, the EPA will prepare a Responsiveness Summary to address any significant public comments received. After the public comment period, if the EPA determines it is still appropriate to delete OU2 of the Libby Asbestos Superfund Site, the Regional Administrator will publish a final Notice of Partial Deletion in the **Federal Register**. Public notices, public submissions and copies of the Responsiveness Summary, if prepared, will be made available to interested parties and included in the site information repositories listed above.

Deletion of a portion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a portion of a site from the NPL does not in any way alter the EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Intended Partial Site Deletion

The following information provides the EPA's rationale for deleting the OU2 of the Libby Asbestos Superfund Site from the NPL:

Site Background and History

The Libby Asbestos Superfund Site, CERCLIS No. MT0009083840, is located in Lincoln County, Montana in the northwest corner of Montana approximately 35 miles east of Idaho and 65 miles south of Canada. The Site was proposed for inclusion on the NPL on February 26, 2002 (67 FR 8836) and listed on October 24, 2002 (67 FR 65315).

Vermiculite was discovered 7 miles northeast of Libby, Montana in 1881 by

gold miners. In the early 1920s, Mr. Edward Alley began initial mining operations on the vermiculite ore body. Full-scale operations began later that decade under the name of the Universal Zonolite Insulation Company (Zonolite). This ore body contained a mixture of amphibole mineral fibers of varying elemental composition (e.g., winchite, richterite, tremolite) that have been identified in the Rainy Creek complex near Libby (Libby amphibole asbestos or LA). Unlike the commercially exploited chrysotile asbestos, the LA material has never been used commercially on a wide scale, and, for the mine's operating life, it was considered a byproduct of little or no value. The commercially exploited vermiculite was used in a variety of products including insulation and construction materials, as a carrier for fertilizer and other agricultural chemicals, and as a soil conditioner. The vermiculite ore was mined using standard strip mining techniques and conventional mining equipment. The ore was then processed in an onsite dry mill to remove waste rock and overburden material. Once processed, the ore was transported down from the mine to the former Screening Plant (OU2), which sorted the ore into five size ranges. After the sorting process, the material was shipped to various locations across the United States for either direct inclusion in products or for "expansion" prior to use in products. Expansion (also known as "exfoliation" or "popping") was accomplished by heating the ore, usually in a dry kiln, to approximately 2000 °F. This process explosively vaporizes the water contained within the mica structure, causing the vermiculite to expand by a factor of 10 to 15. This produces the vermiculite material most commonly seen in stores and sold as soil conditioner for gardens and greenhouses. In 1963, Grace purchased Zonolite and continued vermiculite-mining operations in a similar fashion. In 1975, a wet milling process was added that operated in tandem with the dry mill until the dry mill was taken off line in 1985. The wet milling process was added to reduce dust generation by the milling process. Expansion operations at the former Export Plant ceased in Libby sometime prior to 1981, although this area was still used to bag and export milled ore until mining operations were stopped in 1990. Before the mine closed in 1990, Libby produced about 80 percent of the world's supply of vermiculite.

The Site was placed on the NPL in response to media articles, which detailed extensive asbestos-related

health problems in the Libby population. EPA arrived on-site in 1999 and since then EPA has conducted sampling and response action activities to address highly contaminated areas in the Libby Valley. While at first the situation was thought to be limited to those with direct or indirect occupational exposures, it soon became clear there were multiple exposure pathways, and many persons with no link to mining-related activities were affected. Typically, the amphibole asbestos contamination found in the Libby Valley comes from one or some combination of source materials (e.g., vermiculite insulation, processed vermiculite ore, mine wastes). Asbestos from these source materials has been found in interior building dust samples and local soils, which in turn act as secondary sources. Response actions to clean up the Site have been ongoing since 1999.

The Site has 8 operable units (OUs). The OUs are as follows: Operable Unit 1 (OU1), Former Export Plant; Operable Unit 2 (OU2), Former Screening Plant; Operable Unit 3 (OU3), Former Vermiculite Mine; Operable Unit 4 and Operable Unit 7 (OU4/OU7), Residential/Commercial Properties of Libby and Troy; Operable Unit 5 (OU5), Former Stimson Lumber Mill; Operable Unit 6 (OU6), BNSF Rail Corridor; and Operable Unit 8 (OU8), Highways and Roadways. The OUs pertain to distinct geographical areas corresponding to areas of responsibility for the identified responsible parties and/or to distinct sources of contamination.

The background and history, the Remedial Investigations and Feasibility Studies (RI/FS), Removal and Response Actions, Selected Remedies, Cleanup Standards, and Operation and Maintenance activities for OU2 are discussed below.

OU2 Background and History

Operable Unit 2 (OU2) consists of the former screening plant and surrounding properties. OU2 is located approximately five miles northeast of the City of Libby on the east side of the Kootenai River and at the confluence of Rainy Creek and the Kootenai River. A map of OU2 can be found in the docket at www.regulations.gov under Docket ID no. EPA-HQ-SFUND-2002-0008. The OU2 site was historically owned and used by W.R. Grace for stockpiling, staging, and distributing vermiculite and vermiculite concentrate to vermiculite processing areas and insulation distributors outside of the City of Libby. OU2 is known as the former Screening Plant and Surrounding Properties. OU2 has been separated into

distinct impacted areas that include the former Screening Plant (Subarea 1), the Flyway (Subarea 2), Privately-Owned Property (Subarea 3), and the Rainy Creek Road Frontages (Subarea 4). The Highway 37 right-of-way (ROW) adjacent to the OU2 site was included due to its proximity to OU2 and the known contamination in the ROW.

OU2 Remedial Investigations and Feasibility Study (RI/FS)

The State, the EPA and certain Potentially Responsible Parties (PRPs) conducted various studies and investigations to evaluate the nature and extent of contamination generally at the Site. Remedial Investigations (RIs) began in 1999 within the Site, including the export and screening plants and highly contaminated areas with exposure pathways such as residential/commercial properties and schools. Various removal actions were conducted starting in 2000 through 2006 where source areas were excavated and were disposed of at the former vermiculite mine (OU3). The Former Screening Plant Remedial Investigation (2009 RI) evaluated the human health and environmental impacts due to the former screening plant and surrounding properties.

In August 2009, the OU2 Remedial Investigation (2009 RI) confirmed that OU2 had been mostly cleaned up by prior removal actions and that only two more locations needed to be remediated to meet EPA's clearance criteria and to break the exposure pathway to LA.

The EPA released the OU2 Feasibility Study (FS) in August 2009 and a proposed plan in September 2009.

OU2 Selected Remedy

The EPA issued the Record of Decision (ROD) for OU2 (2010 OU2 ROD) on May 10, 2010. The selected remedy in the 2010 OU2 ROD was narrowly focused on breaking the exposure pathway to LA in a few locations on OU2 as most of the former screening plant was already remediated by prior removal actions. Other surrounding contaminated geographical areas were addressed as part of remedial actions taken at other operable units. Thus, the 2010 OU2 ROD identified three remedial action objectives (RAOs) of breaking the exposure pathway for inhalation of LA fibers, controlling erosion of contaminated soil to prevent exposures and spread of contamination, and implementing controls to prevent uses of the site that could pose unacceptable risks to human health.

The original remedy selected in the 2010 OU2 ROD consisted of the following remedial components: (1)

Excavation and offsite disposal of top 18 inches of soil in certain areas; (2) Protective cover of clean soil; (3) Institutional controls such as a utility location service and community awareness programs to prevent exposure to contamination in the subsurface and the spread of contamination; and (4) Operations and maintenance of the remedy.

Because the selected remedy in the 2010 OU2 ROD left wastes in place, ICs are critical to the protection of the remedy. The objectives of ICs for OU2 are as follows: (1) Notify future landowners of the presence of subsurface contamination and IC requirements; (2) Mitigate the potential for inhalation exposures to LA fibers; (3) Control dispersion/erosion of contaminated soil to prevent the spread of contamination; (4) Implement controls to prevent uses of the site that could pose unacceptable risks or compromise the remedy; and (5) Implement controls to prevent uses of the site that could spread contamination to un-impacted or previously remediated locations. The properties that comprise OU2 are owned by Kootenai Development Company and a private residential property owner.

OU2 Cleanup Standards

The OU2 remedy was one of the first source control remedies at the Site that addressed breaking the exposure pathway to a highly contaminated area of the site, but did not contain numeric cleanup standards because toxicity values for Libby amphibole asbestos had not been finalized yet. Numeric cleanup standards for site-wide soil contamination were established in the OUs 4–8 Record of Decision. A post-construction risk assessment for OU2 was released in October 2015 confirming that the remediation met cleanup standards.

OU2 Response Actions

The EPA and W.R. Grace & Co.—Conn (Grace) entered into an Administrative Order on Consent for Removal Action (AOC) to cost recover funds for EPA removal actions on OU2 and for Grace to assume responsibility of post-removal site controls. Notice for completion of work was sent in December 2015 and this AOC has been closed out following recording of an environmental covenant on Grace's property (Flyway).

Remedial activities began in summer of 2010 with excavation of the areas investigated where the exposure pathway needed to be broken including along the Highway 37 ROW. Materials were excavated, disposed offsite at the former vermiculite mine (OU3), and

confirmation sampling was performed at depth. Clean cover was placed as backfill at depths of 6 inches to 25 inches depending upon location and these areas were hydroseeded (vegetated) to prevent erosion. Additional confirmation activity-based sampling was conducted in summer of 2012 to confirm effectiveness of remedy. The OU2 post-construction risk assessment (October 2015) and the site-wide risk assessment (November 2015) both confirmed that the remedy at OU2 is protective. As part of the AOC agreement with Grace, the Kootenai Development Company (a subsidiary of Grace) placed an environmental covenant on its property in OU2 on July 28, 2014 that meets the IC objectives above. All remedial components described in the 2010 OU2 ROD have been implemented.

OU2 Operation and Maintenance

The State and PRP operations and maintenance (O&M) responsibilities are defined in the OU2 O&M Plan (September 2018). Grace's responsibilities are further defined in the environmental covenant (July 2014) for the Flyway property.

Montana DEQ requirements for O&M includes conducting an annual inspection, preparing an annual report, maintaining the cover, and evaluating/ updating institutional controls (ICs). Current annual inspection reports and associated data are available by contacting EPA Region 8 or Montana DEQ.

In regard to ICs, an environmental covenant for the Kootenai Development Company's property within OU2 was recorded with the Lincoln County Clerk and Recorder on July 28, 2014. The environmental covenant provides the following Use Restrictions: (1) No excavation, construction, or disturbing soil on the property without written approval from EPA and Montana DEQ, (2) Prior to disturbance activities, a written plan must be approved by EPA and Montana DEQ that describes the health and safety of workers and restoring the integrity of the cover material, and (3) Restrictions on uses or activities that would disturb/interfere or have the potential to disturb/interfere with the protectiveness of the remedy and remedial components.

Five-Year Review

The remedies at the entire Site, including OU2 require ongoing five-year reviews in accordance with CERCLA Section 121(c) and Section 300.430(f)(4)(ii) of the NCP.

In the statutory 2015 five-year review dated June 22, 2015 conducted for OU1

and OU2 for the Site, the OU2 remedy was determined to be protective since all required institutional controls were in place including an environmental covenant on the Kootenai Development Company's property. There were no issues or recommendations for OU2.

Pursuant to CERCLA section 121(c) and the NCP, EPA will conduct the next five-year review by June 22, 2020 to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at the Site above levels that allow for unlimited use and unrestricted exposure.

Community Involvement

Public participation activities have been satisfied as required in CERCLA Section 113(k), 42 U.S.C. 9613(k) and CERCLA Section 117, 42 U.S.C. 9617. During the development and implementation of the remedy for this operable unit, comment periods were offered for the proposed plan, the five-year review, and other public meetings. The documents that the EPA relied on for the partial deletion of OU2 from the Libby Asbestos Superfund Site are in the docket and are available to the public in the information repositories. A notice of availability of the Notice of Intent for Partial Deletion has been published in the Western News, the Kootenai Valley Record, and the Montanian to satisfy public participation procedures required by 40 CFR 300.425 (e) (4).

The State, the Lincoln County Commissioners, and the City of Libby are supportive of the partial deletion of OU2. The State signed a letter of concurrence on September 13, 2018.

Determination That the Site Meets the Criteria for Deletion

EPA has consulted with the State, Lincoln County Commissioners, and the City of Libby on the proposed partial deletion of OU2 of the Libby Asbestos Site from the NPL prior to developing this Notice of Partial Deletion. Through the five-year review, EPA has also determined that the response actions taken are protective of public health or the environment and, therefore, taking of additional remedial measures is not appropriate.

The implemented remedies achieve the degree of cleanup or protection specified in the 2010 OU2 ROD.

All selected removal and remedial action objectives and associated cleanup goals for OU2 are consistent with agency policy and guidance. This partial deletion meets the completion requirements as specified in OSWER Directive 9320.2-22, Close Out

Procedures for National Priority List Sites. All response activities at OU2 of the Site are complete and the Operable Unit poses no unacceptable risk to human health or the environment. Therefore, EPA and Montana DEQ have determined that no further response is necessary at OU2 of the Site.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(d), 42 U.S.C. 9601-9657; E.O. 12580, E.O. 12777, E.O. 13626, 52 FR 29233, 56 FR 54757, 77 FR 56749, 3 CFR 2013 Comp., p. 306; 3 CFR, 1991 Comp., p. 351; 3 CFR, 1987 Comp., p. 193.

Dated: December 20, 2018.

Douglas H. Benevento,

Regional Administrator, Region 8.

[FR Doc. 2019-01319 Filed 2-5-19; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL MARITIME COMMISSION

46 CFR Part 515

[Docket No. 18-11]

RIN 3072-AC73

Amendments to Regulations Governing Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: In a proposed rule published in the **Federal Register** on December 17, 2018, the Federal Maritime Commission proposed to amend its rules governing licensing, financial responsibility requirements, and general duties for ocean transportation intermediaries (OTIs). The proposed changes are mainly administrative and procedural. This notice reopens the comment period which concluded on January 18, 2019.

DATES: Comments on the proposed rule published December 17, 2018 (83 FR 64502) are due on or before February 22, 2019.

ADDRESSES: You may submit comments by the following methods:

- *Email:* secretary@fmc.gov.
- *Mail:* Rachel E. Dickon, Secretary, Federal Maritime Commission, 800 North Capitol Street NW, Washington, DC 20573-0001.

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary. Phone: (202) 523-5725. Email: secretary@fmc.gov.

Rachel Dickon,
Secretary.

[FR Doc. 2019-01177 Filed 2-5-19; 8:45 am]

BILLING CODE 6731-AA-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 06-160; FCC 18-157]

Proposed Amendment of the Commission's Policies and Rules for Processing Applications in the Digital Broadcast Satellite Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Federal Communications Commission (FCC) proposes to amend its rules to establish a licensing and regulatory framework for space stations in the Digital Broadcast Satellite Service in the 12.2-12.7 GHz and 17.3-17.8 GHz frequency bands that would harmonize the rules regulating DBS with those regulating geostationary-satellite orbit Fixed-Satellite Service systems.

DATES: Comments are due March 25, 2019. Reply comments are due April 22, 2019.

ADDRESSES: You may submit comments, identified by IB Docket No. 06-160, 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: Sean O'More, International Bureau, Satellite Division, 202-418-2453, sean.omore@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Notice of Proposed Rulemaking (Second NPRM), FCC 18-157, adopted November 9, 2018, and released November 13, 2018. The full text of the

Second NPRM is available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-18-157A1.pdf. The full text of this document is also available for inspection and copying during business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street SW, 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

We 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, we seek specific comment on how we might

further reduce the information collection burden for small business concerns with fewer than 25 employees.

Synopsis

In this Second Notice of Proposed Rulemaking (Second NPRM), the Commission seeks comment on whether to establish a licensing and regulatory framework for DBS satellite systems that would be analogous to that which currently exists for geostationary (GSO) Fixed-Satellite Service (FSS) systems. First, the Commission seeks comment on processing requests for new DBS service on a “first-come, first-served” basis—including an optional, two-step application process—that governs GSO FSS licensing. Second, the Commission seeks comment on applying the milestone and bond requirements for the geostationary Fixed-Satellite Service to DBS. Third, the Commission seeks comment on extending the license terms of non-broadcast DBS space stations from 10 to 15 years. Fourth, the Commission seeks comment on lifting the “freeze” on new DBS applications that has been in place since 2006, when the Commission last proposed changes to the DBS licensing regime in a 2006 Notice of Proposed Rulemaking (2006 Notice). Finally, the Commission seeks comment on clarifying that requests for new DBS at orbital locations less than nine degrees apart, but that any new DBS systems at such reduced-spacing orbital locations must not increase interference to DBS systems at the internationally-planned nine-degree orbital locations.

Proposal

While the Commission currently has no DBS license applications before it, clarification of the rules and harmonization of those rules with the recently-updated rules governing the licensing of GSO FSS will facilitate the licensing of new DBS systems and may encourage interest in new DBS systems.

License Application Processing Procedures. The Commission seeks comment on proposed rules for processing requests to provide new DBS service to U.S. consumers. These rules would apply to any future request to provide DBS service to the United States using the 12.2–12.7 GHz band (space-to-Earth) and associated feeder links in the 17.3–17.8 GHz band (Earth-to-space), including channels not currently licensed at orbit locations assigned to the United States under the International Telecommunication Union (ITU) Region 2 BSS and feeder-link Plans (Region 2 Plan), as well as DBS service from space stations located at orbital locations not assigned to the

United States in the ITU Region 2 BSS and feeder-link Plans.

Consistent with the Commission’s prior proposal in the 2006 Notice, the Commission proposes to treat requests to provide DBS using a “first-come, first-served” licensing approach used for GSO-like FSS and to eliminate DBS competitive bidding procedures. The 2006 Notice specifically sought comment on whether, pursuant to section 309(j) of the Communications Act, and in light of the Northpoint case, the Commission could design a competitive bidding system, or auction, to assign mutually exclusive applications for DBS licenses or spectrum. Commenters overwhelmingly supported use of “first-come, first-served,” procedures for DBS and no commenter suggested how the Commission could design a competitive bidding system under section 309(j). Accordingly, based on the court holding in Northpoint and the record in response to the 2006 Notice, the Commission concludes that DBS licenses cannot be auctioned at this time.

The Commission seeks further comment on this proposal. DBS is similar to GSO FSS, except for certain technical features required to protect DBS consumers from interference while using small receive-only antennas, and therefore DBS seems well suited to using the same processing procedure as used for GSO FSS. Comments received in response to the 2006 Notice overwhelmingly supported use of “first-come, first-served” procedures for DBS. The 2006 Notice observed that the Commission’s experience with the “first-come, first-served” approach indicates that this procedure would also allow the quick issuance of DBS licenses and grants of U.S. market access, while still accommodating existing or new competitive systems in the same spectrum, and that this procedure would give applicants flexibility to design systems that will best serve their targeted customers. The Commission seeks comment on whether experience since the 2006 Notice reinforces or changes these assessments of the suitability of the proposed “first-come, first-served” procedure for processing requests to provide DBS services.

Application Processing Framework. If the Commission adopts the proposal to process requests to provide new DBS service according to a “first-come, first-served,” the Commission proposes to apply the streamlined procedures the Commission recently adopted for FSS space stations in the *part 25 Streamlining Order*.

The Commission proposes that applications for authority to construct, deploy and operate a space station to provide DBS service, or requests for U.S. market access to provide DBS service to earth stations in the United States using a non-U.S. licensed space station under section 25.137 of the Commission’s rules, must provide the technical information required by section 25.114 of the Commission’s rules. Of particular applicability to DBS service, the following technical information must be provided under section 25.114: (1) Whether the space station is to be operated on a broadcast or non-broadcast basis; and (2) information and analyses in the event that the technical characteristics of the proposed system differ from those in the Appendix 30 BSS Plans, the Appendix 30A feeder link Plans, Annex 5 to Appendix 30 or Annex 3 to Appendix 30A of the ITU Radio Regulations.

The Commission seeks comment on this proposal and whether section 25.114 should be amended to eliminate any of these DBS-specific requirements or to require any additional information relevant to the provision of DBS service. The Commission also proposes to apply the existing provisions of section 25.112 to determine whether a request to provide DBS service in the United States is acceptable for filing and seek comment on this proposal.

Milestone and Bond. The Commission proposes to apply sections 25.164 (Milestones) and 25.165 (Surety Bonds) to authorizations and grants of U.S. market access to provide DBS service. The Commission’s milestone and bond requirements are intended to deter warehousing by satellite operators before a proposed space station has been launched and begun operations. In this instance, warehousing refers to the retention of preemptive rights to use spectrum and orbital resources by an entity that does not intend to bear the cost and risk of constructing, launching, and operating an authorized space station, is not fully committed to doing so, or finds out after accepting the license that it is unable to fulfill the associated obligations. Such milestone requirements extend not only to U.S. licensees, but also to operators of non-U.S. licensed space stations that have been granted access to the U.S. market.

In 2015, the Commission substantially streamlined the milestone and bond provisions contained in sections 25.164 and 25.165 of the Commission rules. Specifically, the Commission eliminated all of the space station construction milestones, except the requirements to bring a space station into operation at the assigned location within a specified

period of time. Also, in order to provide better incentives against spectrum warehousing, the Commission modified the space station bond requirement to increase liability over time.

The Commission proposes to extend these streamlined milestone and bond provisions to DBS services. Currently, the milestone and bond provisions of sections 25.164 and 25.165 explicitly do not apply to DBS service. Instead, DBS authorizations are subject to analogous, but different, due diligence requirements contained in section 25.148(b) of the Commission's rules. Because we are proposing to treat requests for DBS service in substantially the same manner as the Commission treats requests for GSO FSS, the Commission proposes to eliminate the due diligence requirements contained in section 25.148(b) and replace them with a requirement to comply with the milestone and bond provisions of section 25.164 and 25.165. The Commission seeks comment on this proposal.

License Term. The Commission proposes to extend the license term for DBS space stations not licensed as broadcast facilities to 15 years from the current term of 10 years. Currently, licenses for DBS space stations licensed as broadcast facilities are issued for a period of 8 years, and licenses for DBS space stations not licensed as broadcast facilities are issued for 10 years. The 8-year term for broadcast stations is established by the Communications Act. In 1995, the Commission extended the term of non-broadcast DBS licenses from 5 to 10 years, the maximum term then allowed by the Communications Act, and "which better reflect[ed] the useful life of a DBS satellite." Because all DBS licensees offer subscription services, all existing DBS operators are classified as non-broadcast licensees and their license terms were extended to 10 years. Subsequently, the Telecommunications Act of 1996 granted the Commission authority to establish license terms longer than 10 years for non-broadcast stations.

The Commission believes that issuing non-broadcast DBS space station licenses for 15 years would better reflect the useful life of new DBS satellites, as our extension of the license term for such DBS space stations from 5 to 10 years did in 1995. There are no technical or engineering considerations that render the operating life of a DBS satellite shorter than the operating life of a non-DBS satellite, such as those used to provide GSO FSS, and DBS satellites generally are able to provide service beyond their initial 10-year license terms. It would also make DBS

space station license terms consistent with the terms of most other space stations. The Commission requests comment on our proposal as well as any alternative license term proposals.

Optional Two-Step FCC/ITU License Application Process. The Commission adopted an optional two-step application process for GSO FSS applicants in 2015. Under that two-step application process, an applicant for a GSO FSS license using frequencies in "unplanned" bands must submit a draft Coordination Request filing to the Commission using a simplified application form—Form 312 (Main Form)—pay the full license application fee and post a \$500,000 bond in order to establish and perfect a queue position. This first-step application submission establishes a place in the space station application processing queue as of the time of filing of the simplified Form 312 with the Commission. As a second step, the prospective licensee must file a complete license application within two years of submission of the Coordination Request materials or forfeit the value of the bond and lose the queue status gained by the prior Coordination Request filing. This two-step application process is completely optional, and, as an alternative, applicants may file a full application without first submitting a draft Coordination Request or posting the corresponding \$500,000 bond. The Commission adopted a similar two-step application process for GSO FSS operation in "planned" frequency bands subject to Appendix 30B of the ITU Radio Regulations. In contrast, the Commission stated that it would treat proponents of satellite operations that are subject to Appendices 30 and 30A of the ITU Radio Regulations somewhat differently. For these proponents, which include those proposing operations in the 12.2–12.7 GHz and 17.3–17.8 GHz frequency bands used for DBS service, the Commission would still review and forward their ITU filings in advance of a license application, but such review and forwarding would not afford any licensing status, as applications for DBS systems are not eligible for first-come, first-served processing.

Our proposal to adopt first-come, first-served processing procedures for DBS applications changes this situation and ITU filings subject to Appendices 30 and 30A of the ITU Radio Regulations will not be forwarded to the ITU before a license application is filed with the Commission. However, adopting first-come, first-served processing also supports extending the optional two-step application process to these DBS filings. Thus, the

Commission proposes to extend the two-step process for GSO FSS operations in unplanned bands to DBS operations in planned bands, and, in this respect, will treat ITU filings to modify an existing frequency assignment in the Region 2 Plan, to include a new frequency assignment in the Region 2 Plan, or to include a new or modified frequency assignment in the List of the Regions 1 and 3 Plan in the same manner as a Coordination Request filing for GSO FSS operation in non-planned bands.

Unlike Coordination Requests in non-planned bands, however, the Commission proposes to review a proposed filing under Appendices 30 and 30A prior to forwarding the filing to the ITU to ensure that it is compatible with other U.S. filings. This review is necessary to protect the rights of existing U.S. filings from being unduly eroded under the relevant ITU protection criteria by another U.S. filing. Accordingly, the party requesting a planned-band filing must either submit the results of an analysis demonstrating that the proposed operation will not "affect" any other U.S. filing under the relevant ITU criteria or, if another filing would be deemed affected, submit a letter signed by the affected operator (which may be the same as the operator requesting the new filing) that it consents to the new filing. This proposed review is consistent with our tentative conclusions above regarding the processing of all requests for DBS service. The Commission seeks comment on this proposal. The Commission likewise proposes to require applicants for DBS licenses using the two-step procedure to submit the application filing fee and a bond of \$500,000 with their applications and ITU filings. As noted above, in the FSS licensing framework, an applicant submission with the Commission under the first step of the optional two-step procedure must be accompanied by the application fee and a \$500,000 bond. The purpose of the application-stage bond is to deter speculation during the two-year period of queue priority before the applicant must submit a completed application. The Commission finds that these considerations also apply to DBS licensees. The Commission seeks comment on this proposal.

Non-U.S. Licensed Systems. With the exception of the two-step processing procedure discussed above, the Commission proposes that procedures and requirements proposed for DBS service license applications also apply to requests to access the United States market by non-U.S. licensed space stations under our DISCO II framework.

The Commission notes that the Commission decided in the DISCO II proceeding that entities wishing to serve the United States with a non-U.S. satellite, including DBS satellites, must file the same information as applicants for a U.S. space station license, whether or not that satellite is already licensed by another administration. Consequently, if the Commission adopts a first-come, first-served licensing procedure for applicants for a U.S.-licensed DBS space station, operators of non-U.S. licensed DBS space station seeking U.S. market access and entities filing earth station applications to access non-U.S. licensed DBS space stations must file the same information required under section 25.114 of the Commission's rules.

The Commission further notes that the United States took an exemption from the World Trade Organization's Basic Telecommunication Agreement for "one-way satellite transmission of DTH and DBS television services and digital audio services." Thus, in order to serve the United States, foreign-licensed DBS systems must be found acceptable under the Effective Competitive Opportunities analysis the Commission adopted in our DISCO II proceeding in 1997 (ECO-Sat). The Commission does not intend to revisit any of these considerations, but merely propose that foreign DBS systems requesting market access to serve the United States will be considered on the same first-come, first-served basis as applications for authority to provide DBS services.

Reduced Spacing for DBS Space Stations. The Commission tentatively concludes that the public interest would be served by granting requests for new DBS service via space stations at orbital locations less than nine degrees apart, but that the public interest would not be served by adopting specific rules, different from those contained in Appendices 30 and 30A of the ITU Radio Regulations, for accommodating requests for new DBS systems at reduced-spacing orbital locations. Instead, such requests can be processed using the "first-come, first-served" procedures for DBS service proposed above.

After review of the comments and pleadings filed in response to the 2006 Notice, the Commission tentatively concludes that the potential benefits of adopting additional rules requiring existing DBS service providers to accommodate operations at reduced orbital spacing are outweighed by the potential harms to existing subscribers to DBS service. As an initial matter, it is not clear that access to additional DBS orbital locations is needed to

introduce new video programming services since DBS subscribership is dropping in the United States as the marketplace for the distribution of video programming over the internet continues to grow and other opportunities exist to provide new video programming services in the United States in several frequency bands already allocated for satellite services. These include the 17/24 GHz BSS "reverse" band, which is specifically allocated for the provision of video programming, as well as frequency bands allocated for Ka-band GSO FSS. Furthermore, the proposals made by proponents for additional rules may require changes to the equipment currently used to provide DBS services to subscribers—such as requiring larger customer receive antennas and changes to space station designs—or would require existing DBS providers and their subscribers to accept more interference and service unavailability than is the case today.

However, the record does show that it is possible to accommodate the provision of new DBS services at reduced orbital spacings under existing rules. Specifically, our rules already allow us to consider requests for new DBS service at reduced orbital spacings if entities making such a request can coordinate their proposed operations with other U.S. DBS operators and secure agreements with other operators already having assignments in the ITU Region 2 Plans (or with prior requests for Plan modifications). The Commission proposes to address such requests under these existing rules rather than adopt new rules.

This approach protects current DBS consumers from interference and degradation of their video reception, while at the same time allowing potential new DBS operators to demonstrate—through careful system design, advancing technology, and coordination with existing DBS systems—that new DBS systems can operate at orbital spacings of less than nine degrees without causing harmful interference to existing systems and their customers. It will also ensure that operations at reduced orbital separations will lead to the same levels of interference observed between two DBS systems operating nine degrees apart, with co-frequency, co-coverage operation, and nominal Appendix 30 power density levels. The Commission recognizes that this proposal will require mitigation measures by future operators at reduced orbital spacings, such as reduced power density levels or non-fully overlapping coverages. The Commission tentatively concludes that

such measures are more easily and appropriately implemented by future entrants than retroactively imposed on existing DBS operators and their subscribers.

The Commission notes that the ITU Appendix 30 and 30A ITU rules do not govern the relationship between two DBS systems operating under U.S. ITU filings. The Commission proposes that the same ITU criteria be used to determine compatibility between a new DBS application with respect to a DBS system already in the processing queue or previously authorized, even when both systems are or will be operating under U.S. ITU filings. If any of the frequency assignments of the system already in the queue or previously authorized is affected, according to the ITU criteria, the new DBS application can still be considered compatible with this system by submission of a letter signed by the affected operator indicating that it consents to the new application.

The Commission seeks comment on this approach. In particular, the Commission seeks any updates to the record regarding specific benefits or harms arising from adopting rules to require existing DBS service providers to accommodate requests to provide DBS service at reduced orbital spacings and may consider adopting such rules if the record demonstrates that doing so would serve the public interest.

DBS Licensing "Freeze". The Commission imposed a "freeze" on requests for new DBS systems in 2005. The proposals the Commission makes in this Second Notice will, if adopted, resolve the issues that caused the Commission to impose that freeze. The Commission therefore proposes to lift the freeze and begin accepting new applications for DBS licenses after the effective date of rules adopted as a result of this Second Notice. The Commission also proposes that new applications or requests for U.S. market access be accepted only after a date specified in a public notice, which the International Bureau would release after the rules have become effective. The Commission seeks comment on these proposals.

Other Matters. The 2006 Notice also sought comment on other issues related to the regulation of DBS service that the Commission do not repeat in this Second Notice. These other issues relate to protection requirements among terrestrial Multichannel Video Distribution and Data Service (MVDDS) licensees and DBS operations at reduced spacings, protection of DBS operations at reduced spacings from interference from NGSO FSS operations, protection

of mobile DBS receivers smaller than 45 cm in diameter, and whether to establish a spectrum cap on existing DBS licensees. The Commission seeks additional comment on these issues in light of developments since the 2006 Notice and our tentative conclusions in this Second Notice.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Second Notice of Proposed Rulemaking (NPRM). We request 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 NPRM provided above in section IV.B. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, summaries of the NPRM and IRFA will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

The NPRM seeks comment on several proposals relating to the Commission's rules and policies for licensing space stations in the Digital Broadcasting Satellite (DBS) Service. Adoption of the proposed changes would, among other things, provide a licensing system under which new licenses for DBS satellites in reduced spacing orbital slots would be processed according to the Commission's rules for geostationary orbit space stations in the Fixed-Satellite Service.

B. Legal Basis

The proposed action is authorized under sections 4(i), 303, and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 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 adoption of proposed rules. 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). Below, we describe and estimate the number of small entity licensees that may be affected by adoption of the proposed rules.

Satellite Telecommunications and All Other Telecommunications. The rules proposed in this NPRM would affect some providers of satellite telecommunications services, if adopted. Satellite telecommunications service providers include satellite and earth station operators. Since 2007, the SBA has recognized two census categories for satellite telecommunications firms: "Satellite Telecommunications" and "Other Telecommunications." Under both categories, a business is considered small if it had \$32.5 million or less in annual receipts.

The first category of Satellite Telecommunications "comprises establishments primarily engaged in providing point-to-point 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." For this category, Census Bureau data for 2007 show that there were a total of 512 satellite communications firms that operated for the entire year. Of this total, 482 firms had annual receipts of under \$25 million.

The second category of Other Telecommunications is comprised of entities "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." For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year. Of this total, 2,346 firms had annual receipts of under \$25 million. We anticipate that some of these "Other Telecommunications

firms," which are small entities, are earth station applicants/licensees that might be affected if our proposed rule changes are adopted.

We anticipate that our proposed rule changes may have an impact on earth station and space station applicants and licensees. Space station applicants and licensees, however, rarely qualify under the definition of a small entity. Generally, space stations cost hundreds of millions of dollars to construct, launch, and operate. Consequently, we do not anticipate that any space station operators are small entities that would be affected by our proposed actions.

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

The NPRM proposes and seeks comment on several rule changes that would affect compliance requirements for earth station and space station operators. Most proposed changes, however, are directed at space station applicants and licensees. As noted above, these parties rarely qualify as small entities.

For example, the Commission proposes to allow additional uses of certain frequencies within the 17.2–17.7 GHz band, subject to compliance with technical limits designed to protect other users of the bands. We also seek comment on revised or new technical standards to promote sharing among DBS systems in reduced orbital spacings.

We also propose modified rules for satellite system implementation to provide additional flexibility to operators. In total, the proposals and questions in the NPRM are designed to achieve the Commission's mandate to regulate in the public interest while imposing the lowest necessary burden on all affected parties, including small entities.

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.”

The NPRM seeks comment from all interested parties. The Commission is aware that some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission’s attention any specific concerns they may have with the proposals outlined in the NPRM.

The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the NPRM, in reaching its final conclusions and taking action in this proceeding.

In this NPRM, the Commission invites comment on means to minimize negative economic impacts on applicants and licensees, including small entities, by permitting DBS space stations in orbital locations between the currently authorized orbital locations. Overall, the proposals in the NPRM seek to increase flexibility for DBS applicants and licensees and reduce burdens, while maintaining adequate protections against interference.

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

None.

List of Subjects in 47 CFR Part 25

Administrative practice and procedure, Earth stations, Satellites. Federal Communications Commission.

Marlene Dortch

Secretary, Office of the Secretary.

The Federal Communications Commission proposes to amend 47 CFR part 25, as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. 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.

■ 2. Amend § 25.110 by revising paragraph (b)(3) introductory text and paragraph (b)(3)(iii) and adding paragraph (b)(3)(iv) to read as follows:

§ 25.110 Filing of applications, fees, and number of copies.

* * * * *

(b) * * *

(3) A license application for 17/24 GHz BSS space station operation, for GSO FSS space station operation, or for GSO space station operation subject to the provisions in Appendices 30 and 30A of the ITU Radio Regulations (incorporated by reference, see § 25.108)

may be submitted in two steps, as follows:

* * * * *

(iii) An application for GSO space station operation subject to the provisions in Appendices 30 and 30A of the ITU Radio Regulations (incorporated by reference, see § 25.108) may be initiated by submitting to the Commission, in accordance with the applicable provisions of part 1, subpart Y of this chapter, a draft ITU filing to: Modify an existing frequency assignment in the Region 2 Plan; to include a new frequency assignment in the Region 2 Plan; or to include a new or modified frequency assignment in the List of the Regions 1 and 3 Plan, accompanied by a simplified Form 312 and a declaration of acceptance of ITU cost-recovery responsibility in accordance with § 25.111(d). The simplified Form 312, Main Form submission must include the information required by items 1–17, 43, 45, and 46. In addition, the applicant must submit the results of an analysis demonstrating that no U.S. filing under Appendix 30 and 30A would be deemed affected by the proposed operation under the relevant ITU criteria or, for any affected filings, a letter signed by the affected operator that it consents to the new filing.

(iv) An application initiated pursuant to paragraphs (b)(3)(i), (b)(3)(ii) or (b)(3)(iii) of this section will be considered completed by the filing of an FCC Form 312 and the remaining information required in a complete license application, including the information required by § 25.114, within two years of the date of submission of the initial application materials.

* * * * *

■ 3. Amend § 25.114 by revising paragraph (a)(3) to read as follows:

§ 25.114 Applications for space station authorizations.

(a) * * *

(3) For an application filed pursuant to the two-step procedure in § 25.110(b)(3), the filing pursuant to § 25.110(b)(3)(iv) must be submitted on FCC Form 312, Main Form and Schedule S, with attached exhibits as required by paragraph (d) of this section, and must constitute a comprehensive proposal.

* * * * *

■ 4. Amend § 25.121 by revising paragraph (a)(1) to read as follows:

§ 25.121 License term and renewals.

(a) * * * (1) Except for licenses for SDARS space stations and terrestrial repeaters and 17/24 GHz BSS space stations licensed as broadcast facilities,

licenses for facilities governed by this part will be issued for a period of 15 years.

* * * * *

§ 25.140 [Amended]

■ 5. Amend § 25.140 by revising the section header and adding new paragraph (a)(3)(vii) to read as follows:

§ 25.140 Further requirements for license applications for GSO space station operation in the FSS and the 17/24 GHz BSS.

(a)(1) * * *

(vi) In addition to the information required by § 25.114, an applicant for a GSO space station operating in the frequencies of the ITU Appendices 30 and 30A (incorporated by reference, see § 25.108) must provide a statement that the proposed operation will take into account the applicable requirements of these Appendices of the ITU Radio Regulations and a demonstration that it is compatible with other U.S. ITU filings under Appendices 30 and 30A or, for any affected filings, a letter signed by the affected operator indicating that it consents to the new application.

* * * * *

■ 6. Amend § 25.148 by removing and reserving paragraphs (b), (d) and (e).

■ 7. Amend § 25.164 by revising paragraph (a) to read as follows:

§ 25.164 Milestones.

(a) The recipient of an initial license for a GSO space station, other than a SDARS space station, granted on or after August 27, 2003, must launch the space station, position it in its assigned orbital location, and operate it in accordance with the station authorization no later than five years after the grant of the license, unless a different schedule is established by Title 47, Chapter I, or the Commission.

* * * * *

■ 8. Amend § 25.165 by revising paragraph (a) introductory text to read as follows:

§ 25.165 Surety bonds.

(a) For all space station licenses issued after September 20, 2004, other than licenses for SDARS space stations and replacement space stations as defined in paragraph (e) of this section, the licensee must post a bond within 30 days of the grant of its license. Failure to post a bond will render the license null and void automatically.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 32, 54, and 65

[WC Docket Nos. 10–90, 14–58, 07–135, CC Docket No. 01–92; FCC 18–176]

Connect America Fund, ETC Annual Reports and Certifications, Establishing Just and Reasonable Rates for Local Exchange Carriers, Developing a Unified Inter-carrier Compensation Regime

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on how to implement an auction mechanism for competitive overlapped legacy rate-of-return areas, broadband only line conversions, and legacy support in Tribal areas.

DATES: Comments are due on or before March 8, 2019 and reply comments are due on or before April 8, 2019. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this document, you should advise the contact listed below as soon as possible.

ADDRESSES: Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments and reply comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

▪ *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

▪ *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445

12th St. SW, Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

▪ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

▪ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

FOR FURTHER INFORMATION CONTACT:

Suzanne Yelen, Wireline Competition Bureau, (202) 418–7400 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (FNPRM) in WC Docket Nos. 10–90, 14–58, 07–135, CC Docket No. 01–92; FCC 18–176, adopted on December 12, 2018 and released on December 13, 2018. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW, Washington, DC 20554 or at the following internet address: <https://docs.fcc.gov/public/attachments/FCC-18-176A1.pdf>. The Report and Order and Order on Reconsideration that was adopted concurrently with the FNPRM is published elsewhere in this issue of the **Federal Register**.

I. Introduction

1. In the FNPRM, the Commission is seeking comment on how to implement an auction mechanism for competitive overlapped legacy rate-of-return areas, broadband-only line conversions, and legacy support in Tribal areas.

II. Further Notice of Proposed Rulemaking

2. In the FNPRM, the Commission seeks comment on rules for implementing its determination that support in areas overlapped or almost entirely overlapped by unsubsidized competition should be awarded through an auction. In addition, the Commission seeks comment on whether it needs to take steps to ensure that the budget for legacy carriers is sufficient and to

address the different amounts of support provided for voice-only or voice/broadband lines as compared to broadband-only lines. The Commission also seeks comment on additional support for legacy carriers serving Tribal areas.

3. In the concurrently adopted Report and Order, the Commission determines that the use of an auction is a more efficient way to award support in areas that are overlapped or almost entirely overlapped by unsubsidized competition. Here, the Commission seeks comment on how this decision should be implemented, including auction design. In general, the Commission proposes that the auction process would operate in substantially the same way as the Connect America Fund (CAF) Phase II auction, which concluded on August 28, 2018, but seek comment on whether changes to this overlap auction are necessary and appropriate. Further information regarding the CAF Phase II auction (Auction 903) is available on the FCC's website.

4. *Affected study areas.* Initially, the Commission seeks comment on what percentage it should use to determine those study areas that are almost entirely overlapped according to FCC Form 477. Should support in legacy study areas that are less than 100% overlapped by unsubsidized competition, e.g., 99% or 95%, also be awarded through competitive bidding? Currently, there are eight legacy study areas with 100% overlap and seven legacy study areas with at least 95% overlap with approximately \$12 million in unconstrained projected claims for all 15 study areas for 2018. Rather than solely rely on FCC Form 477 data, should the Commission then also conduct a challenge process to verify the affected study areas? Is such a challenge process necessary given that the areas will be subject to auction?

5. *Eligible areas.* The Commission proposes to break each study area into a census geography, such as census block groups, with each unit as the minimum geographic bidding area. The Commission previously used census block groups but declined to auction units as small as census blocks or as large as counties or census tracts for the CAF Phase II auction. Given that there are likely to be fewer total eligible areas in this auction, should the Commission instead use census blocks as the minimum geographic bidding area? The Commission expects to adopt the bidding unit in the pre-auction process.

6. The Commission proposes to establish the reserve price—the

maximum amount of support available for each bidding unit prior to the auction—by proportionally allocating the incumbent’s legacy support across each eligible study area using the costs for each census block as determined by the cost model in order to account for the relative costs of providing service among areas. Should the Commission instead establish reserve prices based on Alternative Connect America Cost Model (A–CAM) costs, or on some percentage of the incumbent’s prior

year’s legacy claims? The Commission notes that the CAF Phase II auction began with an aggregate reserve price for all eligible areas based on the Commission’s cost model, but cleared at 78.35% of the reserve price. Thus, the CAF Phase II auction reduced the amount of support needed for these areas to substantially less than the reserve price. How can the Commission create similar competition in auctions offering support to overlap areas?

7. *Public interest obligations.* The Commission proposes to accept bids in

technology neutral service tiers with varying speed and usage allowances similar to those used in the CAF Phase II auction but eliminating speeds below 25/3 Mbps, and for each tier will differentiate between bids that would offer either lower or higher latency. The following charts summarize the performance tiers and latency (including the weights as adopted by the Commission for the CAF Phase II auction):

Performance tier	Speed	Monthly usage allowance	Weight
Baseline	≥ 25/3 Mbps	≥ 150 GB or U.S. median, whichever is higher	45
Above Baseline	≥ 100/20 Mbps	≥ 2 terabytes (TB)	15
Gigabit	≥ 1 Gbps/500 Mbps	≥ 2 TB	0

Latency	Requirement	Weight
Low Latency	≤ 100 ms	0
High Latency	≤ 750 ms & MOS ≥ 4	25

8. Are there any reasons to accept different performance tiers or different latency metrics? The Commission notes that 99.75% of locations awarded through the CAF Phase II auction were at speeds of 25/3 Mbps or higher.

9. Winning bidders would be required to serve all locations within each census block group, with interim and final deployment milestones similar to those of recipients of CAF Phase II auction support. Should the Commission make any changes to that framework?

10. *Eligibility to participate.* The Commission seeks comment on what entities should be eligible to participate. The Commission proposes that the auction not be limited only to the incumbent and the competitors that report coverage within the study area, but open to any eligible provider. The Commission notes that more auction participants are more likely to lead to market-based support levels. The Commission also recognizes the possibility that limiting eligibility could result in only one or two bidders per study area.

11. The Commission proposes to adopt a two-stage application filing process for participants in this auction, similar to that used in other Commission universal service auctions. Specifically, in the pre-auction “short-form” application, a potential bidder must establish its eligibility to participate, providing, among other things, basic ownership information and certifying to its qualifications to receive support. After the auction, the Commission would conduct a more

extensive review of the winning bidders’ qualifications to receive support through “long-form” applications. Such an approach balances the need to collect essential information with administrative efficiency and will provide the Commission with assurance that interested entities are qualified to meet the relevant terms and conditions if awarded support.

12. In the CAF Phase II auction, the Commission required applicants to demonstrate that they had provided voice, broadband, and/or electric distribution or transmission services for at least two years. The Commission also adopted an alternative pathway for entities that could not demonstrate service for two years by instead submitting (1) audited financial statements for that entity from the three most recent consecutive fiscal years, including balance sheets, net income, and cash flow, and (2) a letter of interest from a qualified bank with terms acceptable to the Commission that the bank would provide a letter of credit to the bidder. Should the Commission adopt the same or similar requirements for this auction?

13. *Auction design.* The Commission also seeks comment on the appropriate auction design for offering support in overlap areas. The Commission already has competitive bidding rules that allow for the subsequent determination of specific final auction procedures based on additional public input during the pre-auction process. The Commission proposes to use the same auction design

as it did in the CAF Phase II auction—a multi-round, descending clock auction in which bidders selecting different performance levels will compete head-to-head in the auction, with weights to take into account the Commission’s preference for higher speeds over lower speeds, higher usage allowances over lower usage allowances, and low latency over high latency. The Commission proposes to auction all affected study areas nationwide in the same auction. The Commission seeks comment on whether any auction design changes should be made to take into account any differences between the nature of competition in the CAF Phase II auction and an auction of support for overlap areas. If so, the Commission asks that commenters identify and describe recommended changes with specificity. Consistent with prior practice, the Commission proposes to develop the specific details of the auction as part of the pre-auction process.

14. *Transition for incumbent provider.* The Commission proposes that any incumbent that does not apply to participate in the auction shall have its support reduced, regardless of whether other carriers apply or bid. The Commission infers that by not applying to participate in the auction the incumbent is demonstrating that it does not need any of its limited universal service funds to continue providing service to its area.

15. The Commission seeks comment on what should happen to the legacy rate-of-return support mechanisms for

an incumbent local exchange carrier (LEC) when it, but no other carrier, bids in the incumbent's area. The Commission also seeks comment on whether, if the incumbent LEC is the sole applicant to bid in its service area, and no other carriers apply to bid, the incumbent should continue to receive support pursuant to the legacy rate-of-return support mechanisms? Should the Commission infer that by not applying to participate in the auction the competitors are demonstrating that they are not capable of providing service to the entire study area?

16. If the incumbent LEC does not win at auction, what, if any, transitional support should be provided to the incumbent, and how should the Commission best ensure customers who are currently served by the incumbent do not lose access to voice service or existing broadband service prior to the deployment of service to those locations by the winning bidder?

17. *Oversight and accountability.* The Commission proposes that the same oversight and non-compliance framework as used in the CAF Phase II auction would apply to auctions offering support to overlap areas. Are there any modifications that should be made and, if so, why?

18. *Frequency of auctions.* The Commission's previous 100% overlap process was conducted every other year. Should the Commission conduct these auctions on a similar schedule, based on the most recent FCC Form 477 data?

19. As described in the concurrently adopted Report and Order, the Commission is concerned that as carriers move from offering voice and voice/broadband lines to broadband-only lines, the amount of support required from the Fund will increase. To address this concern, the Commission has adopted a minimum of a 7% budgetary increase in 2019. The Commission anticipates that this 7% increase should exceed any increases to the budget due to conversions of lines from voice or voice/broadband to broadband-only. The Commission previously recognized the importance of giving consumers the flexibility to purchase broadband-only lines, which may provide an opportunity to move from "plain old telephone service" (POTS) to new IP-based services. Nonetheless, the Commission understands concerns that some carriers may be moving consumers onto broadband-only lines for the purpose of artificially increasing the support they receive from the Fund. The Commission seeks comment on whether other measures are necessary or advisable to address this issue.

20. The Commission seeks comment on whether the Commission should adopt limits on the number of converted lines for which a carrier may seek broadband-only support. Several parties have informally suggested this may be a useful method of limiting increases to the budget. Although this approach would allow for a planned and smooth increase to the budget, it puts an artificial constraint on conversions. More and more customers want broadband-only lines, with interconnected VoIP or wireless service for voice. Such limitations could also lead to arbitrage opportunities as carriers seek to adjust their line counts. The Commission seeks comment on whether the benefits of such a limitation would exceed the burdens.

21. The Commission also seeks comment on other methods of addressing the increased funding needs as lines convert to broadband-only. First, the Commission notes that when a line converts to broadband-only, the carrier immediately begins receiving the increased Connect America Fund Broadband Loop Support (CAF BLS) but also continues to receive High-cost Loop Support (HCLS) for two years even though there is no longer intrastate voice service on the line because of the manner in which HCLS is calculated. Should carriers immediately lose HCLS for any lines converted to broadband? Given that CAF BLS support for broadband-only lines is typically greater than total HCLS and CAF BLS for voice and voice/broadband lines, eliminating HCLS for converted lines would still provide carriers with sufficient support.

22. Some suggest carriers are switching consumers from traditional telephone service to interconnected VoIP service for the sole purpose of maximizing overall support amounts. The Commission seeks comment on how to encourage the transition to broadband networks while preventing carriers from using the transition as a way to artificially inflate their support amounts.

23. Is there a way the Commission can adjust its CAF ICC rules to discourage any arbitrage? The Commission created CAF ICC support to aid carriers in the transition to bill-and-keep for their traditional voice services, and legacy carriers are eligible to receive such support. To calculate a carrier's CAF ICC support, a carrier subtracts its Access Recovery Charge (ARC) assessed on voice end-users from its "Eligible Recovery"—the total funding a carrier is entitled to receive from any source under the Commission's rules for the transition. Importantly, the rules generally require carriers to impute an

amount on broadband-only lines equal to the ARCs they would have assessed on voice and voice/broadband access lines. Notably, CAF ICC support comes with limited deployment obligations and is subject to a fixed annual reduction of 5% to reflect decreasing demand due to line loss. Meanwhile, CAF BLS comes with particularized deployment obligations and increases to reflect additional interstate costs when carriers migrate customers onto broadband-only lines. What measures can the Commission take to prevent carriers from gaming this apparent mismatch in its universal service and intercarrier compensation rules? Specifically, is there a way to determine whether a legacy carrier is migrating its customers to broadband only lines as part of the desired transition to all broadband networks or to benefit from increased high-cost support? Are there circumstances under which a legacy carrier that converts a line to broadband-only but retains that voice customer with interconnected VoIP service should have to impute some portion of those revenues against its CAF ICC support? If so, how much should be imputed? Are there other measures the Commission should consider to address these concerns?

24. To address the unique challenges of deploying high-speed broadband to rural Tribal communities, the Commission incorporates a Tribal Broadband Factor into the A-CAM II offer. In recognition that many rural, Tribal areas contain a high concentration of low-income individuals and few business subscribers—and thus have lower take rates and potential average revenues per subscriber than non-Tribal areas—the Tribal Broadband Factor reduces the high-cost funding threshold by 25% to a benchmark of \$39.38 for locations in Indian Country. As a result, carriers opting for the A-CAM II offer will receive more funding and be required to deploy to more locations than they would have without the Tribal Broadband Factor. In recent weeks, NTTA and Gila River have proposed applying the Tribal Broadband Factor from the A-CAM II offer to legacy carriers. NTTA suggests addressing legacy support by reducing the CAF BLS "\$42 per month per line funding threshold by 25 percent to \$31.50 . . . [and] revising the HCLS algorithm using a similar 25 percent factor."

25. The Commission seeks comment on this proposal as well as other ways to appropriately incorporate a Tribal Broadband Factor into the legacy system. *First*, the Commission seeks comment on whether to incorporate a

Tribal Broadband Factor into the legacy program. How do the differences between the A-CAM II offer and legacy support impact the Commission's analysis? For example, the A-CAM II offer is based on the estimated take rates and potential revenues per subscribers, whereas the legacy program is based on actual take rates and imputed revenues per subscriber. Does this difference suggest a different means of implementing a Tribal Broadband Factor in the legacy program? If so, in what way? Also, do the newly increased legacy budget, along with elimination of the capital investment allowance and earlier opex limitation relief, mitigate to a degree the need for a Tribal Broadband Factor for legacy carriers? If so, how much?

26. *Second*, if the Commission were to proceed with a Tribal Broadband Factor for CAF BLS, how should it be structured? For CAF BLS, should the Commission reduce the \$42 per line funding threshold to \$39.38 (the high cost funding threshold for the A-CAM II offer), to \$31.50 (as suggested by NTTA), or to some other amount? How should the structural differences between the CAF BLS program and the A-CAM II offer impact the Commission's decision? Should the Commission adopt a Tribal Broadband factor that applies to all carriers serving Tribal lands (as the Commission has defined that for the purposes of the A-CAM II offer), or should the Commission target it based on the level of existing deployments, whether by the legacy carrier or its competitors? What additional deployment obligations should the Commission apply to carriers receiving the benefit of a Tribal Broadband Factor? And what other rules, if any, would the Commission need to amend to make a Tribal Broadband Factor a reality for CAF BLS?

27. *Third*, should the Commission proceed with a Tribal Broadband Factor for HCLS? Whereas the A-CAM II offer is designed to support broadband-capable networks and requires concrete buildout obligations in exchange for support, the HCLS component of the legacy program is designed to offset the intrastate costs of voice networks without any corresponding buildout obligations. Given that context, would a Tribal Broadband Factor make sense applied to HCLS? If so, how could the Commission revise the HCLS algorithm to incorporate a Tribal Broadband Factor? What would the impact be on other carriers participating in these programs given the Commission's decision to maintain the separate HCLS funding cap? Should the Commission create new broadband deployment

obligations tied to any increase in HCLS funding from a Tribal Broadband Factor, and if so, how should the Commission do so? And what other rules, if any, would the Commission need to amend to make a Tribal Broadband Factor a reality for HCLS?

28. *Finally*, the Commission seeks comment on whether there are any other approaches the Commission should consider in creating a Tribal Broadband Factor for legacy rate-of-return carriers. And if so, what are those approaches and how should they work?

III. Procedural Matters

A. Paperwork Reduction Act

29. This document contains proposed 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 (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

30. *Ex Parte* Presentations. The proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents

shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

31. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in the FNPRM. The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

32. The proposals in this FNPRM seek to build on efforts to modernize the high-cost program by targeting support efficiently and providing market-based mechanisms to award support. In the FNPRM, the Commission seeks comment on issues related to auction design and service requirements stemming from the decision to use competitive bidding in study areas that are subject to a certain amount of competitive overlap from unsubsidized providers. The Commission also seeks comment whether the Commission should adopt limits on the number of converted lines for which a carrier may seek broadband-only support. Finally, the Commission seeks comment on additional support for legacy carriers serving Tribal areas.

33. 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).

34. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission’s actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.

35. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” Nationwide, as of Aug 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

36. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37, 132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on this data the Commission estimates that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”

37. In the FNPRM, the Commission seeks comment on what the deployment

obligations should be for areas subject to competitive bidding in terms of what locations should be served and at what minimum speeds. The Commission also seeks comment on whether additional measures are needed to address the increase in the demand for high-cost USF that results from lines converting from voice or voice/broadband to broadband-only. The Commission also seeks comment on additional support for legacy carriers serving Tribal areas and accompanying obligations.

38. 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. The Commission expects to consider all of these factors when it has received substantive comment from the public and potentially affected entities.

39. In the concurrently adopted Report and Order, the Commission adopts changes whereby support in certain legacy areas will be awarded through competitive bidding. In the FNPRM, the Commission seeks comment on several auction related issues. The questions the Commission asks, in part, aim to reduce economic impacts on the incumbent LECs and help with the overall efficiency of the competitive bidding process. Furthermore, in seeking comment whether the Commission should adopt limits on the number of converted lines for which a carrier may seek broadband-only support, it asks about ways to minimize the impact on carriers. The Commission also seek comment on additional support for legacy carriers serving Tribal areas, accompanying obligations, and possibly targeting Tribal areas with lower levels of deployment.

40. More generally, the Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the FNPRM and this IRFA, in reaching its final conclusions and taking action in this proceeding. The proposals and questions laid out in the FNPRM were designed to ensure the Commission has a complete understanding of the benefits and potential burdens

associated with the different actions and methods.

IV. Ordering Clauses

41. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1–4, 5, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, and 405 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151–155, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 403, 405, and 1302, the Further Notice of Proposed Rulemaking *is adopted*, effective thirty (30) days after publication of the text or summary thereof in the **Federal Register**, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the **Federal Register** of OMB approval, and the rules adopted pursuant to section III.C.8 of this Report and Order shall become effective on January 1, 2020. It is the Commission’s intention in adopting these rules that if any of the rules that the Commission’s retains, modifies, or adopts herein, or the application thereof to any person or circumstance, are held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law.

42. *It is further ordered* that, pursuant to the authority contained in sections 1, 2, 4(i), 5, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, and 1302 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), 155, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, 1302, *notice is hereby given* of the proposals and tentative conclusions described in the Further Notice of Proposed Rulemaking.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–01315 Filed 2–5–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 10**

[Docket No. DOT-OST-2017-0028]

RIN 2105-AE76

Maintenance of and Access to Records Pertaining to Individuals

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Transportation proposes to add a system of records relating to aviation consumer protection to the list of Department of Transportation Privacy Act Systems of Records that are exempt from one or more provisions of the Privacy Act. The Department is proposing to exempt this system of records, titled Aviation Consumer Complaint Application Online System, to protect records compiled for investigations and inquiries into alleged Federal civil rights and consumer protection misconduct by airlines and air travel companies. This exemption was initially proposed on February 28, 2005 and the Department did not receive any comments on the proposed rule. Nonetheless, given the time that has passed since the original Notice of Proposed Rulemaking, the Department is issuing this Notice of Proposed Rulemaking for comment. The current system of records notice indicates that an exemption applies to this system; however, the Department is updating the system of records notice to specify the basis of the exemption. This rulemaking conforms the Department of Transportation's regulations on Maintenance and Access to Records Pertaining to Individuals to the applicable System of Records Notices (SORNs) to current Department of Transportation practice.

DATES: Submit comments on or before April 8, 2019.

ADDRESSES: You may file comments identified by the docket number DOT-OST-2017-0028 by any of the following methods:

○ *Federal Rulemaking 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 or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.

○ *Fax:* 202-493-2251.

Instructions: You must include the agency name and docket number DOT-OST-2017-0028 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's system of records notice for dockets in the **Federal Register** notice published on January 17, 2008 (73 FR 3316-3317).

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Claire Barrett, Departmental Chief Privacy Officer, Office of the Chief Information Officer, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590 or privacy@dot.gov or (202) 366-8135.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, 5 U.S.C. 552a, requires that agencies tell the public when they maintain information about a person in a file that may be retrieved to that person's name or some other identifying particular. A group of these files is a "system of records," and the existence of each system must be published in a "system of records notice" (SORN). An Agency wishing to exempt portions of some systems of records from certain provisions of the Privacy Act must notify the public of that exemption in both the SORN and in an exemption rule. This proposed rulemaking clarifies that portions of the Aviation Consumer Complaint Application Online System are not subject to some access and notification provisions of the Privacy Act. Exempting the systems from these requirements is necessary to protect the public's interest in fair and accurate investigations.

In 2005, the DOT established the Aviation Consumer Complaint Application Online System to monitor consumer comments regarding airlines

and air travel companies and to determine the extent to which these entities are in compliance with Federal aviation civil rights and consumer protection regulations. The records contain the inquiries, opinions, and compliments of individuals, as well as complaints of discrimination based on physical handicap, race, religion, etc. Thus, records may contain complaints containing alleged violations of Federal law and regulations, which can lead to civil and criminal investigations by the Department of Transportation. Consequently, the records should be treated as other law enforcement systems as some information needs to remain confidential for these investigative purposes.

This proposed rulemaking would exempt certain records maintained by the Aviation Consumer Complaint Application Online System from the access and notification provisions of the Privacy Act. An exemption from these requirements would be necessary to: Avoid disclosure of aviation compliance inquiry techniques; protect the confidential information of confidential informants and third parties; prevent unwarranted invasions of another individual's privacy; and support DOT's ability to obtain information relevant to resolving an aviation compliance concern. DOT may take administrative or other appropriate action within the scope of its respective legal authority in response to an aviation compliance concern. Thus, an aviation compliance inquiry is comprised of records compiled for law enforcement purposes falling under the subsection (k)(2) exemption (5 U.S.C. 552a(k)(2)) making it applicable to this system of records.

In appropriate circumstances, where compliance with the request would not appear to interfere with or adversely affect the conduct of an aviation compliance inquiry or result in the unauthorized disclosure of confidential information, OST may opt to waive these exemptions. In addition, some information may be available under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). Any request for information from this system under the FOIA would be assessed on a case-by-case basis to determine what, if any, information could be released consistent with section (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2).

DOT identifies a system of records that is exempt from one or more provisions of the Privacy Act (pursuant to 5 U.S.C. 552a (k)) both in the SORN published in the **Federal Register** for public comment and in an Appendix to DOT's regulations implementing the Privacy Act (49 CFR part 10, Appendix).

This rule would exempt records in the Aviation Consumer Complaint Application Online System of records from subsection (d) (Access to Records) of the Privacy Act to the extent that records consist of investigatory material compiled for law enforcement purposes in accordance with 5 U.S.C. 552a(k)(2).

Regulatory Analysis and Notices

A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The DOT has considered the impact of this proposed rulemaking action under Executive Orders 12866 and 13563 (January 18, 2011, "Improving Regulation and Regulatory Review"), and the DOT's regulatory policies and procedures (44 FR 11034; February 26, 1979). The DOT has determined that this action would not constitute a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT regulatory policies and procedures. This rule has not been reviewed by the Office of Management and Budget. There would be no costs associated with this rule.

B. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

C. Regulatory Flexibility Act

The DOT has evaluated the effect this change would have on small entities and does not believe that this rule would impose any costs on small entities because the reporting requirements themselves would not change and because the rule applies only to information on individuals that is maintained by the Federal Government or that is already publicly available. Therefore, I hereby certify that this proposal would not have a significant economic impact on a substantial number of small entities.

C. National Environmental Policy Act

The DOT has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined preliminarily that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on

the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.C.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway

Administration's implementing procedures, "[promulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to amend the Appendix to DOT's Privacy Act regulations. The DOT does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

E. Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, Federalism, dated August 4, 1999, and it has been determined that it would not have a substantial direct effect on, or sufficient Federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the preparation of a Federalism Assessment is not necessary.

F. Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because it would not have an effect on Indian Tribal Governments, the funding and consultation requirements of Executive Order 13084 do not apply.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that this action would not contain a collection of information requirement for the purposes of the PRA.

H. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L.

104-4, 109 Stat. 48, March 22, 1995) requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments; and the private sector. The UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A "Federal mandate" is a new or additional enforceable duty, imposed on any State, local, or tribal Government; or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$143.1 million or more in any one year (adjusted for inflation), an UMRA analysis is required. This proposed rule would not impose Federal mandates on any State, local, or tribal governments; or the private sector.

List of Subjects in 49 CFR Part 10

Penalties, Privacy.

In consideration of the foregoing, DOT proposes to amend part 10 of title 49, Code of Federal Regulations, as follows:

PART 10—MAINTENANCE OF AND ACCESS TO RECORDS PERTAINING TO INDIVIDUALS

■ 1. The authority citation for part 10 continues to read as follows:

Authority: 5 U.S.C. 552a; 49 U.S.C. 322.

■ 2. Amend the Appendix to Part 10 by:

a. In Part II, adding a new subsection H.

APPENDIX TO PART 10—EXEMPTIONS

Part II. Specific Exemptions

* * * * *

H. The following systems of records are exempt from subsection (d) (Access to records) of the Privacy Act, 5 U.S.C. 552a, to the extent that they contain investigatory material compiled for law enforcement purposes, in accordance with 5 U.S.C. 552a(k)(2).

I. Aviation Consumer Complaint Application Online System, maintained by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in the Office of the Secretary (DOT/OST 102).

This exemption is justified because granting an individual access to investigative records could interfere with the overall law enforcement process by revealing a sensitive investigative technique, or confidential sources or information.

Issued in Washington DC on December 21, 2018.

Elaine L. Chao,
Secretary.

[FR Doc. 2019-01338 Filed 2-5-19; 8:45 am]

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Notices

Federal Register

Vol. 84, No. 25

Wednesday, February 6, 2019

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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted five recommendations at its Seventieth Plenary Session. The appended recommendations address Recusal Rules for Administrative Adjudicators, Public Availability of Adjudication Rules, Improving Access to *Regulations.gov's* Rulemaking Dockets, Public Engagement in Rulemaking, and Public-Private Partnerships.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2018–4, Gavin Young; for Recommendation 2018–5, Todd Phillips; for Recommendations 2018–6 and 2018–8, Todd Rubin; and for Recommendation 2018–7, Frank Massaro. For each of these actions the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Seventieth Plenary Session, held December 13–14, 2018, the Assembly of the Conference adopted five recommendations.

Recommendation 2018–4, *Recusal Rules for Administrative Adjudicators*.

This recommendation urges agencies to issue procedural rules governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. It encourages agencies to adopt procedures by which parties can seek recusal of adjudicators assigned to their cases and to provide written explanations for recusal decisions.

Recommendation 2018–5, *Public Availability of Adjudication Rules*. This recommendation offers best practices to optimize agencies' online presentations of procedural rules governing adjudications. It encourages agencies to make procedural rules for adjudications and related guidance documents available on their websites and to organize those materials in a way that allows both parties appearing before the agencies and members of the public to easily access the documents and understand their legal significance.

Recommendation 2018–6, *Improving Access to Regulations.gov's Rulemaking Dockets (formerly titled Regulations.gov and the Federal Docket Management System)*. This recommendation offers suggested improvements to *Regulations.gov*, the website that allows the public to comment on many federal agencies' rulemaking proposals. It provides recommendations to the governing body of *Regulations.gov*, called the eRulemaking Program, and to agencies that participate in *Regulations.gov* for ensuring that rulemaking materials on *Regulations.gov* are easily searchable and categorized consistently and clearly. These recommendations include using one electronic docket per rulemaking, promoting interoperability among key websites (e.g., *Federalregister.gov* and *Reginfo.gov*), and making rulemaking materials available to search engines.

Recommendation 2018–7, *Public Engagement in Rulemaking*. This recommendation offers strategies for agencies to enhance public engagement prior to and during informal rulemaking. It encourages agencies to invest resources in a way that maximizes the probability that rulewriters obtain high quality public information as early in the process as possible. It recommends expanding the use of requests for information and advance notices of proposed rulemaking, targeting outreach to

individuals who might otherwise be unlikely to participate, and taking advantage of in-person engagement opportunities to solicit stakeholder input and support future informed participation.

Recommendation 2018–8, *Public-Private Partnerships*. This recommendation offers agencies guidance on legal and practical considerations for participating in public-private partnerships. It commends to agencies a *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level*, which provides guidance on the key legal questions agencies encounter in the operation of public-private partnerships, and proposes mechanisms that would allow agencies to share resources and best practices with one another when creating and administering such partnerships.

The Appendix below sets forth the full texts of these five recommendations. In addition, there are two timely filed Separate Statements associated with Recommendations 2018–4 and 2018–6 (authorized under 5 U.S.C. 595(a)(1)). The Conference will transmit the recommendations to affected agencies, Congress, and the Judicial Conference of the United States, as appropriate. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: <https://www.acus.gov/meetings-and-events/plenary-meeting/70th-plenary-session>.

Dated: February 1, 2019.

Shawne C. McGibbon,
General Counsel.

Appendix—Recommendations of the Administrative Conference of the United States

Administrative Conference Recommendation 2018–4

Recusal Rules for Administrative Adjudicators

Adopted December 13, 2018

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication. Recusal serves two important purposes. First, it helps ensure that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of

recusal is reflected in the Due Process Clause, as well as statutory, regulatory, and other sources of recusal standards. Second, the recusal of adjudicators who may appear partial helps inspire public confidence in adjudication in ways that a narrow focus on actual bias against the parties themselves cannot.¹ Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.² Unlike with federal judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of administrative adjudication.

In Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the case of actual bias.³ This Recommendation builds upon Recommendation 2016–4 by addressing the need for agency-specific recusal rules that consider the full range of actual and apparent bias. It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.⁴ It also covers appeals from those adjudications. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when determining rules for the recusal of agency heads.

Recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the

agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency and that allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 for agencies to consider in fashioning their own recusal rules. The parenthetical explanations accompanying these factors show how different features of an agency's administrative scheme may affect the stringency of those rules.

Recusal rules also provide a process for parties to petition their adjudicator to recuse in the event he or she does not elect to do so sua sponte. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for appeal of those decisions within the agency. Such appeals are typically conducted by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of appeal increases the reliability and accuracy of recusal determinations and helps ensure the consistency and effectiveness of the work assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must provide parties with a written explanation of their recusal decisions.⁵ Finally, agencies could provide for the publication of recusal decisions. Both written explanations and publication of recusal decisions increase transparency and thus the appearance of impartiality.

It is important to distinguish adjudicative recusal rules and procedures from the ethics rules promulgated by the Office of Government Ethics (OGE).⁶ As an initial matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules prohibit employees from participating in certain matters when they have a conflict of interest or an appearance of a conflict. Adjudicative recusal rules focus on how an agency, acting through its adjudicators and appeal authorities, decides who will hear certain cases in a manner that ensures the integrity and perceived integrity of adjudicative proceedings. Adjudicative recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need to have clear guidance as to what they may or may not do. Adjudicative recusal rules, by contrast, tend to be much more open-ended and standard-like. They are focused on maintaining both

actual impartiality and the appearance of impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association.

The enforcement mechanism is also different. If an adjudicator, like other employees, participates in a matter in violation of an ethics rule, the adjudicator can be subject to discipline. In contrast, if an adjudicator decides not to recuse him or herself in a case where he or she should have been recused, even if the adjudicator would not be subject to discipline, the decision not to recuse could be appealed under whatever process the agency has established. In addition, the recusal process can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself sua sponte.

Under current law, an agency that wishes to supplement its ethics rules must, of course, do so through the OGE supplemental process.⁷ Under that process, agencies, with the concurrence of OGE, may promulgate ethics rules that supplement existing OGE rules. This Recommendation, in contrast, focuses exclusively on a set of recusal rules an agency may wish to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

Recommendation

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA), as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but not to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.

2. Agency rules should, consistent with ACUS Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*,⁸ provide for the recusal of adjudicators in cases of actual adjudicator impartiality, referred to as bias in ACUS Recommendation 2016–4, including:

- a. Improper financial or other personal interest in the decision;
- b. Personal animus against a party or group to which that party belongs; or
- c. Prejudgment of the adjudicative facts at issue in the proceeding.

3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:

- a. The regularity of the agency's appearance as a party in proceedings before

⁷ See Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635.105.

⁸ 81 FR 94,314 (Dec. 23, 2016).

¹ Louis J. Virelli, III, Recusal Rules for Administrative Adjudicators (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.

² See 28 U.S.C. 455(a) (2012); Model Code of Judicial Conduct for Federal Administrative Law Judges Canon 3(C) (Am. Bar Ass'n 1989), available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj>. Both require recusal by federal adjudicators when their "impartiality might reasonably be questioned."

³ Admin. Conf. of the U.S., Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 FR 94,314 (Dec. 23, 2016).

⁴ In the context of Recommendation 2016–4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation addresses both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). See Admin. Conf. of the U.S., Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 FR 94,314 (Dec. 23, 2016); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 2* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

⁵ 5 U.S.C. 555(e) (2012).

⁶ The Ethics in Government Act of 1978, Public Law 95–521, 92 Stat. 1824 (codified at 5 U.S.C. App.) established the Office of Government Ethics to provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." OGE's *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 CFR part 2635.

the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);

b. Whether the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);

c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);

d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and

e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).

4. Agency rules should include provisions identifying considerations that do not, on their own, warrant recusal and specifying situations in which recusal is not required or is presumptively not required.

5. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and internal agency appeal.

6. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions must provide written explanations of their recusal decisions. In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications and adjudicative personnel.

7. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.

Separate Statement on Administrative Conference Recommendation 2018–4 by Public Member Richard D. Klingler¹

Filed January 4, 2019

This statement briefly summarizes the reasons for my vote against adopting

¹ Partner, Sidley Austin LLP. This statement is made solely in my capacity as an ACUS Public Member.

Administrative Conference Recommendation 2018–4, *Recusal Rules for Administrative Adjudicators* (Dec. 13, 2018). I appreciate the fine and careful work by committee members and others leading to this Recommendation, and in particular Prof. Virelli's thorough and helpful report to the Conference. However, I believe the Recommendation is in considerable tension with basic separation of powers principles and will lead to associated distortions in Executive Branch decisionmaking and accountability. To avoid these results, agencies might (a) carefully consider whether any recusal rules should apply at all to more senior agency officials, including those reviewing initial adjudicatory decisions and (b) clarify that their recusal rules do not apply to statements or positions regarding policy or the interpretation of statutes or regulations. I especially urge agencies not to extend the Recommendation's provisions to agency heads.

The Recommendation focuses on “the appearance of adjudicator impartiality” to force “the recusal of adjudicators who may appear partial.” Rec. at 1, 2 (emphases added).² It acknowledges that the resulting recusal rules will “tend to be much more open-ended and standard-like” than the extensive ethics rules already applicable to these and other officials and will be akin to rules “codified in judicial recusal statutes as well as model codes.” *Id.* at 1, 3. Most troubling for my purposes, the Recommendation states that “[t]he recusal rules should also apply to adjudicators who conduct internal agency review of decisions from [initial] hearings” and that “agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.” *Id.* at 4, 6.

Appearance of impartiality standards, especially those modeled on judicial standards, tend and often seek to foster the public perception that agency adjudicators act independently of policy determinations or the directions of more senior officials. Those standards also tend to foster agency cultures and official actions consistent with those views. But that independence does not reflect reality, nor should it. These “adjudicators” are Executive Branch officials. They are not Article III or even Article I judges, and should not be treated as such. They should be and inevitably are “partial” in the sense of implementing and developing distinct Executive Branch policies through their decisions, and many of those policies are set forth prior to deciding individual cases. Ideally, those policy choices and associated legal interpretations would be expressly acknowledged and would reflect the views of senior officials, including the President. This is especially so for officials reviewing initial hearing decisions and for agency heads, who must even more clearly execute the law through the exercise of

discretion informed by distinct views of law and policy.

The Recommendation's conflation of these judicial and executive roles will likely undermine the formulation and implementation of Executive Branch legal policy. This is so because large segments of the public and many adjudicators themselves are prone to view the advocacy and implementation of distinct policies in the course of or prior to executing the law as reflecting inappropriate bias and lack of independence. That is, they view what should be the proper discharge of office as reflecting the “appearance of adjudicator impartiality.” The resulting rules and the likely frequent resort to recusal motions will reinforce those views and impede the articulation of legal policy and the implementation of senior officials' judgments of how the law should be executed. Indeed, the Recommendation seeks to bar activities “such as advocating a particular policy in a speech before a professional association” and suggests that “the greater authority of the reviewer could warrant stronger appearance-based recusal standards.” Rec. at 3 & 5. Especially as applied to officials who review initial adjudications and even more so for agency heads, this type of constraint is beyond unwarranted: It is undesirable as inconsistent with those officials' core responsibilities as Executive Branch officials and inconsistent with the powers vested in them and their superior officers.

The Recommendation also will tend to insulate administrative adjudicators further from the President, principal officers, other political appointees, and other officials who formulate policy and direct the execution of laws. That may be the intended effect. But that insulation does not only produce decisions that reflect uncoordinated policy choices and legal interpretations, masked as neutral decisionmaking. It also undermines the ultimate public accountability that the separation of powers is designed to ensure. The adjudicators subject to the recommended rules will be at least “inferior Officers,” and those reviewing or ultimately issuing the adjudicatory orders may well be principal officers. For both, the Appointments Clause is designed to “maintain clear lines of accountability—encouraging good appointments and giving the public someone to blame for poor ones,” *Lucia v. SEC*, 585 U.S. ___, slip op. 2 (2018) (Thomas, J., concurring), and those clear lines of accountability are also necessary to enable the President to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, § 3.

The Recommendation and resulting rules also have the unintended effect of inserting the Conference and agencies into highly contested legal debates regarding the proper scope of Presidential appointment and removal powers. Like other limitations on or counterweights to those powers, the recommended rules will have the practical effect of submerging the role that discretionary policy and legal determinations play in adjudications, and of insulating agency adjudicators from the direct and indirect influence of officials accountable to the President. The Recommendation was adopted soon after the President expanded

² Citations to the recommendation in this Statement refer to page numbers of the original document that is posted at <https://www.acus.gov/sites/default/files/documents/Recusal%20Rules%20Recommendation%20Post-Plenary%2012-21-2018%20Final.pdf>.

his control over appointing certain adjudicators, *see* E.O. 13843, *Excepting Administrative Law Judges from the Competitive Service* (July 10, 2018), and as the courts appear poised to address broader challenges to limits on the President's ability to direct agency decisionmaking, including adjudications, by appointing and removing officers. *See, e.g., Lucia v. SEC, supra; Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). The Conference and agencies should, if anything, seek instead to foster a more unified and coordinated exercise of Executive Branch action within our scheme of separated powers.

Administrative Conference Recommendation 2018-5

Public Availability of Adjudication Rules

Adopted December 13, 2018

[**Note:** The appendix referenced in this Recommendation has been omitted from this notice because of the inaccessible images it contains. The full appendix may be found online at www.acus.gov/sites/default/files/documents/Recommendation-2018-5_Appendix.pdf.]

Every year, federal agencies conduct hundreds of thousands of adjudications.¹ In order to participate meaningfully in adjudications, persons appearing before federal agencies must have ready online access both to the key materials associated with these adjudications (including prior decisions) and the procedural rules governing them. Administrative Conference Recommendation 2017-1 addresses the former set of materials, urging agencies to provide online access to the key documents associated with adjudications.² This Recommendation deals with the latter set of materials. It sets forth best practices to assist agencies in making their procedural rules available online and in organizing those materials in a way that is accessible to and comprehensible for the public and persons appearing before agencies, consistent with 5 U.S.C. 552(a)(1), (a)(2), and other applicable provisions of law.³

A number of different sources create procedural rules that govern agency adjudications. At the very least, these sources include: (a) The Due Process Clause of the Constitution's Fifth Amendment; (b) the adjudication provisions of the Administrative Procedure Act (APA);⁴ (c) agency or program-specific statutes that set forth rules for particular types of adjudications; (d) agency-promulgated rules of procedure with legal effect; (e) agency precedents as set forth

in decisions by agency officials authorized to engage in final agency action;⁵ (f) adjudicator-specific practice procedures applicable across multiple cases, such as standing orders; and (g) agency-specific forms that persons appearing before an agency are required to use.

In addition, many agencies have issued guidance documents and explanatory materials that help persons appearing before agencies navigate the adjudicative process and guide agency adjudicators and other agency officials.⁶ These documents and materials usually take the form of policy statements and other forms of agency guidance, that, if not published, cannot be used to the disadvantage of persons appearing before the agency.⁷

Under existing law, agencies, with some limited exceptions, are required to publish rules of procedure with general applicability and legal effect in the **Federal Register** and to codify such rules in the *Code of Federal Regulations*,⁸ and those rules in turn are required to be published on the agency websites.⁹ Generally, agencies have some discretion over how to organize these materials on their websites.

A review of existing agency websites reveals that agency practices vary widely. Some provide access on their websites to all relevant statutes, rules of practice, precedents, standing orders, forms, and guidance documents and explanatory materials, whereas others publish few or none of these things. Of those that do publish such documents and materials, some identify the sources of law from which the rules derive and clearly delineate between agency-promulgated rules of procedure with legal effect and (non-binding) guidance documents, whereas others do not. Finally, some websites are much more effective than others in organizing these materials and placing them in a logical location on the agency website such that they are easily accessible.

This Recommendation offers best practices to optimize agencies' online presentation of procedural rules for agency adjudications. Implementation of these best practices will benefit not only individuals appearing before agencies, who need ready access to procedural rules in order to proceed effectively, but also agencies, which, among other things, have an interest in ensuring that non-binding explanatory materials are clearly labeled as such. These best practices will also

⁵ *Id.* § 704. Decisions of the Supreme Court may also be considered a binding source of law. Whether lower-court decisions are binding is not addressed here.

⁶ To facilitate ease of understanding, an agency should tailor explanatory materials to meet the needs of the members of the public who typically appear before it. Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 FR 61,728 (Dec. 29, 2017).

⁷ 5 U.S.C. 552(a)(1)-(2); but *see id.* § 552(a)(1) (providing that an individual that has "actual and timely notice" of a requirement may be bound thereby even if the document was not published).

⁸ 5 U.S.C. 552(a)(1); 44 U.S.C. 1505(a)(2), 1510(a); 1 CFR 5.2(c), 5.5, 5.9.

⁹ *See, e.g.,* E-Government Act of 2002, Public Law 107-347, 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. 3501).

advance the purpose of the E-Government Act and recent amendments to the Freedom of Information Act, which expand affirmative disclosure by federal agencies and ensure that key agency documents are made available.¹⁰

Recommendation

The following recommendations offer best practices for agencies to consider as they seek to make procedural rules publicly available and to present those rules and related materials in a way that is accessible to and comprehensible for the public and persons appearing before agencies:

1. Agencies should provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications, including as relevant: (a) The provisions of the Administrative Procedure Act relating to adjudication (5 U.S.C. 554-58); (b) statutory provisions providing procedural rules for adjudication; (c) agency-promulgated rules of procedure with legal effect; (d) guidance documents and explanatory materials relating to adjudicative procedures, including guides designed for persons appearing before an agency and agency adjudicators (*e.g.*, manuals, bench books), excepting those covered by a Freedom of Information Act exemption that the agency intends to invoke; and (e) agency-specific forms that individuals must use. Agencies should also consider, as appropriate, providing access to adjudicator-specific practice procedures applicable across multiple cases, such as standing orders.

2. In providing access to the materials pursuant to Paragraph 1, agencies should present the materials in a clear, logical, and comprehensive fashion. One way to do so is to display the materials published under Paragraph 1 in an easy-to-read table. An example appears in the Appendix located at www.acus.gov/sites/default/files/documents/Recommendation-2018-5_Appendix.pdf. When possible, agencies should prominently delineate between binding and nonbinding materials.

3. Agency-promulgated rules of procedure with legal effect should be accessible on agency websites in one easily searchable file. The rules should include a table of contents listing the rule titles. The rule titles should be hyperlinked to the rule text. The numbering system in the searchable file should mirror the *Code of Federal Regulations'* (CFR) numbering system and provide a link to the official version of the CFR.

4. When an agency's mission consists exclusively or almost exclusively of conducting adjudications, the agency should link to its materials published under Paragraph 1 on the agency's homepage. When conducting adjudications is merely one of an agency's many functions, the agency should link to its rules and guidance from a location on the website that is both dedicated to adjudicatory materials and logical in terms of

¹ *See* Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 FR 40,260 (June 21, 2016).

² *See* Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 FR 31,039 (July 5, 2017).

³ Another ongoing Administrative Conference project addresses the online availability of agency guidance documents. Admin. Conf. of the U.S., *Public Availability of Agency Guidance*, <https://www.acus.gov/research-projects/public-availability-agency-guidance>. This recommendation deals only with the limited class of those documents relating to adjudication procedure.

⁴ 5 U.S.C. 554-58.

¹⁰ E-Government Act of 2002, § 206, (amending 44 U.S.C. 3501); FOIA Improvement Act of 2016, Public Law 114-185, 2, 130 Stat. 538 (amending 5 U.S.C. 552(a)(2)).

a person's likelihood of finding the documents in the selected location, such as an enforcement or adjudications page. Examples appear in the Appendix located at www.acus.gov/sites/default/files/documents/Recommendation-2018-5_Appendix.pdf.

5. Agencies should consider providing access on their websites to explanatory materials aimed at providing an overview of relevant agency precedents that apply the rules of procedure. Explanatory materials should link to applicable statutes, rules of procedure, and adjudicative precedents relating to adjudication procedures.

Administrative Conference Recommendation 2018-6

Improving Access to *Regulations.gov*'s Rulemaking Dockets

Adopted December 13, 2018

As agencies develop regulations, they often seek input from the public. In order to submit an informed comment, a member of the public needs to be able to at least: (1) Access the proposed rule and the agency's justification for it, and (2) access materials upon which the agency substantially relied to develop the proposed rule. Commenters should also be able to access other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible.

Members of the public, especially those who are subject to the rule, should be able easily to determine whether further action has been taken on the proposed rule and, when a final rule has been issued, to access the rule and all materials, including public comments, that informed its development. This Recommendation seeks to make it easier for members of the public to access these materials on *Regulations.gov*, thereby allowing them to contribute more effectively to the rulemaking process and understand their regulatory obligations.

Legal Requirements for Maintaining Electronic Rulemaking Dockets

The purposes of the E-Government Act of 2002 are to "improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency," and to "enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act]."¹ The E-Government Act of 2002 requires agencies, to the extent practicable, to maintain electronic rulemaking dockets (e-dockets).² An e-docket is simply a virtual folder that contains materials relevant to a particular rulemaking. It ideally includes any relevant notices (e.g., notices of proposed rulemaking (NPRMs)), supporting materials, and comments. Under the E-Government Act of 2002, e-dockets must make publicly available online, to the extent practicable, all comments received "and other materials that by agency rule or

practice are included in the rulemaking docket . . . whether or not submitted electronically."³

The Administrative Conference has recommended that agencies manage their public rulemaking dockets to achieve "maximum public disclosure." This means that, to the extent feasible, agencies should include the following within their public rulemaking dockets: (1) Notices pertaining to the rulemaking; (2) comments and other materials submitted to the agency related to the rulemaking; (3) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking; (4) reports or recommendations of any relevant advisory committees; (5) other materials required by statute, executive order, or agency rule to be considered or made public in connection with the rulemaking; and (6) any other materials considered by the agency during the course of the rulemaking.⁴ Because the E-Government Act of 2002 treats the e-docket as equivalent to the traditional rulemaking docket, agencies should include all these materials in their e-dockets.

Basic Structure of *FDMS/Regulations.gov*

Regulations.gov and the Federal Docket Management System (FDMS) are the primary vehicles through which all agencies, except for some independent regulatory agencies,⁵ comply with the electronic commenting and e-docket requirements of the E-Government Act of 2002.⁶ *FDMS/Regulations.gov* therefore houses a large part of the federal government's rulemaking and, for some agencies, non-rulemaking materials (e.g., adjudication dockets and Paperwork Reduction Act notices), spanning nearly 40 years from over 180 federal agencies.

Agencies create and manage e-dockets and their contents through *FDMS.gov*, a password-protected site that can be accessed only by authorized agency personnel. Agency officials are responsible not only for creating e-dockets but also for appropriately indexing them by selecting relevant Docket and Document Types and Subtypes, which will be described in greater detail below.

FDMS maintains a data feed that is updated daily with contents of the **Federal Register**. Data received through this feed includes all rulemaking materials from participating and non-participating agencies that are published in the **Federal Register**.

The Regulatory Information Service Center (RISC) within the General Services Administration (GSA) also regularly interacts with *FDMS/Regulations.gov*. RISC maintains

³ *Id.* § 206(d)(2)(B).

⁴ See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 1, 78 FR 41,358, 41,360 (July 10, 2013).

⁵ The Federal Communications Commission and the Securities and Exchange Commission, for example, do not participate in *FDMS/Regulations.gov*. Instead, they maintain their own online rulemaking systems.

⁶ *Regulations.gov* and FDMS were established by an initiative led by the Office of Management and Budget to implement President George W. Bush's Management Agenda. See Office of Mgmt. & Budget, Exec. Office of the President, Memorandum No. M-02-08, Redundant Information Systems Related to On-Line Rulemaking Initiative (May 6, 2002).

the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), a semi-annual publication of significant regulatory actions that agencies plan to take in the short and long term. The Unified Agenda requires agencies to indicate, among other things, whether a rule has federalism implications, creates unfunded mandates, or affects small entities.⁷ When an agency official enters a key identifier assigned by RISC, which is referred to as the Regulation Identifier Number (RIN) into the e-docket in FDMS, the Unified Agenda information publicly appears on *Regulations.gov*.

Governance and Funding of *FDMS/Regulations.gov*

FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that consists of officials from dozens of federal agencies. The Committee is co-chaired by the Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA) and the Chief Information Officer of the Environmental Protection Agency (EPA). It makes decisions about the design, operations, maintenance, and budgeting of *FDMS/Regulations.gov* upon advice from several smaller, lower-tiered bodies.

EPA is considered the "managing partner" of *FDMS/Regulations.gov*. As such, it is responsible for implementing changes to the system that have been approved by the Committee. To carry out this responsibility, the EPA created a Project Management Office (PMO), which consists of a small staff of experts in online docket management technology. This staff implements the policy decisions of the Committee. Although some commenters use the term "eRulemaking Program" to refer to the PMO specifically, the term as used in this Recommendation refers not solely to the PMO, but also to the *FDMS/Regulations.gov* governance structure as a whole, including participating agencies.

There is no direct appropriated funding for *FDMS/Regulations.gov*.⁸ Agencies that participate in *FDMS/Regulations.gov* fund the system through contributions, decided by a formula. The formula for contributions, established by the EPA in its Capital Asset Plan and Business Case, is based on a number of factors, including the average annual number of rules and non-rule items the agency publishes and the average annual number of comments posted on *Regulations.gov*.

Interaction Among *FDMS/Regulations.gov*, Other Online eRulemaking Systems, and Commercial Search Engines

In addition to the eRulemaking Program, there are federal offices that publish rulemaking materials and information. These include the Office of the Federal Register (OFR) and RISC. OIRA (within the Office of Management and Budget) and GSA publish the Unified Agenda on *Reginfo.gov*. The

⁷ Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 FR 36,757 (June 26, 2015).

⁸ Cynthia R. Farina, Reporter, *Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal E-Rulemaking*, 62 Admin. L. Rev. 279, 282 (2010).

¹ E-Government Act of 2002, Public Law 107-347, 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. 3501).

² The E-Government Act of 2002 also requires agencies, to the extent practicable, to accept comments by electronic means. *Id.* § 206(c).

Unified Agenda indicates, among other pieces of information, whether a rule imposes unfunded mandates and whether it has federalism implications. OFR's *Federalregister.gov* provides access to the officially published **Federal Register**. Combined, information published by all three of these bodies and others provides the user with important context about rulemakings.

As used in this Recommendation, the term "data interoperability" means that rulemaking data published or housed by different entities is connected. Complete data interoperability in this context is achieved when a user is able to find all relevant information about a rule in one place. Currently, a basic level of data interoperability among *FDMS/Regulations.gov*, RISC, and OFR begins when agencies enter certain identifying numbers (key identifiers) pertaining to a rule into e-dockets. The three key identifiers are: (1) The *Regulations.gov* Document Number, (2) the RIN (described above), and (3) the **Federal Register** Document Number. The *Regulations.gov* Docket Number is generated by *FDMS* when an agency user creates an e-docket. The RIN is generated when an agency requests it from RISC. The **Federal Register** Document Number is assigned by OFR when an agency sends a document to it for publication in the **Federal Register**. Because e-dockets often contain more than one document that has been published in the **Federal Register**, there are often two or more **Federal Register** Document Numbers associated with any given rulemaking. When all three key identifiers are entered, users can understand the relationships among related e-dockets and can have access to the entire lifecycle of a rulemaking. If any of these key identifiers are missing, or are incorrectly entered, users may have difficulty discerning important context about the rulemaking.

In addition to these other offices, *FDMS/Regulations.gov* interacts, to a limited extent, with commercial search engines. Currently, commercial search engines capture materials that have appeared on the "front page" of *Regulations.gov* (e.g., "What's Trending" notices). However, for technical reasons that are beyond the scope of this Recommendation, search engines currently do not capture the vast majority of materials on *Regulations.gov*.⁹

Third parties, including commercial search engines, may submit a request to the eRulemaking Program for an application programming interface (API) key. An API key allows a user to download all dockets and documents that appear on *Regulations.gov*. If a commercial search engine were to request and be granted an API key, it could therefore have access to all such dockets and documents. By working with commercial search engines to capture this data, the eRulemaking Program could harness the technological expertise of the private sector to make it easier for people to find rulemaking materials.

⁹ See Cary Coglianese, *A Truly "Top Task": Rulemaking and Its Accessibility on Agency websites*, 44 *Env'tl. L. Rep.* 10,660, 10,661–63 (2014).

Problems With *FDMS/Regulations.gov*

Many users of *Regulations.gov* have found that the system does not allow them to consistently and reliably search for and find particular e-dockets and access supporting materials and other relevant information about rulemakings.¹⁰

One reason it is difficult to search for and find particular e-dockets is because agencies sometimes create multiple e-dockets for the same rulemaking.¹¹ For example, if an agency moves its rulemaking action from an NPRM to a final rule, the agency sometimes creates a separate e-docket for the final rule, instead of maintaining a single e-docket to which all documents related to the rulemaking are assigned. A user who tries to find this proposed rule might come across the first e-docket the agency created and conclude incorrectly that there was no final rule issued. Sometimes the "multiple e-docket" problem happens because a sub-agency (e.g., the Occupational Safety and Health Administration) issued the NPRM and created the initial e-docket, and the parent agency (e.g., the Department of Labor) issued the final rule and created the second e-docket. In any case, there are often at least two e-dockets, each containing documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads users as to the status of the rulemaking if their searches do not locate both e-dockets and enable them to recognize the relationship between them.

Another reason it is difficult to search for and find particular e-dockets is because the "Advanced Search" feature on *Regulations.gov* often does not helpfully narrow down the number of results that come up in a search. The purpose of an "advanced search" is to allow users to search by different filters (e.g., date range, type of source, and author), reduce the number of search results, and therefore increase the likelihood of finding what they are looking for. An advanced search function is especially important on *Regulations.gov*, given the millions of materials, many with similar titles, that are in the system.

However, many of the filters that appear within *Regulations.gov*'s "Advanced Search" feature do not helpfully narrow down the relevant results. A user can search by Document Type, with the options listed as "Notice," "Proposed Rule," "Rule," "Public Submission," and "Other." These options do not capture the vast array of rulemaking materials, such as advanced and supplemental notices of proposed rulemaking, that are on *Regulations.gov*. Agencies also use these labels inconsistently, which further hinders the public's ability to use the Document Type filter to successfully locate materials.¹² Some agencies, for

¹⁰ See Farina, *supra* note 8, at 285–86.

¹¹ See eRulemaking Program, *Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies* 8 (Nov. 30, 2010).

¹² Because of inconsistent use of these labels, users cannot easily address broad questions about agency rulemaking practices, such as: How often agencies use pre-proposal public information gathering processes like notices of inquiry and advanced notices of proposed rulemaking, and how

example, label an advanced notice of proposed rulemaking as a "Notice," and others label it as a "Proposed Rule."¹³ Additionally, there are Document Subtypes and Docket Subtypes, which offer a more comprehensive list of options that some agencies use and others do not. The existence of these Subtypes exacerbates the problem of inconsistent use and generates more confusion for the user of *Regulations.gov* who is trying to locate relevant results.

An additional problem with advanced searching is that selecting a parent agency as the "Agency" does not include results for sub-agencies. For example, a rule listed by a specific sub-agency (e.g., the Bureau of the Census) may not be available when one searches for rules issued by the parent agency (e.g., the Department of Commerce). Visitors who use the "Agency" filter and select a parent agency may erroneously conclude that a particular document has not been published.

When users do find relevant e-dockets, they may discover that the e-dockets do not always contain supporting materials and Unified Agenda information that are visible to the public.¹⁴ Although agencies may have legitimate reasons for not posting some comments on *Regulations.gov* (e.g., concerns about confidential business information or copyrighted materials, a high volume of duplicate comments, or materials not subject to disclosure under the Freedom of Information Act), there are good, practical reasons for agencies to include supporting materials within their e-dockets.¹⁵ Doing so likely helps boost the quality of public comments, because the public can then better understand the agency's rationale and evidentiary support for the rule. Furthermore, if no Unified Agenda information appears within the e-docket, members of the public cannot easily determine, among other things, whether a rule is considered a "major rule," whether it has "federalism implications," and whether it affects small entities. The absence of this information may diminish the public's ability to comment adequately and therefore undermines the E-Government Act of 2002's goals of informed public participation and transparency in rulemaking.¹⁶

Yet another problem with *FDMS/Regulations.gov* is that it is not seamlessly interoperable with the other two main

often agencies use direct final, interim final, and other final-before-comment processes.

¹³ See Todd Rubin, *Regulations.gov* and the Federal Docket Management System 9 (Dec. 1, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/regulationsgov-and-fdms-final-report>.

¹⁴ See Farina, *supra* note 8, at 287.

¹⁵ See Admin. Conf. of the U.S., *Recommendation 2013–4, Administrative Record in Informal Rulemaking*, 78 FR 41,358 (July 10, 2013).

¹⁶ See E-Government Act of 2002, Public Law 107–347, 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. 3501) (stating that two of its purposes are to "improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency," and to "enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act].").

rulemaking sites: *Reginfo.gov* and *Federalregister.gov*. For example, if an agency user of FDMS neglects to enter the RIN for an e-docket, or enters an incorrect RIN, Unified Agenda information will not be displayed on *Regulations.gov*. A user of *Federalregister.gov* can search by whether a rule is “economically significant,” but no such search option is available on *Regulations.gov*. Complete interoperability among these three sites would allow users to seamlessly locate essential context about rulemakings.

FDMS and *Regulations.gov* are remarkable achievements, made possible by the diligent work of many government officials over many years. However, FDMS and *Regulations.gov* can be improved to allow the public, agency officials, and members of Congress to find rulemaking materials easily and understand how rulemakings were developed.

Recommendation

1. The eRulemaking Program should work with the Office of the Chairman of the Administrative Conference on an ongoing basis to help identify and meet user needs in navigating and finding materials on *Regulations.gov*, both in its current form and as it continues to evolve.

2. The default requirement should be for agencies to use one e-docket for each rulemaking proceeding to the maximum extent possible. In instances in which agencies must use more than one e-docket for a single rulemaking, they should link the related e-dockets by using relevant identifiers and making clear to users in each of the related e-dockets that the e-dockets are linked. The eRulemaking Program should offer tools both on *Regulations.gov*, to help users identify instances of related e-dockets, and on the Federal Docket Management System, to help agency administrators, docket managers, and other agency officials implement the concept of one e-docket and highlight any related e-dockets.

3. The eRulemaking Program should work with the Office of the Federal Register, other federal officials, and other experts as needed to analyze the current list of Document and Docket Types and Subtypes and make any changes to these labels that will facilitate consistent use within and across agencies.

4. The eRulemaking Program, the Office of the Federal Register, the Regulatory Information Service Center, and offices that have statutory responsibilities related to rulemaking such as the National Institute of Standards and Technology, should work to achieve data interoperability so that information in e-dockets can be connected to other relevant information, reflecting the entire lifecycle of a rulemaking proceeding.

5. The eRulemaking Program should ensure that agencies receive prompts that alert them to any e-dockets that do not have supporting and related materials. The prompt should remind agencies of their legal obligation to include, to the extent practicable, all materials that by agency rule or practice are included in the rulemaking docket, whether or not submitted electronically.

6. The eRulemaking Program should work with commercial search engines to make its

publicly-available data as open, accessible, and searchable as possible.

7. Participating agencies should strive to ensure rulemaking comments are posted on *Regulations.gov* as soon as feasible.

8. Agencies should indicate in their e-dockets which, if any, types of comments were not posted and whether these comments can be accessed.

Separate Statement on Administrative Conference Recommendation 2018–6 by Various Members

Filed December 21, 2018 [The following statement is submitted by Government Member Chai R. Feldblum; Public Members Victoria F. Nourse, Anne Joseph O’Connell, Sidney A. Shapiro, and Kathryn A. Watts; and Senior Fellows Cynthia R. Farina, Ronald M. Levin, Jerry L. Mashaw, Nina A. Mendelson, Richard J. Pierce Jr., Richard L. Revesz, and Peter L. Strauss.]

The preamble to Recommendation 2018–6, *Improving Access to Regulations.gov’s Rulemaking Dockets* properly opens with the statement that

As agencies develop regulations, they often seek input from the public. In order to submit an informed comment, a member of the public needs to be able to at least: (1) Access the proposed rule and the agency’s justification for it; and (2) access materials upon which the agency substantially relied to develop the proposed rule. Commenters should also be able to access other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible.

Members of the public, especially those who are subject to the rule, should be able easily to determine whether further action has been taken on the proposed rule and, when a final rule has been issued, to access the rule and all materials, including public comments, that informed its development. This Recommendation seeks to make it easier for members of the public to access these materials on *Regulations.gov*, thereby allowing them to contribute more effectively to the rulemaking process and understand their regulatory obligations.

As teachers of Administrative Law, we enthusiastically subscribe to these aims. The Recommendation does not promote them as fully as it could have, however, because it does not address the absence of comments and materials that may be submitted by other government agencies, including the Office of Information and Regulatory Affairs (OIRA), from the *Regulations.gov* docket. Some government discussions, of course, are pre-decisional policy discussions that the Freedom of Information Act (FOIA) permits government agencies to withhold from disclosure. But much of the material provided rulemaking agencies in other agencies’ comments constitutes both data and other matters that would have to be disclosed in response to a FOIA request, and “materials upon which the agency substantially relied to develop

the proposed rule.” Moreover, Executive Order 12,866 and its amendments promise the publication of certain OIRA communications, to an extent that might not be required under FOIA but nonetheless could contribute to the important ends this Recommendation supports. Academic research has shown, again and again, that these promises are not being fulfilled; *Regulations.gov* is essentially devoid of the governmental agency contributions to rulemaking we are certain have been ongoing, and knowledge of which would allow members of the public “to contribute more effectively to the rulemaking process and understand their regulatory obligations.”

In the Assembly’s discussion of this Recommendation, this important gap was discussed, and the suggestion made that the Recommendation should invite the inclusion of government contributions to *Regulations.gov*, at least to the extent that those contributions would be subject to disclosure in response to a proper FOIA request. The Assembly failed to act on this suggestion after an objection that the issue had not been explored at earlier stages of the Conference’s process. Whatever the merit of that procedural objection, the omission is regrettable. We hope that agencies will include these government contributions in their rulemaking dockets, so that *Regulations.gov* may better enable the public to “access materials upon which the agency substantially relied to develop the proposed rule . . . [and] other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible.”

The members who have joined in this statement are mindful that the issue of disclosure of intra-government communications arises in multiple contexts. Another such context is the set of additional disclosure principles prescribed in Executive Order 12,866. This order requires federal agencies and OIRA, following publication or issuance of a regulatory action subject to the order, to publish what has been submitted to OIRA, to identify any substantive changes between the draft submitted to OIRA and the published rule, and to identify those changes made at OIRA’s suggestion or recommendation. Any such disclosures would be a natural, and welcome, element of *Regulations.gov*. These broader issues also remain available as topics that the Conference may wish to take up in the future.

Administrative Conference Recommendation 2018–7

Public Engagement in Rulemaking

Adopted December 14, 2018

Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.¹ Agencies, however, often face challenges in involving a variety of affected interests and interested persons in the rulemaking process.

The Administrative Procedure Act (APA) recognizes the value of public participation in rulemaking by requiring agencies to publish a notice of a proposed rulemaking (NPRM) in the **Federal Register** and provide interested persons an opportunity to comment on rulemaking proposals.² Other statutes, including the Federal Advisory Committee Act (FACA)³ and Negotiated Rulemaking Act,⁴ describe other means to engage representatives of identified interests in the rulemaking process. In many rulemakings, however, agencies rely primarily on notice-and-comment procedures to solicit public input. Although the notice-and-comment process generates important information, agencies can sometimes benefit from engaging the public at other points in the process and through other methods, particularly as they identify regulatory issues and develop potential options before issuing NPRMs.

The Conference has previously adopted several recommendations directed at expanding participation in the rulemaking process. These previous recommendations address a variety of issues, including rulemaking petitions, advisory committees, negotiated rulemaking, social media, comment and reply periods, and plain language in regulatory drafting.⁵ This

¹ Michael Sant’Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 9–17 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/public-engagement-rulemaking-final-report>.

² 5 U.S.C. 553(b)–(c).

³ Federal Advisory Committee Act, Public Law 92–463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2).

⁴ Negotiated Rulemaking Act, Public Law 101–648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. 561–70).

⁵ See Admin. Conf. of the U.S., Recommendation 2017–3, *Plain Language in Regulatory Drafting*, 82 FR 61,728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017–2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 FR 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014–6, *Petitions for Rulemaking*, 79 FR 75,117 (Dec. 17, 2014); Admin. Conf. of the

Recommendation builds on these past recommendations and focuses on supplemental tools agencies can use to expand their public engagement.

For the purposes of this Recommendation, “public engagement” refers to activities by the agency to elicit input from the public. It includes efforts to enhance public understanding of agency rulemaking and foster meaningful participation in the rulemaking process by members of the public. Because some affected interests and other interested persons may not be aware of agency rulemakings or understand how to participate, effective public engagement may require agencies to undertake deliberate outreach and public education efforts to overcome barriers to participation, including geographical, language, resource, and other constraints.⁶

Strategic planning focused on public engagement can help agencies solicit and obtain valuable information from a greater number of affected interests with diverse experiences, information, and views throughout the rulemaking process, including experts, individuals, or entities with knowledge germane to the proposed rule who do not typically participate in the notice-and-comment process.⁷ An agency should begin by developing a general policy for public engagement that identifies factors or establishes standards for the agency to use to design engagement efforts in individual rulemakings. The agency can then apply or tailor its general policy to specific rule proposals, reflecting the unique purposes, goals, and needs of each rulemaking. Well-designed planning for specific rulemakings will include consideration of a variety of methods to obtain valuable information

U.S., Recommendation 2013–5, *Social Media in Rulemaking*, 78 FR 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011–8, *Agency Innovations in e-Rulemaking*, 77 FR 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011–7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 FR 2261 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011–2, *Rulemaking Comments*, 76 FR 48,791 (Aug. 9, 2011).

⁶ See, e.g., Cary Coglianese, Federal Agency Use of Electronic Media in the Rulemaking Process 46–48 (Dec. 5, 2011) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-agency-innovations-report> (discussing the “digital divide” and differing internet usage among a variety of demographics).

⁷ For a discussion of general public engagement policies, see Sant’Ambrogio & Staszewski, *supra* note 1, at 138–43. For examples of general public engagement policies, see U.S. Dep’t of the Interior, Nat’l Park Serv., Director’s Order #75A: Civic Engagement and Public Involvement Policy (Aug. 30, 2007); Env’tl. Prot. Agency, Public Involvement Policy of the U.S. Environmental Protection Agency (2003).

from diverse sources at various stages during the rulemaking process.⁸

Not all rulemakings, however, warrant enhanced public engagement. Some rules hold little public salience or address narrow issues, so public engagement beyond the notice-and-comment process is unlikely to provide the agency with additional relevant information. On the other hand, some rules are complex, affect a wide range of interests in a variety of ways, or implicate controversial issues. For these rules, additional, well-designed public engagement may be worthwhile to obtain information from affected interests and other interested persons who might not otherwise participate in the rulemaking and encourage more useful participation from those who do. Agencies considering enhanced public engagement for a particular rule must carefully evaluate many factors, including agency resources, rule complexity, and the prevalence of otherwise missing information or views, before deciding whether to pursue additional outreach. Furthermore, even after agencies decide to undertake enhanced public engagement when developing their rules, they must decide what methods are best suited to accomplish their outreach goals. Each method may offer distinct benefits but come with varying costs or other limitations. Agencies should consider how a specific method of public engagement will assist them in obtaining the type of information and feedback they seek. Agencies should also consider the best timing for using a method of public engagement. Finally, with whatever public engagement method an agency chooses, it should demonstrate a sincere desire to learn from those who participate and should display open-mindedness about the relevant issues presented by the rulemaking.

This Recommendation highlights three main methods for supplementing the notice-and-comment process. First, agencies can publish “requests for information” (RFIs) or “advance notices of proposed rulemaking” (ANPRMs) in the **Federal Register** to request data, comments, or other information on regulatory issues before proceeding with a specific regulatory proposal.⁹ Although these two mechanisms are similar, RFIs are generally used when an agency is determining whether to

⁸ For a discussion of specific public engagement plans for individual rulemaking initiatives, see Sant’Ambrogio & Staszewski, *supra* note 1, at 143–49.

⁹ Some agencies refer to documents similar to RFIs and ANPRMs under other names, including “notice of inquiry.”

proceed at all and, if so, what general approach to take.¹⁰ ANPRMs are generally used when the agency has formulated one or more tentative regulatory options and seeks input on which option to propose.¹¹ RFIs and ANPRMs may be particularly beneficial when agencies seek additional information to identify areas of concern, compare potential approaches to problems, and evaluate and refine regulatory proposals. RFIs and ANPRMs provide agencies with additional opportunities to solicit information without organizing potentially costly or burdensome face-to-face engagement efforts.

Second, agencies may engage in targeted outreach to identify and engage affected interests that might not otherwise participate in the rulemaking.¹² RFIs and ANPRMs are useful tools to enhance participation early in the rulemaking process. However, RFIs and ANPRMs published in the **Federal Register** may only reach affected interests that are already likely to participate in the rulemaking. Targeted outreach efforts allow agencies to seek information from individuals and entities that may not read the **Federal Register** or otherwise would be unaware of or unable to participate effectively in the notice-and-comment process. To engage in targeted outreach, an agency identifies affected interests that are not likely to participate and undertakes efforts to notify those interests of the rulemaking and encourage and facilitate their participation. Targeted outreach can take on a variety of forms, and agencies tailor these efforts to specific affected interests and rules.

Third, agencies may also convene meetings of affected interests and other interested persons to obtain useful feedback on potential regulatory alternatives and elicit information through a process of interactive dialogue. Meetings can educate participants and allow them to consider and respond to differing views, thereby

informing decision-makers in the process. When all goes well, meetings can foster the generation of new ideas and creative solutions that would be missed when participants simply assert their existing positions. Meetings also can lead to some change in participants' positions in light of a greater understanding of others' concerns.

Agencies must carefully plan meetings to help ensure that they will elicit the type of information sought.¹³ An agency can structure a meeting to generate open-ended dialogue, allowing participants the opportunity to raise their own concerns or issues.¹⁴ Alternatively, an agency can structure a meeting so that the agency's priorities dictate the agenda or discussion topics. Although meetings, whether designated as workshops, hearings, or listening sessions, can vary in their format, they can be structured so that the requirements of FACA or the Paperwork Reduction Act (PRA) are not applicable.¹⁵

Agencies should make information available to the public about individual rulemakings and opportunities to participate. The availability of this information will help ensure that members of the public are adequately informed and can participate meaningfully in response to RFIs, ANPRMs, meeting opportunities, and other forms of public engagement.¹⁶ For example, an agency may list such information on a dedicated web page or a section of a page on an agency's website. Doing so could help that agency inform and engage affected interests and other interested persons throughout the rulemaking process.¹⁷

¹³ For a discussion of focus groups and listening sessions, see *id.* at 48–54 (discussing the use of focus groups by the National Highway Traffic Safety Administration to address public fears about airbags and potential labels on tire fuel efficiency), 65–68 (discussing use of facilitated listening sessions by the Nuclear Regulatory Commission), 80–82 (discussing public meetings in general and EPA's use of “shuttle diplomacy” and technical workshops).

¹⁴ For a discussion of different techniques to facilitate enhanced deliberation, see *id.* at 128–138.

¹⁵ These methods would not implicate FACA as long as they are structured so the group is not collaborating to offer a set of proposals to the agency. See, e.g., *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1233 (D.C. Cir. 1996). These methods also would not implicate the PRA so long as the agency is not circulating a structured set of inquiries. 44 U.S.C. 3502(3) (2012).

¹⁶ For example, the Bureau of Consumer Financial Protection posted prototypes of disclosure forms on its website and sought targeted feedback when it developed rules governing disclosure requirements for home mortgages. See Sant'Ambrogio & Staszewski, *supra* note 1, at 83–84.

¹⁷ See generally Recommendation 2011–8, *supra* note 5.

Recommendation

Public Engagement Planning

1. Agencies should develop and make publicly available general policies for public engagement in their rulemakings. An agency's general policy should address how the agency will consider factors, such as:

- a. the agency's goals and purposes in engaging the public;
- b. The types of individuals or organizations with whom the agency seeks to engage, including experts and any affected interests that may be absent from or insufficiently represented in the notice-and-comment rulemaking process;
- c. how such types of individuals or organizations can be motivated to participate;
- d. what types of information the agency seeks from its public engagement;
- e. how this information is likely to be obtained;
- f. what the agency will do with the information;
- g. when public engagement should occur; and
- h. the range of methods of public engagement available to the agency.

2. An agency's general policy for public engagement should be used to inform public engagement with respect to specific rulemakings. Planning for public engagement for specific rules would best take place at the earliest feasible part of the rulemaking process.

3. In determining whether and how to enhance or target public engagement prior to the publication of a specific proposed rule, agencies should consider factors such as:

- a. The complexity of the rule;
- b. the potential magnitude and distribution of the costs and benefits of the rule;
- c. the interests that are likely to be affected and the extent to which they are likely to be affected;
- d. the information needed and the potential value of experience or expertise from outside the agency;
- e. whether specific forms of enhanced or targeted public engagement are likely to provide useful information, including from experts, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, or other individuals with relevant views that may not otherwise be expressed;
- f. any challenges involved in obtaining informed participation from affected interests or other interested persons likely to have useful information, including the challenge of providing rulemaking materials in a

¹⁰ For a discussion of the use of RFIs during agenda setting and rule development, see *id.* at 50–52, 65 (discussing the use of RFIs by the Department of Energy, the Bureau of Consumer Financial Protection, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation).

¹¹ For a discussion of the use of ANPRMs, see *id.* at 78–80. For example, the Department of Energy routinely issues ANPRMs to solicit public comments on preliminary proposals pursuant to its process rule. See *id.* at 141–43.

¹² For example, the Forest Service conducted targeted outreach, including forums, roundtables, and consultation meetings, seeking the input of recreational users of forests, Native American tribal communities, and state and local government officials when developing its 2012 Planning Rule. See *id.* at 53.

language and form comprehensible to nonexperts whose participation is being sought;

g. whether the rule is likely to be controversial;

h. the time and resources available for enhanced or targeted public engagement as opposed to other uses; and

i. whether additional legal requirements, such as the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply.

4. Agencies should consider using personnel with public engagement training and experience to participate in both the development of their general public engagement policies as well as in planning for specific rules. Agencies should support or provide opportunities to train employees to understand and apply recognized best practices in public engagement.

Timing and Methods of Public Engagement

5. Public engagement should generally occur as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities.

6. *Requests for Information and Advance Notices of Proposed Rulemaking.*

a. Agencies should consider using requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) when they need to:

- i. Gather information or data about the existence, magnitude, and nature of a regulatory problem;
- ii. evaluate potential strategies to address a regulatory issue;
- iii. choose between more than one regulatory alternative; or
- iv. develop and refine a proposed rule.

b. When using RFIs and ANPRMs, agencies should:

- i. Sufficiently convey their receptivity to input;
- ii. pose detailed questions aimed at soliciting the information they need; and
- iii. indicate that they are open to input on other questions and concerns.

c. Agencies should review any comments they receive in response to RFIs and ANPRMs and, when issuing any proposed rule that follows an RFI or ANPRM, explain how these comments informed or influenced the development of the subsequent proposal.

7. *Targeted Outreach.* When agencies believe that their public engagement may not reach all affected interests, they should consider conducting outreach that targets experts not already likely to be involved, individuals with knowledge germane to the proposed

rule who do not typically participate in rulemaking, and members of the public with relevant views that may not otherwise be represented. These targeted outreach efforts should include:

a. Proactively bringing the rulemaking to the attention of affected interests that do not normally monitor the agency's activities;

b. overcoming or minimizing possible geographical, language, resource, or other barriers to participation;

c. motivating participation by explaining the nature of the rulemaking process and how the agency will use public input; or

d. providing information about the issues and questions raised by the rulemaking in an accessible and comprehensible form and manner, so that potential participants are able to provide focused, relevant, and useful input.

8. *Meetings with Affected Interests and Other Interested Persons.*

a. Agencies should consider convening meetings of affected interests and other interested persons to obtain feedback on their priorities and potential regulatory alternatives, particularly when they are unlikely to obtain the same information from written responses to RFIs, ANPRMs, or notices of proposed rulemaking (NPRMs). When conducting a meeting, the agency should:

- i. Determine whether to target and invite specific participants or open the meeting to any interested member of the general public;
- ii. determine whether to conduct the meeting in person, online, or both;
- iii. recruit participants based on the nature of the rule at issue and the type of feedback that the agency seeks;
- iv. consider using a trained facilitator or moderator from inside or outside the agency, as appropriate;
- v. provide background materials for the participants that clearly explain relevant issues and the primary policy alternatives in language and form comprehensible to all types of participants the agency seeks to engage;
- vi. disseminate questions to participants in advance, including either open-ended questions or questions aimed at soliciting specific information the agency needs to make informed decisions;
- vii. determine whether and how to structure interactive dialogue among participants;
- viii. consider recording the session and making that recording publicly available; and
- ix. prepare a summary of the meeting.

b. Agency representatives should convey their receptivity to input during

meetings with affected interests and other interested persons.

c. The agency should consider structuring its meetings in a manner to promote enhanced input from affected interests and other interested persons.

Public Availability of Rulemaking Information

9. To support public engagement prior to the publication of the NPRM, agencies should consider affirmative steps to make publicly available relevant information about the rulemaking, such as by creating a dedicated web page. Agencies should seek to make rulemaking information comprehensible for individuals and groups that do not typically participate in the rulemaking process, such as by using audiovisual materials or other media to supplement more traditional written information in appropriate situations. Information to make available could include:

- a. The status of the rulemaking initiative and opportunities to participate in the process;
- b. an explanation of the rulemaking process, the role of public participation, and the qualities of a useful comment;
- c. an identification of the issues under consideration and related information, presented in forms that are readable and comprehensible by non-experts; and
- d. summaries of public engagement efforts, including any information received from the public or a description of the impact of those efforts.

Administrative Conference Recommendation 2018-8

Public-Private Partnerships

Adopted December 14, 2018

Federal agencies often participate in public-private partnerships (partnerships) to assist in carrying out their missions.¹ A private-sector entity

¹ This Recommendation focuses on partnerships that relate to social welfare topics, such as health, labor, education, and diplomacy. The Recommendation focuses on these kinds of partnerships, as opposed to, for example, infrastructure partnerships, research and development (R&D) partnerships, and activities under the National Technology Transfer and Advancement Act, because social welfare topics are areas of expertise for agencies involved in an interagency working group convened by the Office of the Chairman of the Administrative Conference to develop the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (described below). Readers who are interested in infrastructure partnerships should also consult, among other sources, U.S. Dep't. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015). Those interested in R&D partnerships should also consult, among other

and the federal government may have a variety of reasons for wanting to partner with one another. Both sectors may find, for instance, that a partnership with the other allows them to access more resources and expertise. Expanded access to such resources and expertise may allow them to complement and reinforce their missions, producing outcomes with greater impact than they could achieve working entirely independently of one another.² Recent government-wide initiatives relating to, among other areas, workforce training³ and government effectiveness,⁴ are centered on partnerships.

There is no binding definition of “public-private partnerships” that spans across all agencies, but an interagency working group has defined them as “collaborative working relationships between the U.S. government and non-federal actors in which the goals, structures, and roles and responsibilities of each partner, are mutually determined.”⁵

There is no bright line distinction between partnerships and other forms of collaboration between federal agencies and the private sector, but there are certain characteristics that are indicative of a partnership. With partnerships, there is continuous, ongoing assessment and decision making with respect to the goals and structures of the arrangement, the roles and responsibilities of each partner, and the risks that each partner assumes. Because of the continuous nature of this decision making, there is often a strong alignment of resources: That is, both parties to the partnership generally spend their own materials, time, and money throughout the course of the partnership, without reimbursement from the other partner.

In other forms of collaboration between agencies and the private sector (e.g., procurement contracts), these aspects of the relationship are typically determined at a single point in time and memorialized through a legally binding instrument such as a contract. Although it is possible for a partnership to be formalized through a contract, partnerships are far more often formalized through non-binding memoranda of understanding (MOUs) or

memoranda of agreement (MOAs). These instruments are often quite concrete and specific with respect to the goals of the partnership, but broad and flexible with respect to the roles and responsibilities of the partners and the governance of the partnership. They are therefore better suited than contracts for formalizing partnerships.

This Recommendation does not attempt to adopt a definitive definition of partnerships, but the foregoing characteristics should help agencies identify the types of relationships that fall under the partnership umbrella. Ultimately, it is up to agencies to determine what relationships qualify as partnerships and under what circumstances they should draw upon the recommendations below.⁶

Development of the Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level

In the spring of 2017, at the suggestion of the Committee on Regulation, the Conference’s Office of the Chairman convened dozens of federal officials from 19 different agencies who actively work on partnerships. Throughout the course of three meetings from July 2017 through February 2018, and various discussions with individual group members, the group collaboratively drafted the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level (Guide)*.⁷

The *Guide* addresses major legal issues that agencies will likely encounter as they participate in partnerships. The *Guide* also offers a definition of “public-private partnerships,” briefly discusses a previous interagency effort regarding partnerships, highlights activities that agencies often undertake as part of partnerships, and provides examples of specific partnerships. Finally, the *Guide* discusses issues pertaining to agencies’ vetting of potential private partners.

⁶ For examples of relationships that some agencies consider to be partnerships, see Occupational Safety & Health Admin., U.S. Dep’t of Labor, *Partnership: An OSHA Cooperative Program*, <https://www.osha.gov/dcsp/partnerships/index.html>; U.S. Dep’t of Justice, *Partnership for Freedom*, <https://ovc.ncjrs.gov/humantrafficking/announcements.html> (recently ended); and U.S. Dep’t of State, *Diplomacy Lab*, <https://www.state.gov/s/partnerships/ppp/diplab>.

⁷ See Public-Private Partnerships Working Group, Admin. Conf. of the U.S., Office of the Chairman, *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (Dec. 2018), <https://www.acus.gov/report/guide-legal-issues-involved-public-private-partnerships-federal-level-final-12-6-2018>.

Potential Inefficiencies in Vetting Private Entities

Officials across agencies can benefit from sharing experiences with one another regarding partnerships. One issue that has emerged as a particularly good candidate for such interagency discussion is how agencies vet potential private-sector partners. Agencies vet potential private partners to avoid possible conflicts of interest or harm to the agency’s reputation. Vetting can be a time intensive and potentially duplicative enterprise, both for the agencies and for potential private partners that are asked to submit information to agencies.⁸

Agencies have differing practices with respect to vetting of potential private-sector partners. Some agencies have central vetting units with officers whose exclusive responsibility is to vet proposed private-sector partners and an official whose responsibility is to approve partnerships for the entire agency. Other agencies lack a central vetting unit and, instead, authorize each of their offices to conduct its own vetting. Some of the latter agencies produce resources that all staff are directed to use.

Duplication of vetting happens across agencies (“external duplication”) when two or more agencies gather the same information about the same potential private partner. Duplication also happens within agencies (“internal duplication”) when two or more parts of a single agency gather the same information about the same potential private partner. Some agencies have developed or are developing practices to avoid internal duplication. There do not appear to have been robust efforts to avoid external duplication.

Agencies with a centralized vetting unit are better able to avoid internal duplication by maintaining copies of their vetting reports and updating those reports rather than starting anew when there is another request to partner with that same entity. Some agencies that do not have centralized vetting units maintain central databases that allow all employees to manage partnerships and upload relevant documents, including vetting results. Other employees, as they begin exploring potential partnerships, can access these databases and search them for past or current partnerships and supporting documentation before vetting a potential partner, thereby

⁸ See InterAction, *Partner Vetting Independent Assessment: Insufficient Justification for a Global Rollout 17* (2016), available at <https://www.interaction.org/document/partner-vetting-independent-assessment-insufficient-justification-global-rollout>.

sources, Albert N. Link, *Public/Private Partnerships: Innovation Strategies and Policy Alternatives 7–22* (Springer 2006).

² See CMTY, *P’SHPIS Interagency Policy Comm., Building Partnerships: A Best Practices Guide 2* (2013).

³ See Exec. Order No. 13,845, 83 FR 35,099 (July 24, 2018).

⁴ See Office of Mgmt. & Budget & Gen. Servs. Admin., *The Gear Center*, <https://www.performance.gov/GEARcenter>.

⁵ See CMTY, *P’SHPIS Interagency Policy Comm., supra* note 2, at 1 n.1.

reducing or eliminating duplicative vetting.

Agency Officials Exchanging Best Practices Regarding Partnerships

An online forum could be structured to allow agency officials to exchange best practices on any number of topics involving partnerships, such as how to:

- Initiate or create a partnership in a manner that is consistent with ethical requirements,
- Evaluate the success of partnerships,
- Structure an internal vetting process (for example, whether there should be a central vetting unit, or whether vetting should be carried out office by office),
- Develop internal processes to reduce duplication in vetting, and
- Resolve complex legal issues encountered during the lifecycle of partnerships.

The forum could also allow agency officials to exchange resources with one another, including sample MOUs and MOAs, and checklists or worksheets that agencies use when vetting potential private-sector partners or structuring partnerships.

Additionally, while taking into consideration relevant laws and protections regarding privacy, ethics, and other restrictions on disclosure of personally identifiable information, agencies can consider sharing notes about specific private-sector entities that have been vetted. These notes may help reduce external duplication by allowing agencies to see the results of other agencies' vetting of specific entities.

MAX.gov, a website established by the Office of Management and Budget in 2007, can offer such a forum. The website can be accessed only by those with a federal government email address. An agency could set up an interagency partnership group on *MAX.gov* that would allow agency officials to exchange best practices with respect to partnerships and share resources.

Recommendation

1. All agencies that are considering, or are currently participating in, a public-private partnership (partnership) should distribute the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level (Guide)* (available at <https://www.acus.gov/report/guide-legal-issues-involved-public-private-partnerships-federal-level-final-12-6-2018>) to attorneys in their general counsels' offices, or other central legal offices, and should distribute it to partnership staff throughout the agency.

2. The Office of the Chairman of the Administrative Conference should create a group on *MAX.gov* titled "Strategies for Developing and Managing Successful Partnerships." The group should be structured to allow agency officials to exchange best practices with one another regarding partnerships. It should also allow agency officials to share resources, including sample memoranda of understanding or agreement, and checklists or worksheets that agency officials use when vetting potential private-sector partners.

3. All agencies that are considering, or are currently participating in, a partnership should encourage staff responsible for partnership efforts to join the *MAX.gov* group and actively participate in the discussion topics and uploading of resources. Participation should be consistent with protections regarding privacy, ethics, and other restrictions on disclosure of personally identifiable information and should be undertaken in consultation with the agency's general counsel's office or other designated legal office.

[FR Doc. 2019-01284 Filed 2-5-19; 8:45 am]

BILLING CODE 6110-01-P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Oregon State University of Corvallis, Oregon, an exclusive license to the variety of blackberry described in U.S. Plant Patent Application Serial No. 15/998,301, "BLACKBERRY PLANT NAMED 'TWILIGHT'", filed on August 2, 2018.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4-1174, Beltsville, Maryland 20705-5131.

FOR FURTHER INFORMATION CONTACT: Brian T. Nakanishi of the Office of Technology Transfer at the Beltsville address given above; telephone: 301-504-5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this plant variety are assigned to the

United States of America, as represented by the Secretary of Agriculture. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Mojdeh Bahar,

Assistant Administrator.

[FR Doc. 2019-01220 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-03-P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Golden Valley Organics, Inc. dba BioWest Ag Solutions of Nampa, Idaho, an exclusive license to U.S. Patent No. 9,578,884, "PSEUDOMONAS SPECIES HAVING WEED-SUPPRESSIVE ACTIVITY AND BENIGN SOIL SURVIVAL TRAITS FOR ANNUAL GRASS WEED MANAGEMENT", issued on February 28, 2017.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4-1174, Beltsville, Maryland 20705-5131.

FOR FURTHER INFORMATION CONTACT: Brian T. Nakanishi of the Office of Technology Transfer at the Beltsville address given above; telephone: 301-504-5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Golden Valley Organics, Inc. dba BioWest Ag Solutions of Nampa, Idaho has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with

the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Mojdeh Bahar,

Assistant Administrator.

[FR Doc. 2019-01226 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-03-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 1, 2019.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13 on or after the date of publication of this notice. Comments are requested regarding: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, Washington, DC; New Executive Office Building, 725 17th Street NW, Washington, DC 20503. Commenters are encouraged to submit their comments to OMB via email to: OIRA_Submission@omb.eop.gov or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602.

Comments regarding these information collections are best assured of having their full effect if received by March 8, 2019. Copies of the submission(s) may be obtained by calling (202) 720-8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Stocks Reports.

OMB Control Number: 0535-0007.

Summary of Collection: The primary function of the National Agricultural Statistics Service (NASS) is to prepare and issue current official State and national estimates of crop and livestock production, stocks, disposition, and prices. As part of this function, estimates are made for stocks of off-farm grains and oilseeds, potatoes, peanuts, hops, and rice. Grain and oilseed stocks in all positions (on-farm and off-farm) are estimated quarterly. Grain stock estimates are one of the most important NASS estimates, which are watched closely by growers and industry groups. General authority for data collection is granted under U.S. Code Title 7, Section 2204. The Hop Growers of America provides the data collection for much of the production information because of sensitivity issues an impartial third party, NASS, collects stocks and price information.

Need and Use of the Information: NASS collects information to administer farm program legislation and make decisions relative to the export-import programs. Estimates of stocks provide essential statistics on supplies and contribute to orderly marketing. Farmers and agribusiness firms use these estimates in their production and marketing decisions. Collecting this information less frequently would eliminate data needed by the government, and industry and farmers to keep abreast of changes at the State and national level.

Description of Respondents: Business or other for profit; Farms.

Number of Respondents: 6,590.

Frequency of Responses: Reporting: Monthly; Quarterly; Semi-annually; Annually.

Total Burden Hours: 5,230.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019-01305 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-20-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 1, 2019.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13 on or after the date of publication of this notice. Comments are requested regarding: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, Washington, DC; New Executive Office Building, 725 17th Street NW, Washington, DC, 20503. Commenters are encouraged to submit their comments to OMB via email to: OIRA_Submission@omb.eop.gov or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602.

Comments regarding these information collections are best assured of having their full effect if received by March 8, 2019. Copies of the submission(s) may be obtained by calling (202) 720-8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: List Sampling Frame Survey

OMB Control Number: 0535-0140

Summary of Collection: General authority for these data collection activities is granted under U.S. Code

Title 7, Section 2204 which specifies that “The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain . . . by the collection of statistics . . .”. The primary objective of the National Agricultural Statistics Service (NASS) is to provide data users with timely and reliable agricultural production and economic statistics, as well as environmental and specialty agricultural related statistics. To accomplish this objective, NASS relies heavily on the use of sample surveys statistically drawn from “List Sampling Frame.” The List Sampling Frame is a database of names and addresses, with control data, that contains the components values from which these samples can be drawn.

Need and Use of the Information: The List Sampling Frame Surveys are used to develop and maintain a complete list of possible farm operations. Data from criteria surveys are used to provide control data for new records on the list sampling frame. This information is utilized to define the size of operation, define sample populations and establish eligibility for the Census of Agriculture. New names and addresses of potential farms are obtained on a regular basis from growers association, other government agencies and various outside sources. The goal is to produce for each State a relatively complete, current, and unduplicated list of names for statistical sampling for agricultural operation surveys and the Census of Agriculture. This information is used to develop efficient sample designs, which allows NASS the ability to draw reduced sample sizes from the originally large universe populations.

Description of Respondents: Farms.
Number of Respondents: 671,667.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 141,811.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019-01197 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-20-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 31, 2019.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13 on or after the date of publication of this notice. Comments

are requested regarding: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, Washington, DC; New Executive Office Building, 725 17th Street NW, Washington, DC 20503. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602.

Comments regarding these information collections are best assured of having their full effect if received by March 8, 2019. Copies of the submission(s) may be obtained by calling (202) 720-8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Egg, Chicken, and Turkey Surveys.

OMB Control Number: 0535-0004.

Summary of Collection: The primary function of the National Agricultural Statistics Service (NASS) is to prepare and issue current official State and national estimates of crop and livestock production. Thousands of farmers, ranchers, agribusinesses and others voluntarily respond to nationwide surveys about crops, livestock, prices, and other agricultural activities. Estimates of egg, chicken, and turkey production are in an integral part of this program. General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204.

This statute specifies the “The Secretary of Agriculture shall procure and preserve all information concerning agriculture which she can obtain . . . by the collection of statistics . . . and shall distribute them among agriculturists”. Information published from the surveys in this docket is needed by USDA economists and government policy makers to ensure the orderly marketing of broiler chickens, turkeys and eggs.

Need and Use of the Information:

Statistics on these poultry products contribute to a comprehensive program of keeping the government and poultry industry abreast of anticipated changes. All of the poultry reports are used by producers, processors, feed dealers, and others in the marketing and supply channels as a basis for their production and marketing decisions. Government agencies use these estimates to evaluate poultry product supplies.

Description of Respondents: Farms; Business or other for profit.

Number of Respondents: 2,432.

Frequency of Responses: Reporting: Weekly; Monthly; Annually.

Total Burden Hours: 2,930.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019-01148 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-20-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2018-0092]

Notice of Request for Extension of Approval of an Information Collection; Special Need Requests Under the Plant Protection Act

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Animal and Plant Health Inspection Service (APHIS) to request an extension of approval of an information collection associated with the regulations to allow States to impose prohibitions or restrictions on specific articles in addition to those required by APHIS to help protect against the introduction and establishment of plant pests.

DATES: We will consider all comments that we receive on or before April 8, 2019.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0092>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2018-0092, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0092> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on special need requests under the Plant Protection Act, contact Dr. Robert Baca, Assistant Director, Compliance and Environmental Coordination, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737-1231; (301) 851-2292. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Special Need Requests Under the Plant Protection Act.

OMB Control Number: 0579-0291.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, which administers regulations to implement the PPA. Regulations governing the interstate movement of plants, plant products, and other articles are contained in 7 CFR part 301, "Domestic Quarantine Notices."

The regulations in "Subpart-Preemption and Special Need Requests" allow States or political subdivisions of States to request approval from APHIS to impose prohibitions or restrictions on the movement in interstate commerce of specific articles that pose a plant health

risk that are in addition to the prohibitions and restrictions imposed by APHIS. This process requires information collection activities, including a pest data detection survey with a pest risk analysis showing that a pest is not present in a State, or if already present, the current distribution in the State, and that the pest would harm or injure the environment and/or agricultural resources of the State or political subdivision.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

- (3) Enhance the quality, utility, and clarity of the information to be collected; and

- (4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 160 hours per response.

Respondents: State governments.

Estimated annual number of respondents: 1.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 1.

Estimated total annual burden on respondents: 160 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 30th day of January 2019.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2019-01153 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2018-0093]

Notice of Request for Reinstatement of an Information Collection; Standards for Privately Owned Quarantine Facilities for Ruminants

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Reinstatement of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a reinstatement of an information collection associated with the regulations for privately owned quarantine facilities for ruminants.

DATES: We will consider all comments that we receive on or before April 8, 2019.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0093>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2018-0093, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0093> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for privately owned quarantine facilities for ruminants, contact Dr. Alexandra MacKenzie, Senior Staff Veterinarian, Live Animal Imports, Strategy and Policy, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737-1236; (301) 851-3300, option #2. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Standards for Privately Owned Quarantine Facilities for Ruminants.

OMB Control Number: 0579–0232.

Type of Request: Reinstatement of an information collection.

Abstract: The Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), authorizes the Secretary of Agriculture to, among other things, prohibit or restrict the importation and interstate movement of animals and animal products into the United States to prevent the introduction of animal diseases and pests.

The regulations in 9 CFR part 93 govern the importation into the United States of specified animals and animal products in order to help prevent the introduction of various animal diseases into the United States. The regulations in part 93 require, among other things, that certain animals, as a condition of entry, be quarantined upon arrival in the United States. The Animal and Plant Health Inspection Service operates animal quarantine facilities and also authorizes the use of quarantine facilities that are privately owned and operated for certain animal importations.

The regulations in subpart D of part 93 (9 CFR 93.400 through 93.436) pertain to the importation of ruminants. Ruminants include all animals that chew the cud, such as cattle, buffaloes, sheep, goats, deer, antelopes, camels, llamas, and giraffes. Ruminants imported into the United States must be quarantined upon arrival for at least 30 days, with certain exceptions. However, ruminants from Canada and Mexico are not subject to this quarantine.

The regulations for privately owned quarantine facilities for ruminants require the use of certain information collection activities, including an application for facility approval, a compliance agreement explaining the conditions under which the facility must be operated, creation and maintenance of a daily log of persons entering and leaving the facility while quarantine is in process, request for variance, a manual of standard operating procedures, and maintenance of certain records covering quarantine operations.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 1.07 hours per response.

Respondents: Owners/operators of privately owned quarantine facilities for ruminants.

Estimated annual number of respondents: 5.

Estimated annual number of responses per respondent: 12.

Estimated annual number of responses: 60.

Estimated total annual burden on respondents: 64 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 30th day of January 2019.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2019–01145 Filed 2–5–19; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2018–0100]

Notice of Request for Reinstatement of an Information Collection; Federal Plant Pest and Noxious Weeds Regulations

ACTION: Reinstatement of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request the reinstatement of an information collection associated with the Federal plant pest and noxious weeds regulations.

DATES: We will consider all comments that we receive on or before April 8, 2019.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0100>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2018–0100, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0100> or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information regarding the Federal plant pest and noxious weeds regulations, contact Dr. Colin Stewart, Assistant Director, Pests, Pathogens, and Biocontrol Permits Branch, PHP, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 851–2237. For more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

SUPPLEMENTARY INFORMATION:

Title: Federal Plant Pest and Noxious Weeds Regulations.

OMB Control Number: 0579–0054.

Type of Request: Reinstatement of an information collection.

Abstract: The Plant Protection Act (the Act, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, exportation, or interstate movement of plants, plant products, biological control organisms, noxious weeds, articles, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of plant pests or noxious weeds into the United States or their dissemination within the United States. The associated regulations that were issued by the Animal and Plant Health Inspection Service (APHIS) are located in 7 CFR parts 330 and 360.

These regulations contain information collection activities that include, but are not limited to, applications for permits

and cooperative agreements to import or handle regulated articles or to move regulated articles interstate, amendments and appeals, consultations, site assessments, inspections, certifications, labeling of containers and bags, and recordkeeping. These information collection activities allow APHIS to evaluate the risks associated with the importation or interstate movement of plant pests, noxious weeds, and soil, and also assist with developing risk mitigations, if necessary, for the importation or interstate movement of plant pests, noxious weeds, and soil.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.243 hours per response.

Respondents: Importers and shippers of plant pests, noxious weeds, and other regulated articles; owners/operators of regulated garbage-handling facilities; State plant health officials; Tribal groups; and individuals.

Estimated annual number of respondents: 4,844.

Estimated annual number of responses per respondent: 18.

Estimated annual number of responses: 85,889.

Estimated total annual burden on respondents: 20,879 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request

for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 30th day of January 2019.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2019-01144 Filed 2-5-19; 8:45 am]

BILLING CODE 3410-34-P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the New Jersey Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the New Jersey Advisory Committee to the Commission will convene by conference call, on Friday, February 8, 2019 at 11:30 a.m. (EST). The purpose of the meeting is to discuss the topics under consideration and to select the Committee's civil rights project; to select the Committee Secretary.

DATES: Friday, February 8, 2019, at 11:30 a.m. (EST).

Public Call-In Information:

Conference call number: 1-888-394-8218 and conference call ID number: 6970676.

FOR FURTHER INFORMATION CONTACT: Ivy L. Davis, at ero@usccr.gov or by phone at 202-376-7533

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1-888-394-8218 and conference call ID number: 6970676. Please be advised that before placing them into the conference call, the conference call operator may ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number herein.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1-800-877-8339 and providing the operator with the toll-free conference call number: 1-888-394-8218 and conference call ID number: 6970676.

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

Records and documents discussed during the meeting will be available for public viewing as they become available at <https://gsageo.force.com/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzjVAAQc> the "Meeting Details" and "Documents" links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, www.usccr.gov, or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda: Friday, February 8, 2019 at 11:30 a.m. (EST)

- I. Welcome and Roll Call
- II. Planning Meeting
 - Discuss Project Topics
 - Select Committee Secretary
- III. Other Business
- IV. Public Comment
- V. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102-3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the federal government shutdown.

Dated: January 31, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019-01183 Filed 2-5-19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S-97-2018]

Approval of Subzone Status; Albany Safran Composites LLC; Rochester, New Hampshire

On July 5, 2018, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Pease Development

Authority, grantee of FTZ 81, requesting subzone status subject to the existing activation limit of FTZ 81, on behalf of Albany Safran Composites LLC, in Rochester, New Hampshire.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (83 FR 32072–32073, July 11, 2018). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to establish Subzone 81E was approved on September 26, 2018, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 81's 2,000-acre activation limit.

Dated: January 31, 2019.

Andrew McGilvray,
Executive Secretary.

[FR Doc. 2019–01279 Filed 2–5–19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–03–2019]

Foreign-Trade Zone 50—Long Beach, California; Application for Subzone; Fender Musical Instruments Corporation, San Bernardino and Corona, California

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Board of Harbor Commissioners of the Port of Long Beach, grantee of FTZ 50, requesting subzone status for the facilities of Fender Musical Instruments Corporation (Fender), located in San Bernardino and Corona, California. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on January 31, 2019.

The proposed subzone would consist of the following sites: *Site 1* (15.28 acres) 1295 East Central Avenue, San Bernardino; and, *Site 2* (9.12 acres) 301 and 311 Cessna Circle, Corona. The applicant has indicated that a notification of proposed production activity will be submitted which will be published separately for public comment. The proposed subzone would be subject to the existing activation limit of FTZ 50.

In accordance with the FTZ Board's regulations, Christopher J. Kemp of the

FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is March 18, 2019. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 2, 2019.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230–0002, and in the "Reading Room" section of the FTZ Board's website, which is accessible via www.trade.gov/ftz.

For further information, contact Christopher J. Kemp at Christopher.Kemp@trade.gov or (202) 482–0862.

Dated: January 31, 2019.

Andrew McGilvray,
Executive Secretary.

[FR Doc. 2019–01280 Filed 2–5–19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–185–2018]

Approval of Subzone Status; Future Electronics Distribution Center, L.P.; Southaven, Mississippi

On October 30, 2018, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Tunica County, grantee of FTZ 287, requesting subzone status subject to the existing activation limit of FTZ 287, on behalf of Future Electronics Distribution Center, L.P., in Southaven, Mississippi.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (83 FR 55691, November 7, 2018). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to establish Subzone 287B was approved on January 28, 2019, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 287's 2,000-acre activation limit.

Dated: January 31, 2019.

Andrew McGilvray,
Executive Secretary.

[FR Doc. 2019–01281 Filed 2–5–19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–02–2019]

Foreign-Trade Zone (FTZ) 106—Oklahoma City, Oklahoma; Notification of Proposed Production Activity; Xerox Corporation (Polyester Latex for Printer/Copier Toner); Oklahoma City, Oklahoma

The Port Authority of Greater Oklahoma City, grantee of FTZ 106, submitted a notification of proposed production activity to the FTZ Board on behalf of Xerox Corporation (Xerox), located in Oklahoma City, Oklahoma. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 17, 2018.

Xerox already has authority to produce bulk toner and toner cartridges within Subzone 106D. Xerox has changed its production process and is no longer producing bulk toner and toner cartridges at its Oklahoma City facility. The facility is currently used for the production of polyester latex for printer/copier toner. The current request would add a finished product and foreign status materials/components to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ activity would be limited to the specific foreign-status materials and components and specific finished product described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Xerox from customs duty payments on the foreign-status components used in export production. On its domestic sales, for the foreign-status materials/components noted below, Xerox would be able to choose the duty rate during customs entry procedures that apply to polyester latex (duty rate 5.1%). Xerox would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include dodecanedioic acid, nonanediol, and dodecylbenzenesulfonic acid sodium salt (duty rates range from 4% to 6.5%). The request indicates that certain

materials/components are subject to special duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 18, 2019.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230-0002, and in the "Reading Room" section of the Board's website, which is accessible via www.trade.gov/ftz.

For further information, contact Diane Finver at Diane.Finver@trade.gov or (202) 482-1367.

Dated: January 31, 2019.

Andrew McGilvray,
Executive Secretary.

[FR Doc. 2019-01278 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[C-508-813]

Magnesium From Israel: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 6, 2019.

FOR FURTHER INFORMATION CONTACT: Lana Nigro or Ethan Talbott, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482-1779 or (202) 482-1030, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 13, 2018, the Department of Commerce (Commerce) initiated a countervailing duty (CVD) investigation of imports of magnesium from Israel.¹ The preliminary

¹ See *Magnesium from Israel: Initiation of Countervailing Duty Investigation*, 83 FR 58529 (November 20, 2018).

determination was due no later than January 17, 2019. Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.² As a result, the deadline for the preliminary determination was revised to February 26, 2019.

Postponement of Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires the

Department to issue the preliminary determination in a countervailing duty investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) The petitioner³ makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On December 18, 2018, the petitioner submitted a timely request that Commerce postpone the preliminary CVD determination.⁴ The petitioner stated that it requests postponement so that all parties have sufficient time to develop the record in this investigation.⁵ In accordance with 19 CFR 351.205(e), the petitioner has stated the reasons for requesting a postponement of the preliminary determination, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is

² See memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

³ The petitioner is US Magnesium LLC.

⁴ See the petitioner's Letter titled, "Magnesium from Israel/Petitioner's Request for Postponement of CVD Preliminary Determination," dated December 18, 2018.

⁵ *Id.*

fully extending the deadline for the preliminary determination. Because, as noted above, Commerce tolled the original deadline for the preliminary determination to account for the partial federal government shutdown, the extension is effectively 65 days from the revised deadline for the preliminary determination of February 26, 2019. As a result, the preliminary determination will be due not later than May 2, 2019.⁶ Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: January 31, 2019.

Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019-01266 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[C-570-074]

Common Alloy Aluminum Sheet From the People's Republic of China: Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing a countervailing duty order on common alloy aluminum sheet (common alloy sheet) from the People's Republic of China (China).

DATES: Applicable February 6, 2019.

FOR FURTHER INFORMATION CONTACT: Yasmin Bordas, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482-3813.

SUPPLEMENTARY INFORMATION:

Background

On November 15, 2018, Commerce published its final determination in the countervailing duty investigation of

⁶ This postponement includes the 40-day extension granted as a result of the partial federal government shutdown.

common alloy sheet from China.¹ On January 30, 2019, the ITC notified Commerce of its final determination, pursuant to section 705(d) of the Tariff Act of 1930, as amended (the Act), that an industry in the United States is materially injured within the meaning of section 705(b)(1)(A)(i) of the Act, by reason of subsidized imports of common alloy sheet from China.² Further, the ITC determined that critical circumstances do not exist with respect to imports of common alloy sheet from China.

Scope of the Order

The product covered by this order is common alloy sheet from China. For a complete description of the scope of this order, see the Appendix to this notice.

Countervailing Duty Order

On January 30, 2019, in accordance with section 705(d) of the Act, the ITC notified Commerce of its final determination in this investigation, in which it found that imports of common alloy sheet are materially injuring a U.S. industry.³ Therefore, in accordance with section 705(c)(2) of the Act, we are publishing this countervailing duty order.

As a result of the ITC's final determination, in accordance with section 706(a) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, countervailing duties on unliquidated entries of subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after April 23, 2018, the date on which Commerce published its preliminary countervailing duty determination in the **Federal Register**,⁴ and before August 20, 2018, the effective date on which Commerce instructed CBP to discontinue the suspension of liquidation in accordance with section 703(d) of the Act. Section 703(d) of the

Act states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Therefore, entries of subject merchandise from China made on or after August 20, 2018, and prior to the date of publication of the ITC's final determination in the **Federal Register** are not liable for the assessment of countervailing duties due to Commerce's discontinuation of the suspension of liquidation.

Suspension of Liquidation

In accordance with section 706 of the Act, Commerce will direct CBP to reinstitute the suspension of liquidation of subject merchandise from China, effective the date of publication of the ITC's notice of final determination in the **Federal Register**, and to assess, upon further instruction by Commerce pursuant to section 706(a)(1) of the Act, countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rates for the subject merchandise. On or after the date of publication of the ITC's final injury determination in the **Federal Register**, we will instruct CBP to require, at the same time as importers would normally deposit estimated duties on this merchandise, cash deposits for each entry of subject merchandise equal to the rates noted below. These instructions suspending liquidation will remain in effect until further notice. The all-others rate applies to all producers or exporters not specifically listed, as appropriate.

Company	Subsidy rate (percent)
Chalco Ruimin Co., Ltd	116.49
Chalco-SWA Cold Rolling Co., Ltd	116.49
Henan Mingtai Industrial Co., Ltd./Zhengzhou Mingtai Industry Co., Ltd ⁵	46.48
Yong Jie New Material Co., Ltd ⁶	55.02
All-Others	50.75

Critical Circumstances

With regard to the ITC's negative critical circumstances determination on imports of common alloy sheet from China, we will instruct CBP to lift suspension and to refund any cash

deposits made to secure the payment of estimated countervailing duties with respect to entries of subject merchandise ordered, or withdrawn from warehouse, for consumption on or after January 23, 2018 (*i.e.*, 90 days prior to the date of publication of the *Preliminary Determination*) but before April 23, 2018 (*i.e.*, the date of publication of the *Preliminary Determination*).

Notifications to Interested Parties

This notice constitutes the countervailing duty order with respect to common alloy sheet from China pursuant to section 706(a) of the Act. Interested parties can find a list of countervailing duty orders currently in effect at <http://enforcement.trade.gov/stats/iastatsl.html>.

This order is issued and published in accordance with section 706(a) of the Act and 19 CFR 351.211(b).

Dated: January 31, 2019.

Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Order

The merchandise covered by this order is aluminum common alloy sheet (common alloy sheet), which is a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy sheet within the scope of the order includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet. With respect to not clad aluminum sheet, common alloy sheet is manufactured from a 1XXX-, 3XXX-, or 5XXX-series alloy as designated by the Aluminum Association. With respect to multi-alloy, clad aluminum sheet, common alloy sheet is produced from a 3XXX-series core, to which cladding layers are applied to either one or both sides of the core.

Common alloy sheet may be made to ASTM specification B209-14, but can also be made to other specifications. Regardless of specification, however, all common alloy sheet meeting the scope description is included in the scope. Subject merchandise includes common alloy sheet that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the common alloy sheet.

Excluded from the scope of the order is aluminum can stock, which is suitable for use in the manufacture of aluminum beverage cans, lids of such cans, or tabs used to open such cans. Aluminum can stock is produced to gauges that range from 0.200 mm to 0.292 mm, and has an H-19, H-41, H-48, or H-391 temper. In addition, aluminum can stock has a lubricant applied to the flat surfaces of the can stock to facilitate its

¹ See *Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018) (*Final Determination*).

² See ITC Notification Letter to the Deputy Assistant Secretary for Enforcement and Compliance, referencing ITC Investigation Nos. 701-TA-591 and 731-TA-1399, dated January 30, 2019 (ITC Notification).

³ See ITC Notification; see also *Common Alloy Aluminum Sheet from China* (Inv. Nos. 701-TA-591 and 731-TA-1399 (Final), USITC Publication 4861, December 2018).

⁴ See *Common Alloy Sheet from the People's Republic of China: Preliminary Affirmative Countervailing Duty (CVD) Determination, Alignment of Final CVD Determination with Final Antidumping Duty Determination, and Preliminary CVD Determination of Critical Circumstances*, 83 FR 17651 (April 23, 2018).

⁵ Commerce has found Henan Gongdian Thermal Co., Ltd. to be cross-owned with Henan Mingtai Industrial Co., Ltd. and Zhengzhou Mingtai Industry Co., Ltd.

⁶ Commerce has found the following companies to be cross-owned with Yong Jie New Material: Zhejiang Yongjie Aluminum Co., Ltd.; Zhejiang Nanjie Industry Co., Ltd; Zhejiang Yongjie Holding Co., Ltd; and Nanjie Resources Co., Ltd.

movement through machines used in the manufacture of beverage cans. Aluminum can stock is properly classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7606.12.3045 and 7606.12.3055.

Where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set for the above.

Common alloy sheet is currently classifiable under HTSUS subheadings 7606.11.3060, 7606.11.6000, 7606.12.3090, 7606.12.6000, 7606.91.3090, 7606.91.6080, 7606.92.3090, and 7606.92.6080. Further, merchandise that falls within the scope of the order may also be entered into the United States under HTSUS subheadings 7606.11.3030, 7606.12.3030, 7606.91.3060, 7606.91.6040, 7606.92.3060, 7606.92.6040, 7607.11.9090. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

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DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with November anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

DATES: Applicable February 6, 2019.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482-4735.

SUPPLEMENTARY INFORMATION:

Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with November anniversary dates.

All deadlines for the submission of various types of information,

certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (POR), it must notify Commerce within 30 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at <http://access.trade.gov> in accordance with 19 CFR 351.303.¹ Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy must be served on every party on Commerce's service list.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review. We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 30 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments five days after the deadline for the initial comments.

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, Commerce has found that determinations concerning whether particular companies should be "collapsed" (e.g., treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies

at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (e.g., investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (Q&V) Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where Commerce considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.² Section 773(e) of the Act states that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use

¹ See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

² See Trade Preferences Extension Act of 2015, Public Law 114-27, 129 Stat. 362 (2015).

another calculation methodology under this subtitle or any other calculation methodology.” When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial responses to section D of the questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is Commerce’s policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate

rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities. All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce’s website at <http://enforcement.trade.gov/nme/sep-rate.html> on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the “Instructions for Filing the Certification” in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding³ should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to

their official company name,⁴ should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Status Application will be available on Commerce’s website at <http://enforcement.trade.gov/nme/nme-sep-rate.html> on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to Commerce no later than 30 calendar days from publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.⁵ If the new deadline falls on a non-business day, in accordance with Commerce’s practice, the deadline will become the next business day. Accordingly, based on the revised deadline, we now intend to issue the final results of these reviews not later than January 9, 2020.

Antidumping duty proceedings	Period to be reviewed
India: Welded Stainless Pressure Pipe, A-533-867 Bhandari Foils & Tubes Ltd Hindustan Inox Limited	11/1/17-10/31/18
Indonesia: Monosodium Glumate, A-560-826 PT Cheil Jedang Indonesia	11/1/17-10/31/18
Mexico: Circular Welded Non-Alloy Steel Pipe, A-201-805 Abastecedora y Perfiles y Tubos, S.A. de C.V.	11/1/17-10/31/18

³ Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (e.g., an ongoing administrative review, new shipper review, etc.) and entities that lost their separate rate in the most recently completed

segment of the proceeding in which they participated.

⁴ Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

⁵ See Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Partial Shutdown of the Federal Government,” dated January 28, 2019.

Antidumping duty proceedings	Period to be reviewed
ArcelorMittal Tubular Products Monterrey, S.A. de C.V. Arceros El Aguila y Arco Metal, S.A. de C.V., Arco Metal S.A. de C.V. Burner Systems International De Mexico, S.A. de C.V. Conduit, S.A. de C.V. fischer Mexicana Stainless Steel Tubing S.A. de C.V. fischer Tubtech S.A. de C.V. Fabricaciones Industriales Tumex, S.A. de C.V. Forza Steel, S.A. de C.V. Galvak, S.A. de C.V. Impulsora Tlaxcalteca de Industrias, S.A. de C.V. Industrias Monterrey S.A. de C.V. La Metalica, S.A. de C.V. Lamina y Placa Comercial, S.A. de C.V. Mach 1 Aero Servicios, S. de R.L. de C.V. Mach 1 Global Services, Inc. Maquilacero, S.A. de C.V. Mueller Comercial de Mexico, S. de R.L. de C.V. Nacional de Acero, S.A. de C.V. Nova Tube and Coil de Mexico, S. de R.L. de C.V. Perfiles y Herrajes LM, S.A. de C.V. Precitubo S.A. de C.V. Productos Especializados de Acero, S.A. de C.V. Productos Laminados de Monterrey, S.A. de C.V. PYTCO, S.A. de C.V. Regiomontana de Perfiles y Tubos, S.A. de C.V. RYMCO Servicios Swecomex, S.A. de C.V. Talleres Acerorey, S.A. de C.V. Ternium Mexico, S.A. de C.V. Tubac, S.A. de C.V. Tubacero S. de R.L. de C.V. Tuberia Laguna, S.A. de C.V. Tuberias Procarsa, S.A. de C.V. Tubesa, S.A. de C.V. Tubos Omega	
Mexico: Seamless Refined Copper Pipe and Tube, A-201-838 GD Affiliates S. de R.L. de C.V. IUSA, S.A. de C.V. Nacional de Cobre, S.A. de C.V.	11/1/17-10/31/18
Mexico: Steel Concrete Reinforcing Bar, A-201-844 AceroMex S.A. Aceros Especiales Simec Tlaxcala, S.A. de C.V. Arcelor Mittal ArcelorMittal Celaya ArcelorMittal Cordoba S.A. de C.V. ArcelorMittal Lazaro Cardenas S.A. de C.V. Cia Siderurgica De California, S.A. de C.V. Compafia Siderurgica de California, S.A. de C.V. DE ACERO SA. DE CV. Deacero, S.A.P.I. de C.V. Grupo Simec Grupo Villacero S.A. de C.V. Industrias CH Orge S.A. de C.V. Siderurgica Tultitlan S.A. de C.V. Simec International 6 S.A. de C.V. Talleres y Aceros, S.A. de C.V. Ternium Mexico, S.A. de C.V.	11/1/17-10/31/18
Republic of Korea: Certain Circular Welded Non-Alloy Steel Pipe, A-580-809 Aju Besteel Bookook Steel Chang Won Bending Dae Ryung Daewoo Shipbuilding and Marine Engineering (Dsme) Daiduck Piping Dong Yang Steel Pipe Dongbu Steel Eew Korea Company Histeel Husteel Co. Ltd. Hyundai Rb Hyundai Steel (Pipe Division) Hyundai Steel Company	11/1/17-10/31/18

Antidumping duty proceedings	Period to be reviewed
Kiduck Industries Kum Kang Kind Kumsoo Connecting Miju Steel Manufacturing NEXTEEL Co., Ltd. Samkang M & T Seah Fs Seah Steel Steel Flower Vesta Co., Ltd. Yep Co.	
Taiwan: Certain Circular Welded Non-Alloy Steel Pipe, A-583-814 Chung Hung Steel Chung Hung Steel Corporation (or Chung Hung Steel Co. Ltd.) Far East Machinery Group Far East Machinery Co., Ltd. Femco Femco Pipes & Tubes Founder Land, Co. Ltd. Kao Hsing Chang Iron & Steel Corp. Kounan Steel, Co., Ltd. Luen Jin Enterprise Co., Ltd. Mayer Steel Pipe Corporation Sheng Yu Steel Co., Ltd. Shin Yang Steel Co., Ltd. Tension Steel Industries Co., Ltd. Vulcan Industrial Corporation Wanchi Steel Industrial Co., Ltd. Yieh Hsing Enterprise Co., Ltd. Yieh Phui Enterprise Co., Ltd.	11/1/17-10/31/18
Taiwan: Certain Hot-Rolled Carbon Steel Flat Products, A-583-835 An Feng Steel Co., Ltd. Kao Hsing Chang Iron & Steel Corp. Kao Hsing Chang Iron & Steel Corp. Shang Chen Steel Co. Ltd. Yieh Phui Enterprise Co. Ltd.	11/1/17-10/31/18
Thailand: Certain Hot-Rolled Carbon Steel Flat Products, A-549-817 G Steel Public Company Ltd. Sahaviriya Steel Industries Public Co., Ltd.	11/1/17-10/31/18
The People's Republic of China: 1-Hydroxyethylidene-1,1-Diphosphonic Acid (HEDP), ⁶ A-570-045	11/4/2016-4/30/ 2018
The People's Republic of China: Certain Hot-Rolled Carbon Steel Flat Products, A-570-865 Angang Cold Rolling Sheet (Putian) Angang Steel Co. Ltd.-Anshan Plant Anshan Iron & Steel (Group) Corp Anyang Iron & Steel Group Asia Minmetals Machinery Co. Ltd. Baihualin Metal Industry Group Co. Ltd. Baoshan Iron & Steel Co Ltd. (Baosteel Co. Ltd.) Baosteel Group Corp. Baosteel Group Xinjiang Bayi Iron & Steel Co. Ltd. Baosteel Huangshi Coated and Galvanized Sheet Co. Ltd. Baosteel-NSCI ArcelorMittal Automotive Steel Sheet Co. Ltd. BNA Baosteel Group Shanghai Meishan. Co. Ltd. Baosteel Stainless Steel Co. Ltd. Baotou Iron and Steel (Group) Co. Ltd. Bayi Iron & Steel Co. Ltd. Bazhou Wanlu Metal Production Co. Ltd. Bazhou Jinghua Metal Products Co. Ltd. Beijing Hongyuan Steel Structure Engineering Co. Ltd. Beijing Wanhua Metal Rolling Co. Ltd. Beitai Iron & Steel Group Co. Benlog International Steel Co. Ltd. Benxi Iron & Steel (Group) Special Steel Co. Ltd. BlueScope (Suzhou) Co. Ltd. Bohai Iron & Steel Group Changhe Strip Steel Co. Ltd. Changshu Everbright Material Technology Co. Ltd. Changshu Huaye Steel Strip Co. Ltd. Changshu Jiacheng Coated Steel Co. Ltd. Changzhou Dingang Metal Material Co. Ltd. Chengde Iron & Steel Group Co. Ltd. China Lanjiang Steel Group Co. Ltd.	11/1/17-10/31/18

Antidumping duty proceedings	Period to be reviewed
<p> Chengdu Iron & Steel Co. Ltd. China Oriental Group Co. Ltd. China South East Special Steel Group Co. Ltd. Chongqing Iron & Steel (Group) Co. Ltd. Chuangye Sheet Metal Co. Ltd. Dafeng Honglian Cast Steel Co. Ltd. Dalian POSCO Steel Co. Ltd. Dalian Pujin Steel Plate Co. Ltd. Daye Special Steel Co. Ltd. Delong Holdings Ltd. Dongbei Special Steel Group Co. Ltd. Dongguan Yusheng Steel Co. Ltd. Dongguan Bo Yunte Metal Co. Ltd. Dongyang Global Strip Steel Co. Ltd. Fengchi Refractories Co. of Haicheng City (Fengchi Group) Foshan Apex Stainless Steel Co. Ltd. Technology Foshan Gaoming Jiye Cold Rolling Steel Plate Industrial Co, Ltd. Foshan Jinxi Jinlan Cold Rolled Sheets Co. Ltd. Foshan Vinmay Stainless Steel Co. Ltd. Fujian Casey Steel Group Co. Ltd. Fujian Fuxin Special Steel Co. Ltd. Fujhrn Kaijing Steel Development Co. Ltd. Fujian Sansteel (Group) Co. Ltd. Fujian Wuhang Stainless Steel Products Co. Ltd. Fuzhou Ruilian Iron & Steel Co. Ltd. Guangdong Hanjiang Steel Plate Co. Ltd. Guangdong Huaguan Steel Co. Ltd. Guangdong Huamei Co. Ltd. Guangdong Qingyuan Dongshang Steel Co. Ltd. Guangzhou JFE Steel Sheet Co. Ltd. Guangzhou Jinlai Cold-Rolling Strip Steel Co. Ltd. Handan Iron & Steel Group Co. Ltd. Handan ZhuoLi Fine Steel Plate Co. Ltd. Handan Zongheng Iron & Steel Group Co. Ltd. Hangzhou Iron & Steel Group Co. Haverer Group Ltd. Hebei Dexing Sheet Co. Ltd. Hebei Dongshan Metallurgy Industry Co. Ltd. Hebei Iron & Steel Group Co. Ltd. Hebei Luanhe Industrial Group Co. Ltd. Hebei Puyang Iron & Steel Group Hebei Qian'an Iron & Steel Co. Ltd. Hebei Sunpo Metal Products Co. Ltd. Hebei Tianjie Pipeline Equipment Co. Ltd. Hebei Xinjin Iron & Steel Co. Ltd. Hebei Yanshan Iron & Steel Co. Ltd. Hebei Zhonggang Steel Co. Ltd. Hengshui Jinghua Steel Pipe Co. Ltd. Henan Jianhui Machinery Co. Ltd. Hualu Steel Co. Ltd. Huangshi Shanli Technology Development Co. Ltd. Hunan Valin Iron and Steel Group Co. Ltd. Hunan Valin Lianyuan Iron & Steel Co. Ltd. Hunan Valin Xiangtan Iron & Steel (Group) Co. Ltd. Inner Mongolia Huaye Special Steel Co. Ltd. Jarway Metal Co Ltd JFE Steel Corp (Guangzhou) Jiangsu Cold Rolled (Sutor Group) Jiangsu Dajiang Metal Material Co. Ltd. Jiangsu Gangzheng Steel Sheet Science and Technology Co. Ltd. Jiangsu Guoqiang Zinc-Plating Ind. Co. Ltd. Jiangsu Jiangnan Cold-Rolled Co. Ltd. Jiangsu Jiangnan Industrial Group Co. Ltd. Jiangsu Jida Precision Sheet Co. Ltd. Jiangsu Jijing Metal Technology Co. Ltd. Jiangsu Qiyuan Group Co. Ltd. Jiangsu Shagang Group Co. Ltd. Jiangxi Hongdu SteelWorks Co. Ltd. Jiangyin Hongrun Strip Steel Co. Ltd. Jiangyin Huaxi Iron & Steel Co. Ltd. Jiangyin Jinsong Stainless Steel Co. Ltd. Jiangsu Xicheng Sanlian Holding Group Jiangyin Zongcheng Steel Co. Ltd. </p>	

Antidumping duty proceedings	Period to be reviewed
<p> Jianlong Group Jiaxing Kangshida Stainless Steel Co. Ltd. JinLan Group Jianlong Heavy Industry Group Co. Ltd. Jigang Group Co. Ltd. Jinan Iron & Steel Co. Ltd. Jinxi Jinlan Cold Rolled Sheets Co. Ltd. Jinxi Iron & Steel Group Co. Ltd. Jiangxi Shanlong Strip Steel Co. Ltd. Jiuquin Iron & Steel (Group) Co. Ltd. (nSCO) Kunming Iron & Steel (Group) Co. Ltd. (Kisco) Laiwu Steel Group Ltd. Langfang Fuxin Steel Plate Co. Ltd. Lianyuan Iron & Steel Group Co. Ltd. Liaoning Jiayi Metals & Minerals Co. Ltd. Liaozhong Stainless Steel Corp (LISCO) Lingyuan Iron & Steel (Group) Co. Ltd. Lin Qing Hongji (Group) Co. Ltd. Liuzhou Iron & Steel Co. Maanshan Iron & Steel Co. Ltd. Nanjing Iron & Steel United Co. Ltd. (NISCO) Ningbo Baoxin Stainless Steel Co Ltd Ningbo Iron & Steel Co. Ltd. Ningbo Marina Xi Tie Long Industry Co. Ltd. Ningbo QiYi Precision Metals Co. Ltd. Ningbo Sanshi Metal Co. Ltd. Ningbo Yaoyi Stainless Steel Co. Ltd. Ningbo Zhongmeng Iron & Steel Co. Ltd. North Steel Group Pangang Group Chengdu Steel & Vanadium Co. Ltd. Panhua Group Co. Ltd. Panzhihu.a Iron & Steel (Group) Co (Pangang Group) Pengcheng Special Steel Co. Ltd. Pingxiang Iron & Steel Co. Ltd. Qingdao Baosen Steel Co. Ltd. Qingdao Dtom Metal Products Co. Ltd. Qingdao Hanmei Iron & Steel Co. Ltd. Qingdao Pohang Stainless Steel Co. Ltd. Quindao Weier Plastic Machiner Co. Ltd. Quzhou Yuanli Metal Co. Ltd. Richang Galvanized Plates Ltd. Rizhao Steel Group Sanbao Steel Group Sansteel MinGuang Co. Ltd. SGIS Songshan Co. Ltd. Shaanxi Hongda Industry Co. Ltd. Shaanxi Longmn Industry Co. Ltd. Shanghai Huaye Iron & Steel Group Co. Ltd. Shandong Dongding Steel Rolling Company Shandong Fada Precision Sheet Co. Ltd. Shandong Hong Shengda Steel Plate Co. Ltd. Shandong Hua Stainless Steel Co. Ltd. Shandong Iron & Steel Group Shandong Kerui Steel Plate Co. Ltd. Shandong Lu Steel (Group) Co. Ltd. Lusteel Group Shandong Taishan Iron & Steel Co. Ltd. Shandong Yuanda Sheet Industry Tech Co. Ltd. Shandong Zhongguan Steel Plate Co. Ltd. Shanghai AN LAN Steel Co. Ltd. Shanghai Chengtong Precision Strip Co. Ltd. Shanghai Krupp Stainless Co. Ltd. Shanghai Metal Corp. Shanghai STAL Precision Stainless Steel Co. Ltd. Shenzhen Zhaoheng Specialty Steel Co. Shougang Group Shougang Jingtang United Iron & Steel Co. Ltd. Shunde Posco Coated Steel Sichuan Changcheng Special Steel (Group) Co. Ltd. Sichuan Tranvic Group Co. Ltd. Sino-Coalition (Ningbo) Steel Production Co Ltd Sinosteel Corp South Polar Lights Steel (Shanghai) Co. Ltd. Summary International Co. Ltd. </p>	

Antidumping duty proceedings	Period to be reviewed
<p> Taizhou Yuxiang Stainless Steel Co. Ltd. Taifeng Qiao Metal Products Co. Ltd. Tangshan Fengfeng Cold Rolling Strip Steel Co. Ltd. Tangshan Ganglu Iron & Steel Co Ltd Tangshan Iron & Steel Group Co. Ltd. Tangshan Shengcai Steel Co. Ltd. Tianjin Daqiuzhuang Steel Co. Ltd. Tianjin Haiqing Strip Steel Factory Tianjin Hengxing Steel Industry Co. Ltd. Tianjin Hongmei Steel Strips Co. Ltd. Tianjin Iron & Steel Group Co. Ltd. Tianjin Metallurgical No.1 Steel Group Co. Ltd. Tianjin Nanchen Steels Co. Ltd. Tianjin Pipe (Group) Corp Tianjin Rolling-one Steel Co. Ltd. (TROSCO) Tianjin Tiantic Metallurgical Group Tianjin Tiantie Zhaer Steel Production Co. Ltd. Tianjin Xinyu Color Plate Co. Ltd. Tianjin Jiecheng Galvanized Rolling Plate Co. Ltd. Tianjin Yibo Steel Making Co. Ltd. TISCO-Taiyuan Iron & Steel (Group) Co. Ltd. Tonghua Steel Group Topsky Steel Industry Co. Ltd. Union Steel (China) Valin ArcelorMittal Automotive Steel Co. Ltd. Venus Holdings Shanghai Co. Ltd. WISCO-Wuhan Iron & Steel (Group) Corp Wuhan Iron & Steel Group Echeng Iron & Steel Co. Wuxi Changjiang Sheet Metal Co. Ltd. Wuxi New Dazhong Steel Co. Ltd. Wuxi Xindazhong Steel Sheet Co., Ltd. Wuxi Zhongcai New Material Co. Ltd. Xiehe Group (Zhejiang Concord Group) Xinjiang Bayi Iron & Steel Co. Ltd. Xinyu Iron & Steel Co. Ltd. Xuanhua Steel Group Co. Ltd. Yantai Donghai Steel Strip Co. Ltd. Yichang Three Gorges Quantong Coated and Galvanized Plate Co. Ltd. Yuyao City Shuagniao Metal Strip Co. Ltd. Yieh Phui China Tedrnomaterial Co. Ltd. Yingkou Panpan Chaoshuo High-Tech Steel Co. Ltd. Zhangjiagang New Gangxing Technology Co. Ltd. Zhejiang Hengda Industrial Group Co. Ltd. Zhejiang Huada Steel Industry Co. Ltd. Zhangjiagang Pohang Stainless Steel Co. Ltd. Zhangjiagang Kailai Stainless Steel Co. Ltd. Zhejiang New Yongmao Stainless Steel Co. Ltd. Zhejiang Shunda Weiye Materials Co. Ltd. Zhejiang Southeast Metalsheet Co. Ltd. Zhejiang Taigang Stainless Steel Co. Ltd. Zhejiang Xingristeel Holding Group Co. Ltd. Zhejiang Yuanli Group Zhejiang Jiang Bozhou Steel Industry Co. Ltd. Zhengzhou Tuopu Rolling Technology Co. Ltd. Zhejiang Shenghua Steel Co. Ltd. Zhicheng Steel Material Co. Ltd. Zhongshan Nomura Steel Product Co. Ltd. Zibo Fengyang Color Coated Steel Co. Ltd. </p>	
<p> The People's Republic of China: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses, A-570-958 Chenming HK, Ltd. Gold East (Hong Kong) Trading Co., Ltd. Gold East Paper (Jiangsu) Co., Ltd. Gold Huasheng Paper Co., Ltd. Hainan Jinhai Pulp and Paper Co., Ltd. International Paper and Sun Cartonboard Co., Ltd. Jingxi Chenming Paper Co., Ltd. Ningbo Asia Pulp and Paper Co., Ltd. Ningbo Zhonghua Paper Co., Ltd. Shandong Chenming Paper Holding Ltd. Shandong Huatai Paper Industry Shareholding Co., Ltd. Shandong International Paper and Sun Coated Paperboard Co., Ltd. Shandong Sun Paper Industry Joint Stock Co., Ltd. </p>	11/1/17-10/31/18

Antidumping duty proceedings	Period to be reviewed
Sinar Mas Paper (China) Investment Co. Ltd. Yanzhou Tianzhang Paper Industry Co., Ltd.	
The People's Republic of China: Certain Steel Nails, ⁷ A-570-958	8/1/17-7/31/18
The People's Republic of China: Diamond Sawblades and Parts Therof, A-570-900	11/1/17-10/31/18
ASHINE Diamond Tools Co., Ltd. Bosun Tools Co., Ltd. Chengdu Huifeng New Material Technology Co., Ltd. ⁸ Danyang City Ou Di Ma Tools Co., Ltd. Danyang Hantronic Import & Export Co., Ltd. Danyang Huachang Diamond Tool Manufacturing Co., Ltd. Danyang Like Tools Manufacturing Co., Ltd. Danyang NYCL Tools Manufacturing Co., Ltd. Danyang Tsunda Diamond Tools Co., Ltd. Danyang Weiwang Tools Manufacturing Co., Ltd. Guilin Tebon Superhard Material Co., Ltd. Hangzhou Deer King Industrial and Trading Co., Ltd. Hangzhou Kingburg Import & Export Co., Ltd. Hebei XMF Tools Group Co., Ltd. Henan Huanghe Whirlwind Co., Ltd. Henan Huanghe Whirlwind International Co., Ltd. Hong Kong Hao Xin International Group Limited Hubei Changjiang Precision Engineering Materials Technology Co., Ltd. Hubei Sheng Bai Rui Diamond Tools Co., Ltd. Huzhou Gu's Import & Export Co., Ltd. Jiangsu Fengtai Single Entity ⁹ Jiangsu Huachang Diamond Tools Manufacturing Co., Ltd. Jiangsu Inter-China Group Corporation Jiangsu Youhe Tool Manufacturer Co., Ltd. Orient Gain International Limited Pantos Logistics (HK) Company Limited Pujiang Talent Diamond Tools Co., Ltd. Qingdao Hyosung Diamond Tools Co., Ltd. Qingdao Shinhan Diamond Industrial Co., Ltd. Qingyuan Shangtai Diamond Tools Co., Ltd. Quanzhou Zhongzhi Diamond Tool Co., Ltd. Rizhao Hein Saw Co., Ltd. Saint-Gobain Abrasives (Shanghai) Co., Ltd. Shanghai Jingquan Industrial Trade Co., Ltd. Shanghai Starcraft Tools Co. Ltd. Sino Tools Co., Ltd. Weihai Xiangguang Mechanical Industrial Co., Ltd. Wuhan Baiyi Diamond Tools Co., Ltd. Wuhan Sadia Trading Co., Ltd. Wuhan Wanbang Laser Diamond Tools Co., Ltd. ¹⁰ Wuhan ZhaoHua Technology Co., Ltd. Xiamen ZL Diamond Technology Co., Ltd. Zhejiang Wanli Tools Group Co., Ltd. ZL Diamond Technology Co., Ltd. ZL Diamond Tools Co., Ltd.	
The People's Republic of China: Fresh Garlic, A-570-831	11/1/17-10/31/18
Hebei Golden Bird Trading Co. Ltd. Jinxiang Guihua Food Co., Ltd. Jinxiang Infang Fruit & Vegetable Co., Ltd. Jinxiang Kingkey Trade Co., Ltd. Jining Yongjia Trade Co., Ltd. Jinxiang Changwei Agricultural Products Co., Ltd. Jinxiang Dingyu Agricultural Products Co., Ltd. Jinxiang Feiteng Import & Export Co., Ltd. Jinxiang Fitow Trading Co., Ltd. Jinxiang Hejia Co., Ltd. Jinxiang Honghua Foodstuff Co., Ltd. Jinxiang Wanxing Garlic Products Co. Ltd. Qingdao Doo Won Foods Co., Ltd. Qingdao Joinseafoods Co. Ltd. Qingdao Sea-line International Trading Co., Ltd. Shandong Chengwu Longxing Farm Produce & By-Product Co., Ltd. Shandong Jinxiang Zhengyang Import & Export Co., Ltd. Shijiazhuang Goodman Trading Co., Ltd. Weifang Hongqiao International Logistics Co., Ltd. Xinjiang Longping Hongan Xiwannian Chili Products Co., Ltd. Yantai Jinyan Trading, Inc. Zhengzhou Harmoni Spice Co., Ltd. Zhengzhou Yudishengjin Farm Products Co., Ltd.	

Antidumping duty proceedings	Period to be reviewed
The People's Republic of China: Monosodium Glutamate, A-570-992 Anhui Fresh Taste International Trade Co., Ltd. Baoji Fufeng Biotechnologies Co., Ltd. Blu Logistics (China) Co., Ltd. Bonroy Group Limited Forehigh Trade and Industry Co. Ltd. Fujian Province Jianyang Wuyi MSG Co., Ltd. Golden Banyan Foodstuffs Industry Co., Ltd. Henan Lotus Flower Gourmet Powder Co. Hong Kong Sungiven International Food Co., Limited Hulunbeier Northeast Fufeng Biotechnologies Co., Ltd. K&S Industry Limited King Cheong Hong International Langfang Meihua Bio-Technology Co., Ltd. Liangshan Linghua Biotechnology Co., Ltd. Lotus Health Industry Holding Group Meihau Group International Trading (Hong Kong) Limited Meihua Holdings Group Co., Ltd., Bazhou Branch Neimenggu Fufeng Biotechnologies Co., Ltd. Pudong Prime Int'l Logistics, Inc. Qinhuangdao Xingtai Trade Co., Ltd. S.D. Linghua M.S.G. Incorporated Co. Shandong Linghua Monosodium Glutamate Incorporated Company Shandong Qilu Biotechnology Group Shanghai Totole Food Ltd. Shijiazhuang Standard Imp & Exp Co., Ltd. Sunrise (HK) International Enterprise Limited Tongliao Meihua Biological Sci-Tech Co., Ltd. Zhejiang Medicines & Health	11/1/17-10/31/18
The People's Republic of China: Seamless Refined Copper Pipe and Tube, A-570-964 China Hailiang Metal Trading Foshan Hua Hong Copper Tube Co., Ltd. Golden Dragon Holding (Hong Kong) International Co., Ltd. Golden Dragon Precise Copper Tube Group, Inc. Guilin Lijia Metals Co., Ltd. Hong Kong GD Trading Co., Ltd. Hong Kong Hailiang Metal Ningbo Jintian Copper Tube Co., Ltd. Shanghai Hailiang Copper Co., Ltd. Shanghai Hailiang Metal Trading Limited Sinochem Ningbo Import & Export Co., Ltd. Sinochem Ningbo Ltd. Taicang City Jinxin Copper Tube Co., Ltd. Zhejiang Hailiang Co., Ltd. Zhejiang Jiahe Pipes Inc. Zhejiang Naile Copper Co., Ltd.	11/1/17-10/31/18
United Arab Emirates: Polyethylene Terephthalate (Pet) Film, A-520-803 Flex Middle East FZE	11/1/17-10/31/18
Countervailing Duty Proceedings	
India: Welded Stainless Pressure Pipe, C-533-868 APL Apollo Tubes Ltd. Bhandari Foils and Tubes Ltd. Expeditors International (India) PV Hindustan Inox Limited Shah Foils Ltd. Sun Mark Stainless Pvt. Ltd. Sunrise Stainless Private Limited	1/1/17-12/31/17
The People's Republic of China: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses, C-570-959 Shandong Sun Paper Industry Joint Stock Co., Ltd. Yanzhou Tianzhang Paper Industry Co., Ltd. Shandong International Paper and Sun Coated Paperboard Co., Ltd. International Paper and Sun Cartonboard Co., Ltd. Gold East Paper (Jiangsu) Co. Gold Huasheng Paper Co., Ltd. Gold East (Hong Kong) Trading Co., Ltd. Ningbo Zhonghua Paper Co., Ltd. Ningbo Asia Pulp and Paper Co., Ltd. Hainan Jinhai Pulp and Paper Co., Ltd. Shandong Huatai Paper Industry Shareholding Co. Shandong Chenming Paper Holding Ltd. Chenming HK, Ltd. Jingxi Chenming Paper Co., Ltd.	1/1/17-12/31/17

Antidumping duty proceedings	Period to be reviewed
Sinar Mas Paper (China) Investment Co. Ltd. The People's Republic of China: Chlorinated Isocyanurates, C-570-991 Hebei Jiheng Chemical Co., Ltd.; Heze Huayi Chemical Co., Ltd.; and Juancheng Kangtai Chemical Co., Ltd.	1/1/17-12/31/17
Turkey: Steel Concrete Reinforcing Bar, C-489-819 Acemar International Limited A G Royce Metal Marketing Agir Haddecilik A.S. As Gaz Sinai ve Tibbi Gazlar A.S. Asil Celik Sanayi ve Ticaret A.S. Bastug Metalurji Sanayi AS Colakoglu Dis Ticaret A.S. Colakoglu Metalurji A.S. Demirsan Haddecilik Sanayvi Ve Ticaret AS Diler Dis Ticaret A.S. Dufenco Investment Services SA Dufenco Celik Ticaret Limited Ege Celik Endustrisi Sanayi ve Ticaret A.S. Ekinciler Demir ve Celik Sanayi Anonim Sirketi Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. Izmir Demir Celik Sanayi A.S. Kaptan Demir Celik Endustrisi ve Ticaret A.S. Kaptan Metal Dis Ticaret Ve Nakliyat A.S. Kocaer Haddecilik Sanayi Ve Ticar L Mettech Metalurji Madencilik Muhendislik Uretim Danismanlik ve Ticaret Limited Sirketi MMZ Onur Boru Profil A.S. Ozkan Demir Celik Sanayi A.S. Wilmar Europe Trading BV	1/1/17-12/31/17
Suspension Agreements	
None.	

⁶ In the initiation notice that published on July 12, 2018 (83 FR 32274), the POR for the case listed above was incorrect. The correct period of review is listed in this notice.

⁷ In the initiation that published on October 4, 2018 (83 FR 50077) and the correction notice that published on November 15, 2018 (83 FR 57411), Commerce incorrectly identified that an administrative review was initiated on the antidumping duty order of Certain Steel Nails from China for Anjing Caiqing Hardware Co., Ltd. and Nanjing Caiqing Hardware Co. Ltd. Commerce is now correcting that notice, and neither company is under review. In addition, Commerce is initiating administrative reviews on the antidumping duty order of Certain Steel Nails from China for the following companies: (1) Beijing Camzone Industry & Trading Co., Ltd.; (2) Nanjing Caiqing Hardware Co., Ltd.; (3) Qingdao D&L Group Ltd.; (4) Qingdao YuanYuan Metal Products LLC; (5) Shanghai Yueda Nails Industry Co. Ltd.; and (6) Shanxi Fastener & Hardware Products.

⁸ Commerce determined that Chengdu Huifeng New Material Technology Co., Ltd. is the successor-in-interest to Chengdu Huifeng Diamond Tools Co., Ltd. and for which Commerce received a request for review. See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 82 FR 60177 (December 19, 2017).

⁹ Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., Jiangsu Fengtai Tools Co., Ltd., and Jiangsu Fengtai Sawing Industry Co., Ltd., comprise the Jiangsu Fengtai Single Entity. See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 26912, 26913, n. 5 (June 12, 2017). We received review requests for Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., and Jiangsu Fengtai Tools Co., Ltd.

¹⁰ Commerce determined that Wuhan Wanbang Laser Diamond Tools Co., Ltd. is the successor-in-interest to Wuhan Wanbang Laser Diamond Tools Co. and for which Commerce received a request for review. See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 81 FR 20618 (April 8, 2016).

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the

United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures "gap" period, of the order, if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce's regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (e.g., the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Factual Information Requirements

Commerce's regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of factual information being submitted. Please review the final rule, available at <http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt>, prior to submitting factual information in this segment.

Any party submitting factual information in an antidumping duty or countervailing duty proceeding must certify to the accuracy and completeness of that information.¹¹ Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives. All segments of any antidumping duty or countervailing duty proceedings initiated on or after August 16, 2013, should use the formats for the revised certifications provided at the end of the *Final Rule*.¹² Commerce intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable revised certification requirements.

Extension of Time Limits Regulation

Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by the Secretary. See 19 CFR 351.302. In general, an

extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) Case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning U.S. Customs and Border Protection data; and (5) quantity and value questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This modification also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. These modifications are effective for all segments initiated on or after October 21, 2013. Please review the final rule, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm>, prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: January 31, 2019.

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. 2019–01270 Filed 2–5–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–090]

Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People's Republic of China: Postponement of the Preliminary Determination in the Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 6, 2019.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita at (202) 482–4243, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On August 28, 2018, the Department of Commerce (Commerce) initiated a less-than-fair-value (LTFV) investigation of imports of certain steel wheels 12 to 16.5 inches in diameter (certain steel wheels) from the People's Republic of China (China).¹ The original deadline for the preliminary determination was January 15, 2019. However, Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.² If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. The revised deadline for the preliminary determination is now February 25, 2019.

Postponement of Preliminary Determination

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later

¹ See *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 83 FR 45095 (September 5, 2018).

² See memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

¹¹ See section 782(b) of the Act.

¹² See *Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*); see also the frequently asked questions regarding the *Final Rule*, available at http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.

than 190 days after the date on which Commerce initiated the investigation if: (A) The petitioner³ makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.⁴

On December 12, 2018, the petitioner submitted a timely request that Commerce postpone the preliminary determination in this LTFV investigation.⁵ The petitioner stated that it requests postponement because Commerce was still gathering data and questionnaire responses from the foreign producers in this investigation, and additional time is necessary for interested parties to respond to additional requests from Commerce.

For the reasons stated above, and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for the preliminary determination by 50 days. As a result, Commerce will issue its preliminary determination no later than April 15, 2019. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination, unless postponed at a later date.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: January 31, 2019.

Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019-01268 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-DS-P

³ The petitioner is Dexstar Wheel, a division of Americana Development, Inc.

⁴ See 19 CFR 351.205(e).

⁵ See the petitioner's letter, "Certain Steel Wheels (12 to 16.5 Inches in Diameter) from China: Petitioner's Request to Extend the Preliminary Determination," dated December 12, 2018.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG743

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting (webinar).

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will convene a webinar meeting of its Groundfish Management Team (GMT) to discuss items on the Pacific Council's March 2019 meeting agenda. The meeting is open to the public.

DATES: The webinar meeting will be held Wednesday, February 27, 2019 from 9 a.m. to 12 p.m. Pacific Standard Time. The scheduled ending time for the GMT webinar is an estimate, the meeting will adjourn when business for the day has been completed.

ADDRESSES: This meeting will be held via webinar. A public listening station is available at the Pacific Council office (address below). To attend the webinar: (1) Join the GoToWebinar by visiting this link <https://www.gotomeeting.com/webinar> (Click "Join a Webinar" in top right corner of page), (2) Enter the Webinar ID: 935-324-499 and (3) enter your name and email address (required). After logging into the webinar, you must use your telephone for the audio portion of the meeting. Dial this TOLL number 1-415-655-0052, enter the Attendee phone audio access code 196-258-262, and enter your audio phone pin (shown after joining the webinar). System Requirements: for PC-based attendees: Required: Windows® 10, 8, 7, Vista, or XP; for Mac®-based attendees: Required: Mac OS® X 10.5 or newer; for Mobile attendees: Required: iPhone®, iPad®, Android™ phone or Android tablet (See the <https://www.gotomeeting.com/webinar/ipad-iphone-android-webinar-apps>). You may send an email to Mr. Kris Kleinschmidt or contact him at 503-820-2280, extension 411 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Todd Phillips, Staff Officer; telephone: (503) 820-2426.

SUPPLEMENTARY INFORMATION: The primary purpose of the GMT webinar is

to prepare for the Pacific Council's March 2019 agenda items. The GMT's task is to develop recommendations for consideration by the Pacific Council at its March 2019 meeting. The GMT will discuss items related to groundfish management and administrative Pacific Council agenda items. A detailed agenda for the webinar will be available on the Pacific Council's website prior to the meeting. The GMT may also address other assignments relating to groundfish management. No management actions will be decided by the GMT.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this 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 GMT's intent to take final action to address the emergency.

Special Accommodations

The public listening station is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820-2411 at least 10 days prior to the meeting date.

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01286 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG763

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Caribbean Fishery Management Council's (Council) Outreach and Education Advisory Panel (OEAP) will hold a 2-day meeting in March to discuss the items contained in the agenda in the **SUPPLEMENTARY INFORMATION**.

DATES: The meetings will be held on March 14, 2019, from 10 a.m. to 4 p.m.

and on March 15, 2019, from 10 a.m. to 4 p.m.

ADDRESSES: The meetings will be held at the CFMC Headquarters, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION:

March 14, 2019, 10 a.m.–4 p.m.

- Call to Order
- Adoption of Agenda
- OEAP Chairperson's Report
 - Status of:
 - OEAP members meeting attendance
 - O & E activities/projects proposed for 2019–20
 - Posters
 - Short videos
 - Book “*Know the marine ecosystems of the Caribbean Sea fishery*”
 - Island-Based Fisheries Management Plans (IBFMPs)
 - Orientation meetings
 - Participation of OEAP members
 - Fishery Ecosystem Plan (FEP)
 - Outreach & Education initiatives for stakeholders (fishers and consumers)
 - Responsible Seafood Consumption Campaign
 - USVI activities

March 15, 2019, 10 a.m.–4 p.m.

- St Croix Fishers video by GeoAmbiente
- 2020 Calendar
- Caribbean Fishery App
- CFMC Facebook communications with stakeholders
- PEPCO
- MREP Caribbean
- Other Business

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meeting will begin on March 14, 2019 at 10 a.m. and will end on March 15, 2019 at 4 p.m. Other than the start time, interested parties should be aware that discussions may start earlier or later than indicated. In addition, the meeting may be extended from, or completed prior to the date established in this notice

Special Accommodations

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and other auxiliary aids, please contact Mr.

Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–01290 Filed 2–5–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG764

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will hold a methodology review meeting to evaluate and review fishery independent visual survey methodologies, using remotely operate vehicles (ROVs), for nearshore groundfish species off the states of Oregon and California. The meeting is open to the public.

DATES: The Pacific Council methodology review meeting will be held Tuesday, February 12 through Thursday, February 14, 2019. The meeting will begin each day at 8:30 a.m. Pacific Standard Time and will end at 5 p.m. or when business for the day has been completed. This meeting will also occur via a “listen only” webinar.

ADDRESSES: The Pacific Council methodology review meeting will be held at the NMFS Southwest Fisheries Science Center, Santa Cruz Laboratory, 110 McAllister Way, Santa Cruz, CA 95060; telephone: (831) 420–3900.

The Pacific Council methodology review meeting will also be held by webinar. To attend the “listen-only” webinar, visit this link: <https://www.gotomeeting.com/webinar>. Enter the Webinar ID: 951–132–995, and your email address (required).

This is a “listen only” broadcast, you may use your computer speakers or headset to listen. If you do not have a headset or computer speakers, you may use your telephone to listen to the meeting by dialing this TOLL number +1–213–929–4232 (not a toll-free

number); enter the phone attendee audio access code: 733–934–828. Enter your audio phone pin (shown after joining the webinar). There will be no technical assistance available for the “listen only” webinar. If there are technical difficulties, the broadcast may end and may not be restarted.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Mr. John DeVore, Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2413.

SUPPLEMENTARY INFORMATION: The purpose of the Pacific Council methodology review meeting is to evaluate and review fishery independent visual survey methodologies, using ROVs, for nearshore groundfish species off the states of Oregon and California. West coast nearshore groundfish stock assessments have identified the current lack of fishery-independent data sources as a research and data need. Both Oregon and California have conducted ROV surveys of rockfish in nearshore areas, focusing on rocky reef habitat, and, in California, on areas inside and outside of Marine Protected Areas.

The goals and objectives specific to the review of the new ROV survey methodologies are to: (1) Evaluate the sampling design used in recent (2010–17) ROV surveys conducted by the states of Oregon and California; (2) evaluate proposed methods to develop indices or estimates of abundance for these ROV surveys, including using habitat/substrate type and Marine Protected Area designation as covariates; (3) evaluate proposed methods to estimate size and age compositions of observed species; and (4) identify potential impediments to developing independent indices or estimates of abundance using these ROV surveys and incorporating them into stock assessments. This methodology review will likely provide the basis for future ROV surveys and the development of indices or estimates of abundance for those areas surveyed in Oregon and California, as well as the expansion of such methods to other areas within those states and/or within Washington State.

No management actions will be decided by the Pacific Council methodology review meeting participants. The Pacific Council methodology review meeting participants' role will be development of recommendations and reports for consideration by the Pacific Council's

Scientific and Statistical Committee and the Pacific Council at their April meeting in Rohnert Park, CA.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent of the Pacific Council meeting participants to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (503) 820-2411 at least 10 days prior to the meeting date.

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01291 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF215

Endangered Species; File No. 20315

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

ACTION: Notice; receipt of an application for a permit modification.

SUMMARY: Notice is hereby given that Kristen Hart, Ph.D., U.S. Geological Survey, 3205 College Ave., Davie, FL 33314 has requested a permit modification to Permit No. 20315.

DATES: Written, telefaxed, or email comments must be received on or before March 8, 2019.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 20315-04 from the list of available applications.

These documents are also available upon written request or by appointment

in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone: (301) 427-8401; fax: (301) 713-0376.

Written comments on the application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to NMFS.Pr1Comments@noaa.gov. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on the application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Erin Markin or Amy Hapeman, (301) 427-8401.

SUPPLEMENTARY INFORMATION: The subject permit modification is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

Permit No. 20315 issued on August 11, 2017 (82 FR 11181) authorizes Dr. Hart to take green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), and loggerhead (*Caretta caretta*) sea turtles for research in in the U.S. Virgin Islands, including Buck Island Reef National Monument, Virgin Islands Coral Reef National Monument, and Virgin Islands National Park.

Researchers may conduct vessel surveys for sea turtle counts, captures (by hand or dip, tangle, and cast nets), examination, observation, marking, biological sampling, tagging, and morphometrics. The objectives of the research are to identify inter-nesting habitats, foraging zones, and movement corridors and characterize fine- and broad-scale spatial and temporal patterns of sea turtle habitat use. The permit holder requests authorization to add a new research project that requires the following changes to the permit: (1) Add new objectives to assess the population structure and describe fine scale dive profiles for turtle species; (2) expand the research area to include the Dry Tortugas to Appalachicola Florida, Florida Keys, Everglades and Biscayne National Parks, and the Atlantic coast up to the North Carolina/Virginia border; (3) increase the annual number of sea turtles that may be taken (an additional 240 green, 140 hawksbill,

and 190 loggerhead), and add takes of another species (60 Kemp's ridley [*Lepidochelys kempii*] sea turtles) for study; (4) add methods to include strike nets as a capture method and to obtain animals for study that were captured by another legal authority in lieu of directed capture efforts; and (5) extend the duration of the permit until September 30, 2026.

Dated: February 1, 2019.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019-01203 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG742

Fisheries of the Gulf of Mexico and 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 64 Data Workshop for Southeastern U.S. Yellowtail Snapper.

SUMMARY: The SEDAR 64 assessment process of Gulf of Mexico and South Atlantic yellowtail snapper will consist of a Data Workshop, and a series of assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 64 Data Workshop will be held from 9 a.m. on February 25, 2019, until 5 p.m. on February 27, 2019.

ADDRESSES: *Meeting address:* The SEDAR 64 Data Workshop will be held at the Hilton St. Petersburg Bayfront, 333 1st Street S, St. Petersburg, FL 33701; 1-800-445-8667.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571-4366; email: Julie.neer@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 multi-step process including: (1) Data/Assessment Workshop, and (2) a series of webinars. The product of the Data/Assessment Workshop is a report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses, and describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS 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 NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Data/Assessment Workshop are as follows:

1. An assessment data set and associated documentation will be developed during the workshop.
2. Participants will evaluate proposed data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance.

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

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to the workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01285 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG755

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Mackerel, Squid, and Butterfish Committee will hold a public meeting via webinar.

DATES: The meeting will be held on Monday February 25, 2019, from 2 p.m. to 4 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will be held via webinar, which can be accessed at: <http://mafmc.adobeconnect.com/feb2019msbcom/>. Participants may also connect via telephone by calling 1-800-832-0736 and entering room number 5068871.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674-2331; website: www.mafmc.org.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526-5255.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic Fishery Management Council's Mackerel, Squid, and Butterfish Committee will meet on Monday February 25, 2019 (see **DATES** and **ADDRESSES**). The purpose of this meeting is for the Committee to review public comments, staff recommendations, and Advisory Panel recommendations and to develop their own recommendations for preferred alternatives for the Chub Mackerel Amendment. This amendment considers adding Atlantic chub mackerel (*Scomber colias*) to the Mackerel, Squid, and Butterfish Fishery Management Plan. The amendment includes alternatives regarding catch limits, accountability measures, and

other conservation and management measures required for stocks "in the fishery." Background documents can be found on the Council's website (www.mafmc.org).

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526-5251, at least 5 days prior to the meeting date.

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01288 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG753

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Mackerel, Squid, and Butterfish Advisory Panel will hold a public meeting via webinar.

DATES: The meeting will be held on Friday February 22, 2019, from 10 a.m. to 12 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will be held via webinar, which can be accessed at: <http://mafmc.adobeconnect.com/feb2019msbap/>. Participants may also connect via telephone by calling 1-800-832-0736 and entering room number 5068871.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674-2331; website: www.mafmc.org.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526-5255.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic Fishery Management Council's Mackerel, Squid, and Butterfish Advisory Panel will meet on Friday February 22, 2019 (see **DATES** and **ADDRESSES**). The purpose of this meeting is for the Advisory Panel to

review public comments and staff recommendations and provide recommendations for preferred alternatives for the Chub Mackerel Amendment. The Council will consider the Advisory Panel recommendations when they take final action on this amendment. This amendment considers adding Atlantic chub mackerel (*Scomber colias*) to the Mackerel, Squid, and Butterfish Fishery Management Plan. The amendment includes alternatives regarding catch limits, accountability measures, and other conservation and management measures required for stocks "in the fishery." Background documents can be found on the Council's website (www.mafmc.org).

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526-5251, at least 5 days prior to the meeting date.

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01287 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG735

Nominations for the Western and Central Pacific Fisheries Commission Permanent Advisory Committee

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

ACTION: Notice of request for nominations.

SUMMARY: NMFS, on behalf of the Secretary of Commerce, is seeking nominations for the advisory committee established under the Western and Central Pacific Fisheries Convention Implementation Act (Act). The Permanent Advisory Committee, composed of individuals from groups concerned with the fisheries covered by the Western and Central Pacific Fisheries Convention (Convention), will be given the opportunity to provide input to the U.S. Commissioners to the Western and Central Pacific Fisheries Commission (Commission) regarding the deliberations and decisions of the Commission.

DATES: Nominations must be received no later than March 25, 2019. Nominations received after the deadline will not be accepted.

ADDRESSES: Nominations should be directed to Michael Tosatto, Regional Administrator, NMFS Pacific Islands Regional Office, and may be submitted by any of the following means:

- *Email:* pir.wcpfc@noaa.gov. Include in the subject line the following document identifier: "Permanent Advisory Committee nominations". Email comments, including attachments, are limited to 5 megabytes.

- *Mail or hand delivery:* 1845 Wasp Boulevard, Bldg. 176, Honolulu, HI 96818.

- *Facsimile:* 808-725-5215.

FOR FURTHER INFORMATION CONTACT:

Emily Reynolds, NMFS Pacific Islands Regional Office; telephone: 808-725-5039; facsimile: 808-725-5215; email: emily.reynolds@noaa.gov.

SUPPLEMENTARY INFORMATION:

The Convention and the Commission

The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) and the Agreement for the Implementation of the Provisions of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The Convention establishes the Commission, the secretariat of which is based in Pohnpei, Federated States of Micronesia.

The Convention applies to all highly migratory fish stocks (defined as all fish stocks of the species listed in Annex I of the UNCLOS occurring in the Convention Area, and such other species of fish as the Commission may determine), except sauries.

The United States actively supported the negotiations and the development of the Convention and signed the Convention when it was opened for signature in 2000. It participated as a cooperating non-member of the Commission since it became operational in 2005. The United States became a Contracting Party to the Convention and a full member of the Commission when it ratified the Convention in January 2007. Under the Act, the United States is to be represented on the Commission by five U.S. Commissioners, appointed by the President.

Permanent Advisory Committee

The Act (16 U.S.C. 6902) provides (in section 6902(d)) that the Secretary of Commerce, in consultation with the U.S. Commissioners to the Commission, will appoint individuals as members of the advisory committee established under the Act, referred to here as the "Permanent Advisory Committee".

The appointed members of the Permanent Advisory Committee are to include not less than 15 nor more than 20 individuals selected from the various groups concerned with the fisheries covered by the Convention, providing, to the extent practicable, an equitable balance among such groups. On behalf of the Secretary of Commerce, NMFS is now seeking nominations for these appointments.

In addition to the 15-20 appointed members, the Permanent Advisory Committee includes the chair of the Western Pacific Fishery Management Council's Advisory Committee (or designee), and officials of the fisheries management authorities of American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (or their designees).

Members of the Permanent Advisory Committee will be invited to attend all non-executive meetings of the U.S. Commissioners to the Commission and at such meetings will be given opportunity to examine and be heard on all proposed programs of investigation, reports, recommendations, and regulations of the Commission.

Each appointed member of the Permanent Advisory Committee will serve for a term of 2 years and is eligible for reappointment. This request for nominations is for the term to begin on August 3, 2019, and is for a term of 2 consecutive years.

The Secretaries of Commerce and State will furnish the Permanent Advisory Committee with relevant information concerning fisheries and international fishery agreements.

NMFS, on behalf of the Secretary of Commerce, will provide to the Permanent Advisory Committee administrative and technical support services as are necessary for its effective functioning.

Appointed members of the Permanent Advisory Committee will serve without pay, but while away from their homes or regular places of business in the performance of services for the advisory committee will be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5,

United States Code. They will not be considered Federal employees while performing service as members of the advisory committee except for the purposes of injury compensation or tort claims liability as provided in chapter 81 of title 5, United States Code and chapter 171 of title 28, United States Code.

Procedure for Submitting Nominations

Nominations for the Permanent Advisory Committee should be submitted to NMFS (see **ADDRESSES**). This request for nominations is for first-time nominees as well as previous and current Permanent Advisory Committee members. Self nominations are acceptable. Nominations should include the following information: (1) Full name, address, telephone, and email address of nominee; (2) nominee's organization(s) or professional affiliation(s) serving as the basis for the nomination, if any; and (3) a background statement, not to exceed one page in length, describing the nominee's qualifications, experience and interests, specifically as related to the fisheries covered by the Convention.

Authority: 16 U.S.C. 6902.

Dated: February 1, 2019.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01303 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG750

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of meeting of the South Atlantic Fishery Management Council's Executive Finance Committee.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Executive Finance Committee via webinar to discuss development of the Council's annual budget.

DATES: The meeting will be held February 8, 2019, from 8:30 a.m. until 12:30 p.m.

ADDRESSES: The meeting will be held via webinar. The meeting is open to the

public. Registration for the webinar is required. Persons interested in the meeting, please contact the Council office for details.

FOR FURTHER INFORMATION CONTACT:

Gregg Waugh, Executive Director, SAFMC; phone: (843) 302-8433 or toll free: (866) SAFMC-10; fax: (843) 769-4520; email: Gregg.Waugh@safmc.net.

SUPPLEMENTARY INFORMATION: The Council's Executive Finance Committee will meet via webinar to discuss development of the Council's Calendar Year budget for January through December 2019. Please contact the Council office for details.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to the webinar.

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

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01214 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG757

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a meeting.

DATES: The meeting will be held on Thursday, February 21, 2019, from 10 a.m. to 4 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will take place over webinar with a telephone-only connection option. Details on how to connect to the webinar by computer and by telephone will be available at: <http://www.mafmc.org/ssc>.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674-2331; website: www.mafmc.org.

FOR FURTHER INFORMATION CONTACT:

Christopher M. Moore, Ph.D., Executive

Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526-5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to make multi-year acceptable biological catch (ABC) recommendations for summer flounder based on the results of the recently completed benchmark stock assessment. The SSC will recommend revised 2019 and new 2020-21 ABC specifications. The SSC will also review and discuss recent activities by the Northeast Trawl Advisory Panel (NTAP). In addition, the SSC may take up any other business as necessary.

A detailed agenda and background documents will be made available on the Council's website (www.mafmc.org) prior to the meeting.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526-5251, at least 5 days prior to the meeting date.

Dated: February 1, 2019.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019-01289 Filed 2-5-19; 8:45 am]

BILLING CODE 3510-22-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2019-0005]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is proposing to reinstate with change a previously approved collection titled, "Generic Information Collection Plan for Studies of Consumers Using Controlled Trials in Field and Economic Laboratory Settings."

DATES: Written comments are encouraged and must be received on or before April 8, 2019 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

• *Electronic:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *Email:* FederalRegisterComments@cfpb.gov. Include Docket No. CFPB–2019–0005 in the subject line of the message.

• *Mail:* Comment intake, Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552.

• *Hand Delivery/Courier:* Comment intake, Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT:

Documentation prepared in support of this information collection request is available at www.regulations.gov. Requests for additional information should be directed to Darrin King, PRA Officer, at (202) 435–9575, or email: CFPB_PRA@cfpb.gov. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov. Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Generic Information Collection Plan for Studies of Consumers Using Controlled Trials in Field and Economic Laboratory Settings.

OMB Control Number: 3170–0048.

Type of Review: Reinstatement with change of a previously approved information collection.

Affected Public: Individuals and households.

Estimated Number of Respondents: 36,120.

Estimated Total Burden Hours: 24,405.

Abstract: Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Bureau is tasked with researching, analyzing, and reporting on topics relating to the Bureau’s mission, including developments in markets for consumer financial products and services, consumer awareness, and consumer behavior. Under this generic information collection plan, the Bureau collects data through controlled trials in field and economic laboratory settings. This research is used for developmental and informative purposes to increase the Bureau’s understanding of consumer credit markets and household financial decision-making. Basic research projects will be submitted under this clearance.

In consultation with OMB, the Bureau is proposing to modify this generic information collection plan to provide for public notice and opportunity to comment to OMB for each request submitted under this generic.

Request for Comments: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau’s estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Dated: January 31, 2019.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2019–01166 Filed 2–5–19; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Exclusive Patent License

AGENCY: Rome, New York, Air Force Research Laboratory Information Directorate, Department of the Air Force, DOD.

ACTION: Notice of intent to issue an exclusive patent license.

SUMMARY: Department of the Air Force announces its intention to grant TWSS, Inc., having a place of business at 4001 Ancestry Circle, Weddington, NC 28104, an exclusive license in any right, title and interest the United States Air Force has in: U.S. Patent No. 10,111,031, issued on October 23, 2018 entitled “OBJECT DETECTION AND TRACKING SYSTEM” and having been filed on January 22, 2016 as U.S. Patent Application 15/003,899.

FOR FURTHER INFORMATION CONTACT: An exclusive license for this patent will be granted unless a written objection is received within fifteen (15) days from the date of publication of this Notice. Written objections should be sent to: Air

Force Research Laboratory, Office of the Staff Judge Advocate, AFRL/RIJ, 26 Electronic Parkway, Rome, New York 13441–4514. Telephone: (315) 330–2087; Facsimile (315) 330–7583.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of part 404 of Title 37, Code of Federal Regulations, which implements Public Law 96–517, as amended, the Department of the Air Force announces its intention to grant TWSS, Inc., having a place of business at 4001 Ancestry Circle, Weddington, NC 28104, an exclusive license in any right, title and interest the United States Air Force has in: U.S. Patent No. 10,111,031, issued on October 23, 2018 entitled “OBJECT DETECTION AND TRACKING SYSTEM” and having been filed on January 22, 2016 as U.S. Patent Application 15/003,899.

Henry Williams,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2019–01219 Filed 2–5–19; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Second Record of Decision for the Presidential Aircraft Recapitalization Program at Joint Base Andrews-Naval Air Facility Washington, Maryland Final Environmental Impact Statement

AGENCY: Department of the Air Force, DoD.

ACTION: Notice of Availability of a Second Record of Decision.

SUMMARY: On January 7, 2019, the United States Air Force (“Air Force”) signed a Second Record of Decision for the Presidential Aircraft Recapitalization Program (“Program”) Final Environmental Impact Statement.

ADDRESSES: Mr. Michael Ackerman, (210) 925–2741, AFCEC/CZN, 2261 Hughes Ave, Ste. 155, JBSA Lackland, TX 78326–9853.

SUPPLEMENTARY INFORMATION: By this decision, the Air Force will construct and operate a permanent Hazardous Cargo Pad and Explosive Ordnance Disposal Proficiency Range at a location known as Southeast Option 1A–3 at Joint Base Andrews, as portrayed in the Final Environmental Impact Statement. Further, the Air Force has decided to amend mitigations described in the Final Environmental Impact Statement and adopted in the 2017 Record of Decision for the Presidential Aircraft Recapitalization Hangar Complex (“Hangar Complex”), to reflect

regulatory review and verification of natural resource areas that would be subject to mitigation and permitting during the final design process for the Hangar Complex. In addition, the Air Force has decided to relocate the Military Working Dog Kennel to the Vermont Road site to better meet current facility standards and operational requirements. Last, the Air Force has also clarified the decision in relation to the golf courses at Joint Base Andrews affected by the Program.

As analyzed in the Final Environmental Impact Statement, the existing Hazardous Cargo Pad at Joint Base Andrews would need to be relocated in order to accommodate the Hangar Complex. During the Environmental Impact Analysis Process, the Air Force considered a variety of siting alternatives for these facilities. In the 2017 Record of Decision, the Air Force identified Hazardous Cargo Pad and Explosive Ordnance Disposal Proficiency Range Southeast Option 1 or a variant thereof (e.g. Southeast Option 1A or 1A-3) as its preferred alternative for the permanent siting of these facilities, but did not make a final selection on the permanent siting of these facilities.

To arrive at a decision among the remaining preferred alternatives for the permanent siting of the Hazardous Cargo Pad and Explosive Ordnance Disposal Proficiency Range, the Air Force considered a range of operational, mission capability, land use compatibility and safety factors, as well as potential impacts to adjacent landowner, Soil Safe, Incorporated. Southeast Option 1A-3 was ultimately chosen for implementation because it: (1) Meets the purpose and need for the Program; (2) eliminates off-installation land acquisition; (3) minimizes impacts to adjacent environmental resources compared to other alternatives; and (4) avoids many adverse effects to adjacent landowner, Soil Safe, Incorporated.

In the 2017 Record of Decision, the Air Force identified its decision to relocate the Military Working Dog Kennel to the Vermont Road location subject to specific contingencies. Since publication of the 2017 Record of Decision, funding for the relocation of the Military Working Dog Kennel to a new facility has been secured by Joint Base Andrews. This funding will allow relocating the Kennel to this new facility irrespective of the contingencies. The Vermont Road location better meets the mission and operational requirements of the Kennel, compared to the existing facility, in terms of facility size, layout and amenities. Consequently, the Air Force is electing

to use this location as the site for the new Kennel facility.

Air Force decisions documented in the Program Records of Decision were based on matters discussed in the Final Environmental Impact Statement, inputs from the public and regulatory agencies, and other relevant factors. The Final Environmental Impact Statement was made available to the public on October 17, 2017 through a Notice of Availability in the **Federal Register** (Volume 82, Number 199, Page 48227) with a wait period that ended on November 15, 2017. A Notice of Availability for the December 2017 Record of Decision was published in the **Federal Register** on February 16, 2018 (Volume 83, Number 33, Page 7017).

Authority: This Notice of Availability is published pursuant to the regulations (40 CFR part 1506.6 and 1502.14(e)) implementing the provisions of NEPA (42 U.S.C. 4321, *et seq.*) and the Air Force's Environmental Impact Analysis Process (32 CFR parts 989.21(b) and 989.24(b)(7)).

Henry Williams,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2019-01224 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-10-P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement for T-X Recapitalization Joint Base San Antonio-Randolph

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of intent.

SUMMARY: The United States Air Force (USAF) is issuing this notice to advise the public of the intent to prepare an Environmental Impact Statement (EIS) for the proposed T-X Recapitalization at Joint Base San Antonio (JBSA)-Randolph. The EIS will assess the potential environmental consequences of the replacement of T-38C aircraft with the new fifth-generation T-X training aircraft, and, construction and renovation of T-X support facilities at JBSA-Randolph, Texas.

DATES: USAF invites the public, stakeholders, and other interested parties to attend an open house public scoping meeting from 5 p.m. to 8 p.m. on Tuesday, March 19, 2019 at the Olympia Hills Golf & Event Center, 12900 Mount Olympus, Universal City, Texas. A second open house public scoping meeting will be held from 5 p.m. to 8 p.m. on Wednesday, March 20,

2019 at Midway Hall, 728 Midway, Seguin, Texas. Participants may provide written comments at either of these public scoping meetings.

ADDRESSES: The project website www.TXRecapitalizationEIS.com provides more information on the EIS and can be used to submit scoping comments. Scoping comments may also be submitted to Mr. Christopher Moore, (210) 925-2728, AFCEC/CZN; Attn: T-X Recapitalization EIS; 2261 Hughes Ave, Suite 155; JBSA Lackland, TX 78236-9853, christopher.moore.114@us.af.mil. Comments will be accepted at any time during the environmental impact analysis process. However, to ensure the USAF has sufficient time to consider public input in the preparation of the Draft EIS, scoping comments should be submitted in English to the website or the address listed above by April 5, 2019.

SUPPLEMENTARY INFORMATION: The USAF intends to prepare an EIS to address the proposed replacement of the T-38C aircraft with the T-X aircraft and evaluate alternatives with varying levels of aircraft operations, five military construction projects and additional minor facility renovations at JBSA-Randolph.

Scoping and Agency Coordination: To effectively define the full range of issues to be evaluated in the EIS, the USAF will determine the scope of the analysis by soliciting comments from interested local, state and federal elected officials and agencies, as well as interested members of the public and others. A scoping meeting will be held in Universal City and the City of Seguin and the scheduled dates, times, and locations for the scoping meetings will also be published in local media a minimum of 15 days prior to the scoping meeting. The USAF also welcomes comments under Section 106 of the National Historic Preservation Act (36 Code of Federal Regulations 800) regarding the identification of or effects on historic properties.

If you have comments or would like to become a consulting party in the Section 106 process, please visit the project website or contact Mr. Christopher Moore, AFCEC/CZN at the address above.

Henry Williams,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2019-01225 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-10-P

DEPARTMENT OF DEFENSE**Office of the Secretary****Science, Mathematics, and Research for Transformation (SMART) Defense Education Program**

AGENCY: Office of the Under Secretary of Defense for Research and Engineering, DoD.

ACTION: SMART notice.

SUMMARY: The Science, Mathematics, and Research for Transformation (SMART) Defense Education Program is a Department of Defense (DoD) scholarship for service program that was established in 2005 as a means to recruit and retain civilian scientists and engineers working at DoD laboratories and facilities. The initial pilot program was made permanent by Congress in 2006. From 2005 to 2017, the SMART program has awarded 2,386 scholarships across 19 science, technology, engineering, and mathematics (STEM) disciplines (identified by DoD as critical workforce needs) and placed scholars from all 50 states, the District of Columbia, and Puerto Rico at 162 DoD laboratories and facilities. This notice informs the public that applicants are solicited annually to participate in the SMART Program.

FOR FURTHER INFORMATION CONTACT: Tylar Temple: 571-372-6535, email: osd.smart@mail.mil.

SUPPLEMENTARY INFORMATION: The DoD Science, Mathematics, and Research for Transformation (SMART) Defense Education Program, (SMART Program) authorized by 10 U.S.C. 2192a is part of the National Defense Education Program. The SMART Program is public funded using the DoD appropriations and is designed to increase the number of new civilian science, technology, engineering, and mathematics (STEM) entrants to the DoD; in addition the SMART Program develops and retains current DoD civilian STEM employees that are critical to the national security functions of the DoD and are needed in the DoD workforce. SMART Program awards scholarships, ranging from 1 year to 5 years, to undergraduate- and graduate-level students pursuing a degree in one of 19 technical disciplines. Upon graduation, participants fulfill a service commitment with the DoD facility that selected the participant for an award (the sponsoring facility, or SF).

The SMART Program requires a competitive application process. Eligible persons must be U.S. citizens at

the time of application, or a citizen of a country the government of which is a party to The Technical Cooperation Program (TTCP) memorandum of understanding of October 24, 1995; be 18 years or older at the time of entry into the program, must participate in summer internships at DoD laboratories; willing to accept post-graduation employment with the DoD, in good standing with a minimum GPA of 3.0 on a 4.0 scale; (2) pursuing an associate, undergraduate or advanced degree in one of the 19 program-funded disciplines, and (3) eligible to obtain and maintain a secret level security clearance.

Each year applicants may apply for the program on line beginning in August at <http://smartscholarship.org>. The application process closes in December. Starting in 2018, DoD will publish a notice annually in the **Federal Register** announcing the timeframe for submitting applications. Information is required so that the application may be evaluated for compliance with statutory eligibility requirements, academic merit, and compatibility with DoD workforce needs. See 10 U.S.C. Section 2192a(a). The information collected consists of applications submitted by members of the general public and current DoD personnel who actively choose to become involved in the SMART Program and thus become subject to information collection. The applications may include information on academic records, community and volunteer activities, letters of recommendations from faculty and community leaders, a list of publications, work experience, certification of citizenship and personal contact information. This information is necessary to evaluate and rank each candidate's credentials for awarding scholarships and determining whether the candidate meets specific DoD facility workforce needs. The collection of this information has been approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act and assigned OMB Control Number 0704-0466.

The DoD Components select SMART Program awardees. SMART Program awards are finalized and communicated to the awardee not later than May 15 of each year, provided monies have been appropriated by Congress. In order to receive financial assistance through the SMART Program, the awardee must sign a service agreement. See 10 U.S.C. Section 2192a(c). The period of obligated service for a recipient of

financial assistance is the total period of pursuit of a degree that is covered by such financial assistance. See 10 U.S.C. Section 2192a(c)(2). The period of obligated service is in addition to any other period for which the recipient is obligated to serve in the civil service of the United States. Pursuant to 10 U.S.C. 2192a(d), the Secretary may appoint to the excepted service an individual who successfully completed the SMART program.

A SMART Program participant is in default of the service agreement if the participant (1) voluntarily fails to complete the educational program; (2) fails to maintain satisfactory academic progress; (3) voluntarily terminates employment with the DoD or (4) is removed from employment with DoD on the basis of misconduct. When there is a default of a service agreement, the DoD Component head executing the SMART Program will determine the appropriate amount to be recouped by the United States in accordance with the provisions of 10 U.S.C. 2192a(e).

Dated: February 1, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019-01313 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Office of the Secretary**

[Transmittal No. 18-08]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at karma.d.job.civ@mail.mil or (703) 697-8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 18-08 with attached Policy Justification.

Dated: February 1, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY

201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

NOV 28 2018

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 18-08, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Morocco for defense articles and services estimated to cost \$1.259 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Hooper", is written over the typed name and title.

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

Transmittal No. 18–08

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser*: Kingdom of Morocco

(ii) *Total Estimated Value*:

Major Defense Equipment *	\$.009 billion
Other	\$1.250 billion
TOTAL	\$1.259 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Enhancement of one hundred sixty-two (162) Abrams tanks procured through the Excess Defense Articles (EDA) program to one of the following variants: M1A1 Situational Awareness (baseline version), M1A2M (includes Commander's Independent Thermal Viewer) or M1A1 U.S. Marine Corps version (includes Slew to Cue).

Major Defense Equipment (MDE):

One hundred sixty-two (162) M2 Chrysler Mount Machine Guns
 Three hundred twenty-four (324) M240 Machine Guns
 One thousand thirty-five (1,035) M865 Training SABOT Rounds
 One thousand six hundred ten (1,610) M831A1 HEAT Rounds

Non-MDE:

Also included are one hundred sixty-two (162) Export Single Channel Ground and Airborne Radio System (SINCGARS); one hundred sixty-two (162) RT–1702 Receiver Transmitter; one hundred sixty-two (162) M250 Smoke Grenade Launchers; M962 .50 caliber rounds; special armor; Hunter/Killer technology, which may include the Commander's Independent Thermal Viewer (CITV) or Slew to Cue solution; Commander's Weapon Station Variant which may include the Commander's Weapon Station (CWS), Stabilized Commander's Weapon Station (SCWS), or Common Remotely Operated Weapon Station-Low Profile (CROW–LP); spare parts; support equipment; upgrade/maintenance of engines and transmissions; depot level support; Government-Furnished Equipment (GFE); repair parts; communication support equipment; tool and test equipment; training; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistics and program support.

(iv) *Military Department*: Army (MO–B–USQ, Amendment 1)

(v) *Prior Related Cases, if any*: MO–B–USQ

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex

(viii) *Date Report Delivered to Congress*: November 28, 2018

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Morocco—Abrams Tank Enhancement, Support, and Equipment

The Government of Morocco has requested to purchase enhancements to one hundred sixty-two (162) Abrams tanks procured through the Excess Defense Article (EDA) program to one of the following variants: M1A1 Situational Awareness (baseline version), M1A2M (includes Commander's Independent Thermal Viewer) or M1A1 U.S. Marine Corps version (includes Slew to Cue). Included in the possible sale are one hundred sixty-two (162) M2 Chrysler Mount Machine Guns; three hundred twenty-four (324) M240 Machine Guns; one thousand thirty-five (1,035) M865 Training SABOT Rounds; and one thousand, six hundred ten (1,610) M831A1 HEAT Rounds. Also included are one hundred sixty-two (162) Export Single Channel Ground and Airborne Radio System (SINCGARS); one hundred sixty-two (162) RT–1702 Receiver Transmitter; one hundred sixty-two (162) M250 Smoke Grenade Launchers; M962 .50 caliber rounds; special armor; Hunter/Killer technology, which may include the Commander's Independent Thermal Viewer (CITV) or Slew to Cue solution; Commander's Weapon Station Variant which may include the Commander's Weapon Station (CWS), Stabilized Commander's Weapon Station (SCWS), or Common Remotely Operated Weapon Station-Low Profile (CROW–LP); spare parts; support equipment; upgrade/maintenance of engines and transmissions; depot level support; Government-Furnished Equipment (GFE); repair parts; communication support equipment; tool and test equipment; training; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistics and program support. The total estimated program cost is \$1.259 billion.

This proposed sale will support the foreign policy and national security objectives of the United States by improving the security and capacity of a major Non-NATO Ally.

This proposed sale of M1A1 tank enhancements will contribute to the modernization of Morocco's tank fleet,

enhancing its ability to meet current and future threats. These tanks will contribute to Morocco's goal of updating its military capability while further enhancing interoperability with the United States and other allies. Morocco will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be General Dynamics Land Systems in Sterling Heights, Michigan. Refurbishment work will be performed at Anniston Army Depot in Anniston, Alabama and the Joint Systems Manufacturing Center in Lima, Ohio. There are currently no known offset agreements proposed in connection with this potential sale, but one is expected due to Moroccan law.

Implementation of this proposed sale will require annual trips to Morocco involving up to 55 U.S. Government and 13 contractor representatives for a period of up to five years to manage the fielding and training for the program.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 18–08

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. Thermal Imaging System (TIS). The TIS constitutes a target acquisition system which, when operated with other tank systems, gives the tank crew a substantial advantage over the potential threat. The TIS provides the gunner and commander with the ability to effectively aim and fire the tank main armament system under a broad range of adverse battlefield conditions. The Hunter/Killer technology provides the capability for the commander to search and acquire targets while the gunner engages priority targets. The hardware itself is UNCLASSIFIED. The engineering design and manufacturing data associated with the detector and infrared (IR) optics and coatings are considered sensitive. The technical data package is UNCLASSIFIED with the exception of the specifications for target acquisition range (CONFIDENTIAL).

2. Special Armor. Major components of special armor are fabricated in sealed modules and in serialized removable subassemblies. Special armor vulnerability data for both chemical and kinetic energy rounds are classified SECRET. Engineering design and

manufacturing data related to special armor are also classified SECRET.

3. AGT 1500 Gas Turbine Propulsion System. The use of a gas turbine propulsion system in the M1A1 Abrams tank is a unique application of armored vehicle power pack technology. The hardware is composed of the AGT-1500 engine and transmission, and is not classified. Manufacturing processes associated with the production of turbine blades, recuperator, bearings and shafts, and hydrostatic pump and motor, are proprietary and therefore commercially competition sensitive.

4. Compartmentation. A major survivability feature of the Abrams Tank is the compartmentation of fuel and ammunition. Compartmentation is the positive separation of the crew and critical components from combustible materials such that in the event that the fuel or ammunition is ignited or deteriorated by an incoming threat round, the crew is fully protected. As demonstrated during the Abram Live Fire tests, compartmentation significantly enhances crew survivability and substantially reduces the likelihood of the tank being immobilized by an ammunition explosion and fire. Sensitive information includes the performance of the ammunition compartments as well as the compartment design parameters.

5. 120mm Gun and Ammunition. This gun and ammunition suite are composed of a 120mm smoothbore gun manufactured at Watervliet Arsenal, "long rod" APFSDS warheads, and combustible cartridge case ammunition. The current plan is to supply used cannons inducted at Anniston Army Depot, which are to be inspected according to established criteria and shipped to Lima Army Tank Plant. There may not be a need to procure new cannons for this program.

6. The CROWS-LP (M153A2E1) is a commander's weapon station. It allows

for under armor operation of weapons—M2HB, M2A1, M240B and M240. The CROWS-LP is an updated version of the M153A2 CROWS that is approximately 10 inches shorter; the CROWS-LP M153A2E1 increases visibility over the weapon station. The fire control system of the CROWS-LP allows for "first-burst" on target capability from stationary and moving platforms. The CROWS-LP incorporates a day camera (VIM-C), thermal camera (TIM 1500) and laser range finder (STORM/STORM-PI).

7. M831A1 Target Practice-Tracer (TP-T). The M831A1 cartridge is a target practice round used to simulate the ballistics of the M830 High Explosive Anti-tank Multiple Purpose with Tracer (HEAT MP-T). The external cartridge is identical in appearance to the M830, but the round does not contain any explosives, shape charge liner, base fuze, or nose cap. The highest level of information that could be transferred with the sale of this round is UNCLASSIFIED. There are no sensitivity of technology issues with the HEAT MP-T, and the round is UNCLASSIFIED.

8. M865 Target Practice, Cone Stabilized, Discarding Sabot-Tracer. The M856 is a kinetic energy training round used to simulate the ballistics of the M829 Armor-piercing, Finstabilized, Discarding Sabot-Tracer service round. The M856 utilizes a unique cone stabilizer to limit the training round's flight range to 8km. The highest level of information that could be transferred with the sale of this round is UNCLASSIFIED.

9. If a technologically advanced adversary were to obtain knowledge of the hardware and software elements, the information could be used to develop countermeasures or equivalent systems which might reduce system effectiveness or be used in the

development of a system with similar or advanced capabilities.

10. A determination has been made that the Government of Morocco can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

11. All defense articles and services listed in this transmittal have been authorized for release and export to Morocco.

[FR Doc. 2019-01227 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19-07]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at karma.d.job.civ@mail.mil or (703) 697-8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19-07 with attached Policy Justification.

Dated: February 1, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001-06-P



DEFENSE SECURITY COOPERATION AGENCY

201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

NOV 29 2018

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-07 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Poland for defense articles and services estimated to cost \$655 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

A handwritten signature in black ink, appearing to read "C. W. Hooper".

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 19-07

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Poland

(ii) *Total Estimated Value*:

Major Defense Equipment * ..	\$335 million
Other	\$320 million

TOTAL	\$655 million
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(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Twenty (20) High Mobility Artillery Rocket System (HIMARS) M142 Launchers

Thirty-six (36) Guided Multiple Launch Rocket System (GMLRS) M31A1 Unitary

Nine (9) Guided Multiple Launch Rocket System (GMLRS) M30A1 Alternative Warhead

Thirty (30) Army Tactical Missile System (ATACMS) M57 Unitary
Twenty-four (24) Advanced Field Artillery Tactical Data Systems (AFATDS)

Twenty (20) Multiple Launcher Pod Assembly M68A2 Trainers

Twenty-four (24) M1151A1 High Mobility Multi-purpose Wheeled Vehicles (HMMWVs)

Nine (9) M1151A1 High Mobility Multi-purpose Wheel Vehicles (HMMWVs)
Non-MDE:

Also included are twenty (20) Low Cost Reduced Range (LCRR) practice rockets, support equipment, communications equipment, spare and repair parts, test sets, batteries, laptop computers, publications and technical data, facility design, personnel training and equipment, systems integration support, Quality Assurance Teams and a Technical Assistance Fielding Team, United States Government and contractor engineering and logistics personnel services, and other related elements of logistics support, training, sensors, and other related elements of logistics and program support.

(iv) *Military Department*: Army (PL-B-UDJ)

(v) *Prior Related Cases, if any*: None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Service Proposed to be Sold*: See Attached Annex.

(viii) *Date Report Delivered to Congress*: November 29, 2018

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Poland—High Mobility Artillery Rocket System (HIMARS) and Related Support and Equipment

Poland has requested to buy twenty (20) High Mobility Artillery Rocket System (HIMARS) M142 Launchers, thirty-six (36) Guided Multiple Launch Rocket System (GMLRS) M31 Unitary, nine (9) Guided Multiple Launch Rocket System (GMLRS) M30A1 Alternative Warheads, thirty (30) Army Tactical Missile System (ATACMS) M57 Unitary, twenty-four (24) Advanced Field Artillery Tactical Data Systems (AFATDS), twenty (20) Multiple Launcher Pod Assembly M68A2 Trainers, twenty-four (24) M1151A1 High Mobility Multi-purpose Wheeled Vehicles (HMMWVs), and nine (9) M1151A1 High Mobility Multi-purpose Wheel Vehicles (HMMWVs). Also included are twenty (20) Low Cost Reduced Range (LCRR) practice rockets, support equipment, communications equipment, spare and repair parts, test sets, batteries, laptop computers, publications and technical data, facility design, personnel training and equipment, systems integration support, Quality Assurance Teams and a Technical Assistance Fielding Team, United States Government and contractor engineering and logistics personnel services, and other related elements of logistics support, training, sensors, and other related elements of logistics and program support. The estimated cost is \$655 million.

This proposed sale will support the foreign policy and national security of the United States by improving the security of a NATO ally which is an important force for political stability and economic progress in Europe. This sale is consistent with U.S. initiatives to provide key allies in the region with modern systems that will enhance interoperability with U.S. forces and increase security.

Poland intends to use these defense articles and services to modernize its armed forces and expand its capability to strengthen its homeland defense and deter regional threats. This will contribute to Poland's interoperability with the United States and other allies. Poland will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment will not alter the basic military balance in the region.

The principal contractor will be Lockheed Martin, Grand Prairie, TX. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require U.S. Government or contractor representatives to travel to Poland for program management reviews to support the program. Travel is expected to occur approximately twice per year as needed to support equipment fielding and training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-07

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The High Mobility Artillery Rocket Systems (HIMARS) is a highly mobile, all-weather indirect area fire artillery system. The HIMARS mission is to supplement cannon artillery to deliver a large volume of firepower within a short time against critical time-sensitive targets. At shorter ranges, HIMARS complements tube artillery with heavy barrages against assaulting forces as well as in the counter-fire, or defense suppression roles. The highest level of classified information that could be disclosed by a proposed sale, production, or by testing of the end item is SECRET; the highest level that must be disclosed for production, maintenance, or training is CONFIDENTIAL. Reverse engineering could reveal SECRET information. Launcher platform software, weapon operational software, command and control special application software, and command and control loadable munitions module software are considered UNCLASSIFIED. The system specifications and limitations are classified SECRET. Vulnerability data is classified up to SECRET. Countermeasures, counter-countermeasures, vulnerability/susceptibility analyses, and threat definitions are classified SECRET.

2. Guided Multiple Launch Rocket System (GMLRS) Unitary M31A1 uses a Unitary High Explosive (HE) 200 pound class warhead along with GPS aided Inertial Measurement Unit (IMU) based guidance and control for ground-to-ground precision point targeting. The GMLRS Unitary uses an Electronic Safe and Arm Fuze (ESAF) along with a nose mounted proximity sensor to give enhanced effectiveness to the GMLRS Unitary rocket by providing tri-mode warhead functionality with point detonate, point detonate with programmable delay, or Height of Burst proximity function. GMLRS Unitary

M31A1 end-item is comprised of a Rocket Pod Container (RPC) and six GMLRS Unitary Rocket(s). The RPC is capable of holding six (6) GMLRS Unitary Rockets and can be loaded in a M270A1 launcher (tracked), HIMARS M142 launcher, or European M270 (203 configuration that meets the GMLRS interface requirements) launcher from which the GMLRS rocket can be launched. The highest classification level for release of the GMLRS Unitary is SECRET, based upon the software, sale or testing of the end item. The highest level of classification that must be disclosed for production, maintenance, or training is CONFIDENTIAL.

3. Guided Multiple Launch Rocket System Alternative Warhead (GMLRS-AW) M30A1. The GMLRS-AW, M30A1, is the next design increment of the GMLRS rocket. The GMLRS-AW M30A1 hardware is over 90% common with the M31A1 GMLRS Unitary hardware. The operational range is between 15-70 kilometers, with an accuracy of less than 15 meters Circular Error Probability at all ranges, when using inertial guidance with Global Positioning System (GPS) augmentation. The system uses a proximity sensor fuze mode with a 10 meter height of burst. The Alternative Warhead carries a 200 pound fragmentation assembly filled with high explosives which, upon detonation, accelerates two layers of pre-formed tungsten fragments optimized for effectiveness against large area and imprecisely located targets. The GMLRS-AW provides an area target attack capability that is treaty compliant (no un-exploded ordnance). It provides a 24 hour, all weather, long range attack capability against personnel, soft and lightly armored targets, and air defense targets. The GMLRS-AW uses the same motor, guidance and control systems fuze mechanisms, and proximity sensors as the M31A1 GMLRS Unitary. The highest classification level for release of the GMLRS-AW is SECRET, based upon the software, sale or testing of the end item. The highest level of classification that must be disclosed for production, maintenance, or training is CONFIDENTIAL.

4. The highest classification level for release of the ATACMS Unitary M57

FMS Variant is SECRET, based upon the software. The highest level of classified information that could be disclosed by a sale or by testing of the end item is SECRET; the highest level that must be disclosed for production, maintenance, or training is CONFIDENTIAL. Reverse engineering could reveal CONFIDENTIAL information. Fire Direction System, Data Processing Unit, and special Application software is classified SECRET. Communications Distribution Unit software is classified CONFIDENTIAL. The system specifications and limitations are classified CONFIDENTIAL. Vulnerability Data, countermeasures, vulnerability/susceptibility analyses, and threat definitions are classified SECRET or CONFIDENTIAL.

5. The GPS Precise Positioning Service (PPS) component of the HIMARS munitions (GMLRS Unitary, Alternative Warhead, and ATACMS Unitary) is also contained in the launcher Fire Direction System, is classified SECRET, and is considered SENSITIVE. The GMLRS M30A1, M31A1, ATACMS M57 and HIMARS M142 launchers employ an inertial navigational system that is aided by a Selective Availability Anti-Spoofing Module (SAASM) equipped GPS receiver. To that end, this system requires encryption keys controlled by, and issued by, the National Security Agency. No GPS PPS design information, including GPS software algorithms, will be disclosed in the course of this sale to country. Susceptibility of GMLRS to diversion or exploitation is considered low risk.

6. AFATDS is a multi-service (U.S. Army and U.S. Marine Corp) automated, expert decision support system used for Command, Control, Communications and integration and synchronization of fires on ground targets during all phases of military conflict. AFATDS provides the automated tools that significantly augment the capability of fire support coordinators, fire support asset commanders, and their respective staffs at every echelon during the planning and execution of fire support on the dynamic battlefields in support of the Maneuver Commander and his plans.

7. If a technologically advanced adversary were to obtain knowledge of

the hardware and software elements, the information could be used to develop countermeasures or equivalent systems which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

8. A determination has been made that the Government of Poland can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

9. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Poland.

[FR Doc. 2019-01231 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 17-43]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at karma.d.job.civ@mail.mil or (703) 697-8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 17-43 with attached Policy Justification.

Dated: February 1, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001-06-P



DEFENSE SECURITY COOPERATION AGENCY

201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

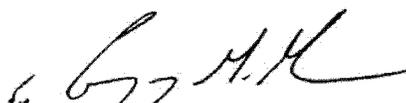
The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

NOV 27 2018

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 17-43, concerning the U.S. Army's proposed Letter(s) of Offer and Acceptance to the Government of Egypt for defense articles and services estimated to cost \$1.0 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,



Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

Transmittal No. 17-43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser*: Government of Egypt

(ii) *Total Estimated Value*:

Major Defense Equipment *	\$.751 billion
Other	\$.249 billion
TOTAL	\$1.000 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Ten (10) AH-64E Apache Attack Helicopters
 Twenty-four (24) T700-GE-701D Engines, with containers (20 installed and 4 spares)
 Twelve (12) Modernized Target Acquisition and Designation Sights (MTADS)/Modernized Pilot Night Vision Sensors (PNVS) (10 installed and 2 spares)
 Twenty-four (24) Honeywell Embedded Global Positioning System with Inertial Navigation System (INS) (EGI) (20 installed, 4 spares)
 Twenty-four (24) M299 Hellfire Launchers (20 installed, 4 spares)
 One hundred thirty-five (135) Hellfire Missiles, AGM-114R
 Five (5) M36E9 Captive Air Training Missiles (CATM)
 Twelve (12) AAR-57 (V) Common Missile Warning Systems (CMWS), (10 installed, 2 spares)

Non-MDE:

Also included are M230 30mm Automatic Guns, AVR-2B Laser Detecting Sets, AN/ARC 201E Single Channel Ground and Airborne Radio Systems (SINCGARS), AN/APR-39D Radar Warning Receivers, AN/AVS-6 Night Vision Goggles, and AN/ASN Doppler Radar Systems. Also included in the request are avionic-related software support for the Aviation Mission Planning Systems (AMPS), survivability equipment, communication and electronic equipment, communication/electronics technical assistance, tools and test equipment, integration and checkout, spares and repair parts, training and training equipment, ferry and fuel support, publications and technical documents, U.S. Government and contractor technical assistance, quality assurance, construction services, and other related elements of logistics and program support.

(iv) *Military Department*: Army (EG-B-VGA)

(v) *Prior Related Cases, if any*: EG-B-ULB (22 Aug 90); EG-B-VBT (5 Oct 09)

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services*

Proposed to be Sold: See Attached Annex

(viii) *Date Report Delivered to Congress*: November 27, 2018

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Egypt—AH-64E Apache Attack Helicopters and Related Equipment and Support

The Government of the Egypt has requested to buy ten (10) AH-64E Apache Attack Helicopters, twenty-four (24) 1700-GE-701D Engines, with containers, twelve (12) Modernized Target Acquisition Designation Sights/Pilot Night Vision Sensors (M-TADS/PNVS), twenty-four (24) Honeywell Embedded Global Positioning Systems (GPS) with Inertial Navigation System (INS) (EGI) (20 installed, 4 spares), twenty four (24) M299 HELLFIRE Launchers, one hundred thirty-five (135) HELLFIRE Missiles, five (5) M36E9 Captive Air Training Missile (CATM) AGM-114R, and twelve (12) AAR-57 (V) Common Missile Warning Systems (CMWS). Also included are M230 30mm Automatic Guns, AVR-2 B Laser Detecting Sets, AN/ARC 201E Single Channel Ground and Airborne Radio Systems (SINCGARS), AN/APR-39D Radar Warning Receivers, AN/AVS-6 Night Vision Goggles, AN/ASN Doppler Radar Systems. Also included in the request are avionic-related software support for the Aviation Mission Planning Systems (AMPS), survivability equipment, communication and electronic equipment, communication/electronics technical assistance, tools and test equipment, integration and checkout, spares and repair parts, training and training equipment, ferry and fuel support, publications and technical documents, U.S. Government and contractor technical assistance, quality assurance, construction services, and other related elements of logistics and program support. The estimated cost is \$1.0 billion.

The proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a strategic partner in the Middle East region.

Egypt intends to expand its existing fleet of multi-mission heavy attack helicopters to address U.S.-Egyptian interest in countering terrorist activities emanating from the Sinai Peninsula that

undermine regional stability. This sale will contribute to Egypt's military goal to update its capability while further enhancing greater interoperability between Egypt, the U.S., and other allies. Egypt will have no difficulty absorbing these additional helicopters into its inventory.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors involved in this program are the Boeing Company, Meza, AZ, Lockheed Martin Corporation, Orlando, FL, General Electric Company, Cincinnati, OH, Lockheed Martin Mission Systems and Sensors, Owego, NY, and Raytheon Corporation, Tucson, AZ. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require twenty five (25) U.S. Government or contractor representatives to travel to the Government of Egypt for a period of 12 weeks for equipment checkout and training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 17-43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The AH-64E Apache Attack Helicopter is an armed attack rotary wing aircraft in the Army inventory. The airframe itself does not contain sensitive technology; however, the aircraft contains communication and target identification equipment, navigational equipment, aircraft survivability equipment, displays and sensors. The highest level of classified material required to be released for training, operation and maintenance is UNCLASSIFIED; however, the highest level which could be revealed through reverse engineering or testing items is SECRET. Components considered to contain sensitive technology in the proposed case are as follows:

a. AN/AVR-2B, Laser Detecting Set—The AN/AVR-2B is a passive laser warning system that enhances crew situational awareness by detecting, identifying and characterizing all three types of laser threats 360 degrees in azimuth and +/- 45 degrees in elevation relative to the aircraft. The sensor units - each measuring approximately 8 inches long by 7 inches wide by 3 inches high, and weighing

approximately 2.4 pounds - are mounted externally to provide aircraft protection in four quadrants. The externally mounted sensor units detect laser illumination over the entire aircraft. In operation, the laser warning system identifies the threat's direction and prioritizes in order of lethality. The hardware is classified CONFIDENTIAL; releasable technical manuals for operation and maintenance are classified SECRET.

b. AN/AAR-57, Common Missile Warning System (CMWS) CMWS provides superior detection of infrared missile threats for rotary-wing, transport and tactical aircraft. It is the detection component of a suite of countermeasures to increase the survivability of current generation of combat, airlift and special operations aircraft against the threat posed by infrared guided missiles. Each platform includes: Electro-optical Missile Sensors, and Electronic Control Unit (ECU) Sequencer, and the Improved Countermeasures Dispenser (ICMD). The ECU hardware is classified CONFIDENTIAL; releasable technical manuals for operation and maintenance are classified SECRET.

c. Honeywell Embedded Global Positioning Systems (GPS) with Inertial Navigation System (INS) (EGI). GPS/INS utilizes GPS satellite signals to correct or calibrate a solution from an INS. Inertial navigation systems usually can provide an accurate solution only for short duration. The INS accelerometers produce an unknown bias signal that appears as a genuine specific force. The EGI is UNCLASSIFIED.

d. Target Acquisition and Designation Sights, Pilot Night Vision System (TADS/PNVs). The TADS/PNVs is the combined sensor and targeting unit fitted to the Boeing AH-64 Apache helicopter. Both systems are independent, but housed together. TADS contain stabilized electro-optical sensors, a laser rangefinder and laser target designator. The TADS assembly can rotate +/- 120 degrees in azimuth, +30/-80 degrees in elevation and can move independently of the PNVs. TADS contains a tomographic camera and monochrome daylight television camera. PNVs is a mounted above the TADS, and contains an infrared camera

slaved to the head movements of the pilot. PNVs can rotate +/- 90 degrees in azimuth and +20/-45 degrees in elevation; with a high rate of movement (120 degrees per second) so as to match the head movement of the pilot. Hardware for the TADS/PNVs is UNCLASSIFIED. The technical manuals for authorized maintenance levels are UNCLASSIFIED. Reverse engineering is not a major concern.

e. The AGM-114R HELLFIRE Missile is precision strike, Semi-Active Laser (SAL) guided missile and is the principle air to ground weapon for the AH-64 Apache. The SAL HELLFIRE missile is guided by laser energy reflected off the target. It has three warhead variants: a dual warhead, shape-charge, high explosive anti-tank capability for armored targets, a blast fragmentation warhead for urban patrol boat and other soft targets and metal augmented charge warhead for urban structures. AGM-114R allows selection of warhead effects corresponding to a specific target type. Hardware for the AGM-114R is UNCLASSIFIED. The technical manuals for authorized maintenance levels are UNCLASSIFIED.

f. The AN/APR-39D(V)2 Radar Warning Receiver is currently in development with a projected IOC date of 4Q2017, and will replace the AN/APR-39A(V)1/4 Radar Warning Receiver (RWR) that has been in production since the mid-1970's. The AN/APR-39D(V)2 is an Engineering Change Proposal (ECP) that fixes documented deficiencies against legacy AN/APR-39 systems by merging the AN/APR-39C(V)2 baseline with Northrop Grumman's Digital Receiver Excited (DRE) technology and combines a 4-Channel Crystal Video Receiver (CV R) and a 2 channel Digital Receiver (DR). The result is the following capability improvements: increased Probability of Detection (Sensitivity); Corrects ID/Ambiguity Resolution; Improves DOA Accuracy versus Circular Polarized (CP) Emitters; and improves DOA Indications versus CID Band Emitters. System will be classified at the SECRET level.

g. The M36E9 Captive Air Training Missile (CATM) is a HELLFIRE training missile (Non-NATO) that consists of a functional guidance section coupled to an inert missile bus. The missile has an

operational semi-active laser seeker that can search for and lock-on to laser designated targets for pilot training, but it does not have a warhead or propulsion section and cannot be launched.

2. A determination has been made that Egypt can provide substantially the same degree of protection of this technology as the U.S. Government. This proposed sale is necessary in furtherance of U.S. foreign policy and national security objectives outlined in the Policy Justification. Moreover, the benefits to be derived from this sale, as outlined in the Policy Justification, outweigh the potential damage that could result if the sensitive technology were revealed to unauthorized persons.

3. All defense articles and services listed on this transmittal are authorized for release and export to the Government of Egypt.

[FR Doc. 2019-01229 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 18-43]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at karma.d.job.civ@mail.mil or (703) 697-8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 18-43 with attached Policy Justification.

Dated: February 1, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001-06-P



DEFENSE SECURITY COOPERATION AGENCY

201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

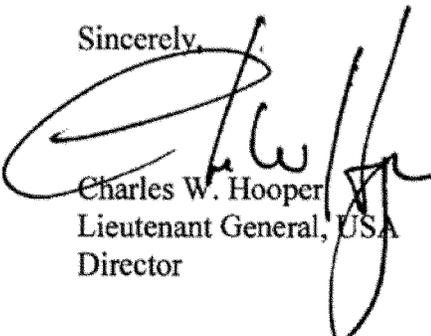
The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Room H-209, The Capitol
Washington, DC 20515

NOV 27 2018

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 18-43, concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Qatar for defense articles and services estimated to cost \$215 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,



Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

Transmittal No. 18-43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Qatar

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	\$ 95 million
Other	\$120 million
TOTAL	\$215 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Government of Qatar has requested to buy defense articles and services from the U.S. Government in support of a Direct Commercial Sales of the National Advanced Surface to Air Missile System (NASAMS).

Major Defense Equipment (MDE):

Forty (40) AIM-120C-7 Advanced Medium Range Air-to-Air Missiles (AMRAAM)

One (1) spare AIM-120C-7 AMRAAM Guidance Section

Non-MDE:

Also included are one (1) spare AIM-120C-7 control section, eight (8) AMRAAM Captive Air Training Missile (CATM-120C), missile containers, classified software for the AN/MPQ-64F1 Sentinel Radar, spare and repair parts, cryptographic and communication security devices, precision navigation equipment, other software, site surveys, weapons system equipment and computer software support, publications and technical documentation, common munitions and test equipment, repair and return services and equipment, personnel training and training equipment, integration support and test equipment, and U.S. Government and contractor, engineering, technical and logistics support services, and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (QA-D-YAE); Army (QA-B-UAS)

(v) *Prior Related Cases, if any:* N/A

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* November 27, 2018

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Qatar—Advanced Medium Range Air-to-Air Missiles (AMRAAM) and Related Equipment and Support for NASAMS

The Government of Qatar has requested to buy defense articles and

services from the U.S. Government in support of a Direct Commercial Sale of the National Advanced Surface to Air Missile System (NASAMS). The items Qatar requests include the following: forty (40) AIM 120C-7 AMRAAM missiles, one (1) spare AIM 120C-7 AMRAAM guidance section, one (1) spare AIM-120C-7 control section, eight (8) AMRAAM Captive Air Training Missile (CATM-120C), missile containers, classified software for the AN/MPQ-64F1 Sentinel Radar, spare and repair parts, cryptographic and communication security devices, precision navigation equipment, other software, site surveys, weapons system equipment and computer software support, publications and technical documentation, common munitions and test equipment, repair and return services and equipment, personnel training and training equipment, integration support and test equipment, and U.S. Government and contractor, engineering, technical and logistics support services, and other related elements of logistical and program support. The estimated cost is \$215 million.

This proposed sale supports the foreign policy and national security objectives of the United States by helping improve the security of a key partner which has been, and continues to be, a significant host and member of coalition forces in the Middle East.

This proposed sale improves Qatar's defense capability to deter regional threats and strengthen its homeland defense. The NASAMS capability would provide a full range of protection from imminent hostile cruise missile, unmanned aerial vehicle, rotary wing, and fixed wing threats. Qatar will have no difficulty in absorbing this equipment.

The proposed sale will not alter the basic military balance in the region.

The principal contractor and integrator will be Raytheon Missiles Systems of Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of additional U.S. Government and contractor representatives to Qatar.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 18-43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. AIM-120C Advance Medium Range Air-to-Air Missile (AMRAAM) is a radar guided missile featuring digital technology and micro-miniature solid-state electronics. AMRAAM capabilities include look-down/shoot-down, multiple launches against multiple targets, resistance to electronic counter measures, and interception of high flying and low flying and maneuvering targets. AIM-120 Captive Air Training Missiles are non-functioning, inert missile rounds used for armament load training, which also simulate the correct weight and balance of live missiles during captive carry on training sorties. Although designed as an air-to-air missile, the AMRAAM can also be employed in a surface-launch mode when integrated on systems such as National Advanced Surface-to-Air System (NASAMS). The AIM-120C-7, as employed on NASAMS, protects national assets from imminent hostile air threats. The AMRAAM All Up Round is classified CONFIDENTIAL, major components and subsystems range from UNCLASSIFIED to CONFIDENTIAL, and technology data and other documentation are classified up to SECRET.

2. The classified radar operational software utilized with the exportable AN/MPQ-4F1 Sentinel Radar contains specific Electronic Counter-Counter Measures (ECCM) capability, but it does not contain Non-Cooperative Target Recognition (NCTR)/classification capabilities. This software will be released for export only in an executable format with no source code. Without source code, the ability of a foreign company or government to analyze the operating software, its processes, and its algorithms is slowed. The highest classification of this software is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Qatar can provide substantially the same degree of protection of this technology as the U.S. Government. This proposed sale furthers the U.S.

foreign policy and national security objectives outlined in the Policy Justification. Moreover, the benefits to be derived from this sale, as outlined in the Policy Justification, outweigh the potential damage that could result if the sensitive technology were revealed to unauthorized persons.

5. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Qatar.

[FR Doc. 2019-01228 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 18-47]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT:

Karma Job at karma.d.job.civ@mail.mil or (703) 697-8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 18-47 with attached Policy Justification.

Dated: February 1, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001-06-P



DEFENSE SECURITY COOPERATION AGENCY

201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Room H-209, The Capitol
Washington, DC 20515

NOV 27 2018

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 18-47, concerning the U.S. Army's proposed Letter(s) of Offer and Acceptance to the Government of Egypt for defense articles and services estimated to cost \$201 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

A handwritten signature in black ink, appearing to read "C. W. Hooper".

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Regional Balance (Classified Document Provided Under Separate Cover)

Transmittal No. 18-47

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Egypt

(ii) *Total Estimated Value:*

Major Defense Equipment* ...	\$156 million
Other	\$ 45 million
TOTAL	\$201 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Forty-six thousand (46,000) 120MM Target Practice—Tracer (M831A1) and 120MM Target Practice, Cone Stabilized, Discarding Sabot—(M865) Rounds

Ten thousand (10,000) 120MM 4th-Generation Kinetic Energy-Tungsten (KE-W) A4 Armor-Piercing Fin-Stabilized Discarding Sabot with Tracer (APFSDS-T) Rounds

Non-MDE:

Also included are four thousand five hundred (4,500) 120MM Insensitive Munitions High Explosive with Tracer (IM HE-T) tank rounds, field implementation, testing inspections, spares and repair parts, support and test equipment, field support publications and technical data, U.S. government and contractor engineering and logistics support services, personnel training and training equipment, quality assurance team support services, preparation of ammunition for shipment, ammunition delivery, component improvement program and repair, other associated equipment and support, and other related elements of logistical and program support.

(iv) *Military Department:* Army (EG-B-VHH, EG-B-NGB, EG-B-VGS)

(v) *Prior Related Cases, if any:* EG-B-VAX, EG-B-NFP, EG-B-NFX, EG-B-UWB

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* None

(viii) *Date Report Delivered to Congress:* November 27, 2018

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Egypt—120MM Tank Rounds

This notification supersedes and replaces Transmittal No. 18-05 delivered to Congress on September 17, 2018. Although the descriptions and quantities of all defense articles and services are unchanged, the dollar

values were under-reported and are updated with this new transmittal.

The Government of Egypt has requested to buy forty-six thousand (46,000) 120MM Target Practice—Tracer (M831A1) and 120MM Target Practice, Cone Stabilized, Discarding Sabot—(M865) rounds and ten thousand (10,000) 120MM 4th-Generation Kinetic Energy-Tungsten (KE-W) A4 Armor-Piercing Fin-Stabilized Discarding Sabot with Tracer (APFSDS-T) rounds. Also included are four thousand five hundred (4,500) 120MM Insensitive Munitions High Explosive with Tracer (IM HE-T) tank rounds, field implementation, testing inspections, spares and repair parts, support and test equipment, field support publications and technical data, U.S. government and contractor engineering and logistics support services, personnel training and training equipment, quality assurance team support services, preparation of ammunition for shipment, ammunition delivery, component improvement program and repair, other associated equipment and support, and other related elements of logistical and program support. The estimated cost is \$201 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that continues to be an important strategic partner in the Middle East.

The proposed sale will improve Egypt's capability to meet current and future threats and provide greater security for its critical infrastructure. Egypt will use the 120MM IM HE-T cartridges to maintain a strategic munitions inventory for its M1A1 tank fleet and in support of operations against militants affiliated with the Islamic State of Iraq and Syria in the Sinai. They will use the target practice rounds to train M1A1 crews in proper crew procedures in a training environment using munitions that cost a fraction of tactical rounds and have nearly zero explosive or penetrating capability. Egypt has been producing this type of ammunition under an existing co-production agreement for approximately 15 years. Egypt intends to use the APFSDS-T rounds to replace older model 120MM KE-W, KE-W A1, and KE-W A2 ammunition to maintain a strategic munitions inventory for its M1A1 tank fleet. Egypt will have no difficulty absorbing these munitions into its armed forces.

The proposed sale of the munition and support will not alter the basic military balance in the region.

The prime contractor involved in this program is General Dynamics Ordnance and Tactical Systems, St. Petersburg, FL. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will involve multiple trips to Egypt involving up to six (6) U.S. Government and contractor representatives over a period of up to 5 years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 2019-01230 Filed 2-5-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive License; ORBIS Wheels, Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The invention listed below is assigned to the United States Government as represented by the Secretary of the Navy. The Department of the Navy hereby gives notice of its intent to grant to ORBIS Wheels, Inc., a revocable, nonassignable, co-exclusive license to practice in the United States, the Government-owned invention described below: U.S. Patent Application Number 62/632,550 (Navy Case 200456); filed February 20, 2018, entitled "HYPER-COMPACT ELECTRIC ALL-TERRAIN VEHICLE DRIVETRAIN AND CONVERSION KIT."

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than February 21, 2019.

ADDRESSES: Written objections are to be filed with Naval Surface Warfare Center, Crane Div, Code OOL, Bldg 2, 300 Highway 361, Crane, IN 47522-5001.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Monsey, Naval Surface Warfare Center, Crane Div, Code OOL, Bldg 2, 300 Highway 361, Crane, IN 47522-5001, telephone 812-854-4100.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: February 1, 2019.

Meredith Steingold Werner,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2019-01201 Filed 2-5-19; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0013]

Agency Information Collection Activities; Comment Request; 2019–20 National Teacher and Principal Survey (NTPS 2019–20)**AGENCY:** Institute of Education Sciences (IES), Department of Education (ED).**ACTION:** Notice of withdrawal.**SUMMARY:** The Department of Education is issuing this notice to inform public that **Federal Register** Notice (Docket ID Number ED–2019–ICCD–0003; FR DOC# 2019–00503), published on January 31, 2019, and entitled “2019–20 National Teacher and Principal Survey (NTPS 2019–20)” has been withdrawn.**DATES:** The intended withdrawal date is January 31, 2019.

Changes are being made to this survey, which will be posted for public comment in February 2019. Therefore, the notice should be withdrawn.

The Acting Director, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer, hereby issues a withdrawal notice as required by the Paperwork Reduction Act of 1995.

Dated: February 1, 2019.

Kate Mullan,*Acting Director, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.*

[FR Doc. 2019–01202 Filed 2–5–19; 8:45 am]

BILLING CODE 4000–01–P**DEPARTMENT OF ENERGY****Environmental Management Site-Specific Advisory Board, Hanford****AGENCY:** Office of Environmental Management, Department of Energy.**ACTION:** Notice of open meeting.**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.**DATES:**

Wednesday, April 10, 2019; 8:30 a.m.–5:00 p.m.

Thursday, April 10, 2019; 8:30 a.m.–5:00 p.m.

ADDRESSES: Red Lion Hanford House, 802 George Washington Way, Richland, WA 99352.**FOR FURTHER INFORMATION CONTACT:**

Kristen Holmes, Federal Coordinator,

Department of Energy Richland Operations Office, P.O. Box 550, H5–20, Richland, WA 99352; Phone: (509) 376–5803; or Email: kristen.l.holmes@rl.doe.gov.**SUPPLEMENTARY INFORMATION:***Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.**Tentative Agenda**

- Potential Draft Advice
 - Fiscal Year 2021 Budget Priorities
 - DOE’s Interpretation of Non-High-Level Radioactive Waste
- Discussion Topics
 - Tri-Party Agreement Agencies’ Updates
 - Approval of a System Plan Assumptions White Paper
 - Hanford Advisory Board Committee Reports
 - Board Business

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kristen Holmes at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Kristen Holmes at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.*Minutes:* Minutes will be available by writing or calling Kristen Holmes’ office at the address or phone number listed above. Minutes will also be available at the following website: <http://www.hanford.gov/page.cfm/hab/FullBoardMeetingInformation>.

Signed in Washington, DC, on January 31, 2019.

LaTanya Butler,*Deputy Committee Management Officer.*

[FR Doc. 2019–01140 Filed 2–5–19; 8:45 am]

BILLING CODE 6450–01–P**DEPARTMENT OF ENERGY****Environmental Management Site-Specific Advisory Board, Oak Ridge****AGENCY:** Office of Environmental Management, Department of Energy.**ACTION:** Notice of Open Meeting.**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.**DATES:** Wednesday, April 10, 2019; 6:00 p.m.**ADDRESSES:** DOE Information Center, Office of Science and Technical Information, 1 Science.gov Way, Oak Ridge, Tennessee 37831.**FOR FURTHER INFORMATION CONTACT:**Melyssa P. Noe, Alternate Deputy Designated Federal Officer, U.S. Department of Energy, Oak Ridge Office of Environmental Management (OREM), P.O. Box 2001, EM–942, Oak Ridge, TN 37831. Phone (865) 241–3315; Fax (865) 241–6932; Email: Melyssa.No@orem.doe.gov. Or visit the website at <https://energy.gov/orem/services/community-engagement/oak-ridge-site-specific-advisory-board>.**SUPPLEMENTARY INFORMATION:***Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.**Tentative Agenda**

- Welcome and Announcements
- Comments from the Deputy Designated Federal Officer (DDFO)
- Comments from the DOE, Tennessee Department of Environment and Conservation, and Environmental Protection Agency Liaisons
- Presentation: Extending Operational Life of Facilities and Reducing Surveillance and Maintenance Requirements
- Public Comment Period
- Motions/Approval of March 13, 2019 Meeting Minutes
- Status of Outstanding Recommendations
- Alternate DDFO Report
- Committee Reports
- Adjourn

Public Participation: The meeting is open to the public. The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to

accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Melyssa P. Noe at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Melyssa P. Noe at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Melyssa P. Noe at the address and phone number listed above. Minutes will also be available at the following website: <https://energy.gov/orem/listings/oak-ridge-site-specific-advisory-board-meetings>.

Signed in Washington, DC, on January 31, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019-01235 Filed 2-5-19; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

[Case Number 2018-007; EERE-2018-BT-WAV-0011]

Energy Conservation Program: Petition for Waiver of Beghelli North America From the Department of Energy Illuminated Exit Signs Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, and request for comments.

SUMMARY: This document announces receipt of and publishes a petition for waiver from Beghelli North America (“Beghelli”), which seeks a waiver from the U.S. Department of Energy (“DOE”) test procedure used for determining the energy consumption of specified illuminated exit sign basic models. Beghelli seeks to use an alternate test procedure to address issues involved in testing the basic models identified in its petition. Beghelli contends that the design characteristics of its combination illuminated exit signs prevent them

from being accurately tested using the currently applicable DOE test procedure. Beghelli has suggested an alternate test procedure to test and rate the Beghelli basic models specified in its petition. For the reasons discussed in this document DOE is proposing a different alternate test procedure. DOE solicits comments, data, and information concerning Beghelli’s petition, its suggested alternate test procedure, and DOE’s proposed alternate test procedure to inform its decision on Beghelli’s waiver request.

DATES: Written comments and information are requested and will be accepted on or before March 8, 2019.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov>.

Alternatively, interested persons may submit comments, identified by case number “2018-007,” and Docket number “EERE-2018-BT-WAV-0011,” by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Email:** Beghelli2018WAV0011@ee.doe.gov. Include the case number [Case No. 2018-007] in the subject line of the message.

- **Postal Mail:** Appliance and Equipment Standards Program, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE-5B, Petition for Waiver Case No. 2018-007, 1000 Independence Avenue SW, Washington, DC 20585-0121. If possible, please submit all items on a compact disc (“CD”), in which case it is not necessary to include printed copies.
- **Hand Delivery/Courier:** Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza SW, 6th floor, Washington, DC 20024. If possible, please submit all items on a “CD”, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on this process, see section V of this document.

Docket: The docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at <http://www.regulations.gov>. All documents in the docket are listed in the <http://www.regulations.gov> index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at <http://www.regulations.gov/docket?D=EERE-2018-BT-WAV-0011>. The docket web page contains simple instruction on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Lucy deButts, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue SW, Washington, DC 20585-0121. Email: AS_Waiver_Request@ee.doe.gov.

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC-33, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585-0103. Telephone: (202) 586-8145. Email: Michael.Kido@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Authority

The Energy Policy and Conservation Act of 1975, as amended (“EPCA”),¹ authorizes the U.S. Department of Energy (“DOE”) to regulate the energy efficiency of a number of consumer products and industrial equipment. (42 U.S.C. 6291-6317) Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain types of consumer products. These products include illuminated exit signs, the focus of this document. (42 U.S.C. 6291(37); 42 U.S.C. 6295(w))

Under EPCA, DOE’s energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6291), energy conservation standards (42 U.S.C. 6295), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) Certifying to DOE that their products comply with the applicable energy conservation

¹ All references to EPCA in this document refer to the statute as amended through the EPS Improvement Act of 2017, Public Law 11-115 (January 12, 2018).

standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making representations about the efficiency of that product (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the product complies with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE is required to follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which reflect the energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and requires that test procedures not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for illuminated exit signs is contained in the Code of Federal Regulations (“CFR”) at 10 CFR 431.204, “Uniform test method for the measurement of energy consumption of illuminated exit signs.”²

Under 10 CFR 431.401, any interested person may submit a petition for waiver from DOE’s test procedure requirements. DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 431.401(f)(2). A petitioner must include in its petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 431.401(b)(1)(iii).

DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(2). As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend

² Although illuminated exit signs are covered products pursuant to EPCA, as a matter of administrative convenience and to minimize confusion among interested parties, DOE codified illuminated exit sign provisions into subpart L of 10 CFR part 431 (the portion of DOE’s regulations dealing with commercial and industrial equipment) because typically businesses, rather than individuals, purchase them. 70 FR 60407, 60409 (Oct. 18, 2005). DOE refers to illuminated exit signs as either “products” or “equipment.”

its regulations so as to eliminate any need for the continuation of such waiver. 10 CFR 431.401(l) As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. *Id.*

When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 431.401(h)(2).

II. Beghelli’s Petition for Waiver

On June 26, 2018, Beghelli filed a petition for waiver from the test procedure applicable to illuminated exit signs set forth in 10 CFR 431.204. (Beghelli, No. 1 at pp. 1–6³) Beghelli has requested a waiver for basic models⁴ that provide the dual function of exit signage and lighting for emergency egress (combination illuminated exit signs⁵), stating that the battery used in combination illuminated exit signs requires a substantially larger capacity to provide a minimum of 90 minutes of egress lighting, as required by safety codes. Beghelli has further stated that it is not feasible to separate the power measurement associated with the exit signage and the egress lighting because a single battery and charging circuit supplies power for both functions.

III. Requested Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures when making representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation

³ A notation in this form provides a reference for information that is in the docket for this test procedure waiver (Docket No. EERE–2018–BT–WAV–0011) (available at <https://www.regulations.gov/document?D=EERE-2018-BT-WAV-0011-0001>) This notation indicates that the statement preceding the reference is document number 1 in the docket and appears at pages 2–4 of that document.

⁴ Due to the lengthy list of affected illuminated exit sign basic models covered by Beghelli’s June 26, 2018 petition, DOE is making the complete list publicly available in the relevant regulatory docket. The specific basic models identified on pages 2–4 of the petition can be found in the docket at <http://www.regulations.gov/docket?D=EERE-2018-BT-WAV-0011>.

⁵ DOE uses the term “combination illuminated exit sign” in this notice to mean an illuminated exit sign that includes or is packaged with (1) at least one auxiliary feature and (2) a battery electrically connected to the illumination source for the face.

standards. Pursuant to its regulations applicable to waivers from applicable test procedures at 10 CFR 431.401, and after consideration of public comments on the petition, DOE will consider setting an alternate test procedure for the products identified by Beghelli’s petition in a subsequent Decision and Order.

Beghelli seeks to use an alternate test procedure to test and rate specific combination illuminated exit sign basic models. As an alternate to the test procedure currently in place at 10 CFR part 431, subpart L, Beghelli has requested that it determine the power for its combination illuminated exit signs using the following procedure:

1. Measure AC input power of the complete unit of combination illuminated exit sign with a fully charged battery.
2. Measure the DC output voltage and current to the light source of the unit.
3. Calculate the AC power consumption of the light source of the unit by applying a power factor correction of 30 percent as worst-case scenario. (Beghelli asserted that based on the circuitry design the loss would not exceed 30 percent.)
4. If needed, calculate the stand-by power for the unit when the battery is fully charged. *Stand-by power = input power (from item 1) – power of basic exit sign light source (from item 3).*

The alternate test procedure suggested by Beghelli in its petition would measure the output power of the exit sign and apply conversion losses to back-calculate the input power to the exit sign. This approach requires assumptions that will likely result in an uncertainty of measured values. Beghelli contends that the input to output power conversion losses of all basic models under consideration are at maximum 30 percent. However, Beghelli’s petition does not provide a sufficient basis for the 30-percent value. With the differences in battery types and sizes in the various basic models for which the waiver is being requested, it is not evident from the petition that the 30-percent value would apply across all the basic models of illuminated exit sign models identified in Beghelli’s petition. Additionally, it is unclear whether the DC output voltage and current measurement in step 2 of Beghelli’s suggested alternative testing method would result in a power measurement that could only be attributable to the light sources of the exit sign, without resorting to additional steps such as cutting wires or otherwise modifying the equipment’s circuitry. Based on the limited information contained in Beghelli’s petition, in DOE’s view, the

alternative test procedure suggested by Beghelli to use the estimated conversion losses in conjunction with a measurement that does not clearly isolate the power consumption to the light source(s) of the exit sign would be unlikely to accurately calculate the combination illuminated exit sign input power demand of the affected basic models.

As an alternative to Beghelli's suggested approach, this interim waiver will require the company to apply an alternate testing method that does not require application of conversion losses and, instead, relies on a more direct measurement of the input power consumption attributable to the light source(s) of the exit sign. This alternative approach, as noted in Section IV of this document, is consistent with one that DOE has permitted to be used in similar test procedure waiver circumstances. Although Beghelli would be required to use this approach for the purposes of this interim waiver, as discussed in Section V of this document, DOE seeks comment on both the applicability of Beghelli's suggested method as well as the one required as part of this grant of interim waiver.

IV. DOE's Proposed Alternate Test Procedure

DOE investigated various approaches to isolate the input power used to illuminate only the exit sign portion of a combination exit sign including: Scaling or prorating the portion of the input power demand associated with the battery; and measuring alternative power quantities as a proxy for input power demand. DOE tentatively concluded that these methods would require isolating the battery power used to illuminate the faces of the exit sign from the battery power used to operate auxiliary features. Based on DOE's understanding of combination exit sign circuitry, DOE has tentatively determined that it is either not possible to measure the required quantities or that doing so would require cutting wires and modifying the circuitry of the combination exit sign. However, DOE has determined that the basic models identified by Beghelli in its petition for waiver have equivalent non-combination illuminated exit sign models. For the specified basic models, DOE proposes the following alternate test method be used in the context of this interim waiver grant to Beghelli:

(1) Identify an equivalent non-combination illuminated exit sign for the combination illuminated exit sign under test. A unit is an equivalent non-combination illuminated exit sign only

if it consists entirely of electricity-consuming components identical to all of those of the unit whose input power demand is being determined, but does not include any auxiliary features, and contains an electrically connected battery. The equivalent non-combination illuminated exit sign must also have the same manufacturer and number of faces as the unit whose input power demand is being determined.

(2) Test the equivalent non-combination illuminated exit sign using the DOE test procedure at 10 CFR, part 431, subpart L. Assign the input power demand of the combination illuminated exit sign under test as the input power demand of the equivalent non-combination illuminated exit sign.

This alternate test procedure permits Beghelli to use the same approach that DOE permitted Acuity Brands to use as part of a prior Decision and Order granting that company a waiver from the DOE test procedure for evaluating similar equipment. 83 FR 11740 (March 16, 2018). Because the alternate procedure granted to Acuity Brands offers a more direct measurement of the actual energy use of the lighting sources in the exit sign—rather than an estimated power factor correction value—DOE is applying an approach that it believes offers a more accurate method in evaluating the energy usage of the lighting equipment at issue.

V. Request for Comments

DOE is publishing Beghelli's petition for waiver in its entirety, pursuant to 10 CFR 431.401(b)(1)(iv). The petition includes the basic models for which Beghelli is requesting the waiver and Beghelli's suggested alternate test procedure to determine the efficiency of Beghelli's those specified illuminated exit signs. DOE is particularly interested in the merits of Beghelli's suggested alternative testing method, including data supporting the suggested or another power factor, as well as comments comparing the accuracy of that approach against the one that DOE is requiring as part of this interim waiver—*i.e.*, the Acuity Brands-based alternative test method.

DOE invites all interested parties to submit in writing by March 8, 2019, comments and information on all aspects of the petition, including the alternate test procedure. Pursuant to 10 CFR 431.401(d), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is Wenceslao Garro, wenceslao.garro@beghellinorthamerica.com, 3250

Corporate Way, Miramar, FL 33025 USA.

Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information ("CBI")). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to <http://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do

not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily

treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Signed in Washington, DC, on January 31, 2019.

Steve Chalk,

Acting Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Date: 6/26/2018

To Whom It May Concern

Subject: Beghelli Petition for Test Procedure Waiver for Specified Combination Illuminated Exit Signs

Following the waiver granted to Acuity Brands in reference to illuminated exit signs combo units (Case Number IES-001) for Test Procedure Waiver for Illuminated Exit Signs, Pursuant to 10 CFR § 430.27; Beghelli is petitioning under the provision 10 C.F.R. § 431.401 a waiver for specified combination illuminated exit signs basic models on the grounds that contain design characteristics which prevent testing the basic models as per the prescribed test procedures.

1) Test procedure sought to be waived

The test procedure to be waived is in 10 CFR part 431, subpart L, 431.203 & 431.204 that requires the measurement of power including the internal battery. Since the power limits were not established using a baseline for units that provide the dual function associated with a combo unit, it is not possible to separate the power measurement for the exit sign and the egress lighting at the same time since a

single battery and charging circuit supplies power for both functions.

2) Manufacturers of all other basic models distributed in commerce in the United States and known to the petitioner to incorporate design characteristic(s) similar to those found in the basic model that is the subject of the petition.

Vernon J. Nagel, Acuity Brands, 1170 Peachtree Street NE, Suite 2300, Atlanta, GA 30309-7676, Waiver 83FR11740.

Mr. David Woodward, Standards and Regulations Manager Americas, Philips Lighting, 938 South Green Street, Tupelo, MS 38802-1687, david.r.woodward@philips.com.

Mr. Bob Howard-Anderson, Fulham Co., Inc., 12705 S. Van Ness Ave., Hawthorne, CA 90250.

Jessica Stanek, Con-Tech Lighting, 2783 Shermer Road, Northbrook, IL 60062, jstanek@con-techlighting.com.

3) Alternative test procedure known to the petitioner to evaluate the performance of the equipment type in a manner representative of the energy and/or water consumption characteristics of the basic model.

For combination exit and egress lighting units (combo units), the power shall be determined by the following procedure:

1. Measure AC input power of the complete combo unit for a fully charged battery
2. Measure the DC output voltage and current to the light source of the exit sign
3. Calculate the AC power consumption of the light source of the exit sign by applying a power factor correction of 30% as worst case scenario. Based on our circuitry design the loss couldn't be more than 30%
4. If needed calculate the stand-by power for the combo unit when the battery is fully charged

$$\text{Stand-by power} = \text{input power (from item 1)} - \text{power of basic exit sign light source (from item 3)}$$

4) Individual model name for which a waiver is requested.

Model code breakdown sample:

SAMPLE MODEL: RBO-C-6-36-LR1-U-W-2LRWP-9W

SERIES	OPERATION (6V, 12V)	CAPACITY	LED	FACE	CHEVRONS	MOUNTING	HEADS	COMPOSITE TUNGSTEN: 9W, 18W
	6V, 12V	Pb-A: 36, 60, 72, 100, 120, 140. NI-CD: 42, 54, 90, 130.	RED, GREEN.	1 (SINGLE).	U (UNIVERSAL) ...	W (WALL)	2LRWP (ONLY)	COMPOSITE TUNGSTEN: 9W, 18W. HALOGEN: 8W.

SAMPLE MODEL: RBO-C-6-36-LR1-U-W-2LRWP-9W—Continued

SERIES	OPERATION (6V, 12V)	CAPACITY	LED	FACE	CHEVRONS	MOUNTING	HEADS	COMPOSITE TUNGSTEN: 9W, 18W
RBO-C	6V	36	LR (RED) ...	1 (SIN- GLE).	U (UNIVERSAL) ...	W (WALL)	2LRWP	9W.

LRWP: LEFT, RIGHT, WATERPROOF.

NOTE: THESE MODELS ARE ALL 2 HEADS, THE 1, 3, 4 HEAD OPTIONS WILL BE CONSIDERED IN THE FUTURE.

RBO-C BASIC MODELS

RBO-C-6-36-LR1-U-W-2LRWP-9W	6V, 9W (RED) (COMPOSITE TUNGSTEN).
RBO-C-6-42-LR1-U-W-2LRWP-9W	
RBO-C-6-54-LR1-U-W-2LRWP-9W	
RBO-C-6-60-LR1-U-W-2LRWP-9W	
RBO-C-6-72-LR1-U-W-2LRWP-9W	
RBO-C-6-90-LR1-U-W-2LRWP-9W	
RBO-C-6-100-LR1-U-W-2LRWP-9W	
RBO-C-6-120-LR1-U-W-2LRWP-9W	
RBO-C-6-36-LG1-U-W-2LRWP-9W	6V, 9W (GREEN) (COMPOSITE TUNGSTEN).
RBO-C-6-42-LG1-U-W-2LRWP-9W	
RBO-C-6-54-LG1-U-W-2LRWP-9W	
RBO-C-6-60-LG1-U-W-2LRWP-9W	
RBO-C-6-72-LG1-U-W-2LRWP-9W	
RBO-C-6-90-LG1-U-W-2LRWP-9W	
RBO-C-6-100-LG1-U-W-2LRWP-9W	
RBO-C-6-120-LG1-U-W-2LRWP-9W	
RBO-C-12-36-LR1-U-W-2LRWP-9W	12V, 9W (RED) (COMPOSITE TUNGSTEN).
RBO-C-12-42-LR1-U-W-2LRWP-9W	
RBO-C-12-60-LR1-U-W-2LRWP-9W	
RBO-C-12-90-LR1-U-W-2LRWP-9W	
RBO-C-12-120-LR1-U-W-2LRWP-9W	
RBO-C-12-130-LR1-U-W-2LRWP-9W	
RBO-C-12-140-LR1-U-W-2LRWP-9W	
RBO-C-12-36-LG1-U-W-2LRWP-9W	12V, 9W (GREEN) (COMPOSITE TUNGSTEN).
RBO-C-12-42-LG1-U-W-2LRWP-9W	
RBO-C-12-60-LG1-U-W-2LRWP-9W	
RBO-C-12-90-LG1-U-W-2LRWP-9W	
RBO-C-12-120-LG1-U-W-2LRWP-9W	
RBO-C-12-130-LG1-U-W-2LRWP-9W	
RBO-C-12-140-LG1-U-W-2LRWP-9W	
RBO-C-6-36-LR1-U-W-2LRWP-18W	6V, 18W (RED) (COMPOSITE TUNGSTEN).
RBO-C-6-42-LR1-U-W-2LRWP-18W	
RBO-C-6-54-LR1-U-W-2LRWP-18W	
RBO-C-6-60-LR1-U-W-2LRWP-18W	
RBO-C-6-72-LR1-U-W-2LRWP-18W	
RBO-C-6-90-LR1-U-W-2LRWP-18W	
RBO-C-6-100-LR1-U-W-2LRWP-18W	
RBO-C-6-120-LR1-U-W-2LRWP-18W	
RBO-C-6-36-LG1-U-W-2LRWP-18W	6V, 18W (GREEN) (COMPOSITE TUNGSTEN).
RBO-C-6-42-LG1-U-W-2LRWP-18W	
RBO-C-6-54-LG1-U-W-2LRWP-18W	
RBO-C-6-60-LG1-U-W-2LRWP-18W	
RBO-C-6-72-LG1-U-W-2LRWP-18W	
RBO-C-6-90-LG1-U-W-2LRWP-18W	
RBO-C-6-100-LG1-U-W-2LRWP-18W	
RBO-C-6-120-LG1-U-W-2LRWP-18W	
RBO-C-12-36-LR1-U-W-2LRWP-18W	12V, 18W (RED) (COMPOSITE TUNGSTEN).
RBO-C-12-42-LR1-U-W-2LRWP-18W	
RBO-C-12-60-LR1-U-W-2LRWP-18W	
RBO-C-12-90-LR1-U-W-2LRWP-18W	
RBO-C-12-120-LR1-U-W-2LRWP-18W	
RBO-C-12-130-LR1-U-W-2LRWP-18W	
RBO-C-12-140-LR1-U-W-2LRWP-18W	
RBO-C-12-36-LG1-U-W-2LRWP-18W	12V, 18W (GREEN) (COMPOSITE TUNGSTEN).
RBO-C-12-42-LG1-U-W-2LRWP-18W	
RBO-C-12-60-LG1-U-W-2LRWP-18W	
RBO-C-12-90-LG1-U-W-2LRWP-18W	
RBO-C-12-120-LG1-U-W-2LRWP-18W	
RBO-C-12-130-LG1-U-W-2LRWP-18W	
RBO-C-12-140-LG1-U-W-2LRWP-18W	
RBO-C-6-36-LR1-U-W-2LRWP-8W	6V, 8W (RED) (HALOGEN).
RBO-C-6-42-LR1-U-W-2LRWP-8W	
RBO-C-6-54-LR1-U-W-2LRWP-8W	
RBO-C-6-60-LR1-U-W-2LRWP-8W	
RBO-C-6-72-LR1-U-W-2LRWP-8W	
RBO-C-6-90-LR1-U-W-2LRWP-8W	
RBO-C-6-100-LR1-U-W-2LRWP-8W	
RBO-C-6-120-LR1-U-W-2LRWP-8W	
RBO-C-6-36-LG1-U-W-2LRWP-8W	6V, 8W (GREEN) (HALOGEN).
RBO-C-6-42-LG1-U-W-2LRWP-8W	
RBO-C-6-54-LG1-U-W-2LRWP-8W	

Appendix A: Basic models table.

- 1) All model combinations will be considered for the waiver request except for the model that includes 0(no heads) that does not qualify for this waiver because it does not have egress lighting

Brand Name	Basic Model Number
Beghelli	RBO-C6***_***
Beghelli	RBO-C12***_***

ordering logic

Series	Operation	Pb-A (Capacity)	Ni-Cd (Capacity)	LED	Face No.	Chevron	Mounting	Heads ²	Lamps	Options
RBO-C	6 (6V)	36 (6V, 12V)	42 (6V, 12V)	LR (red)	1 (single)	U (universal)	W (wall)	4LRWP	See lamps	AT (autotest)
	12 (12V)	60 (6V, 12V)	54 (6V)	LG (green)				3LRWP	selection on next page	NC ³ (nickel-cadmium battery)
		72 (6V)	90 (6V, 12V)					2LRWP		TD ⁴ (time delay- specify 5, 10, 20 mins)
		100 (6V)	130 (12V)					1LRWP		TP (tamper proof screws)
		120 (6V, 12V)						0 (no heads)		AM (ammeter)
		140 (12V)								VM (voltmeter)
										SW (special wording- specify)
										FAI ⁵ (fire alarm interface)
										SMT (side mount heads)
										TC (teflon coating)
										WG (winguard)

NOTE 1: Nickel-cadmium. Must select NC from options when selecting Ni-Cd.
 NOTE 2: Only PAR-36 heads available
 NOTE 3: NC (select wattage/voltage from Ni-Cd column).

NOTE 4: Must specify at time of order, 10 min standard.
 NOTE 5: Specify type- open/closed dry contact.

Appendix B: Test report RBO-C-12 on illuminated exit signs for combo units

 CSA INTERNATIONAL	TEST REPORT
Client: Beghelli Canada	Date: Aug 14, 2013
Master Contract: 187981	Project: Input Rating for Robusto Combo Series RBO: (Sign + charger) Base Model: RBO-C-12-140-xx-yy-zz
Network:	Model no: xx=LED colour of sign LR or LG yy=Number of face and mounting 1U or 1W zz=Number of heads 1,2,3,4LRWP
Device: Unit Equipment for Emergency Lighting	
The subject device was tested for compliance with C22.2 No 141-10	
Tests performed at 60Hz, unless otherwise noted	
Tested by: Fan Yang, P.Eng.	Signature: 
Reviewed by: Peter Shiling	Signature: 

Test Instruments Used:	Accuracy of Instruments
Fluke 73 multimeter (75970170)	+/- 0.3% for DC Voltage
Kikusui DC Electronic Load PLZ1004W (PA001402)	+/- 0.2% for Constant Current Mode
Fluke 52 Thermometer J-type (6617140)	+/- 0.2% + 0.3 ^o C
Simpson AC Current Leakage Meter (5-115695)	+/- 0.5% for AC Current
Yokogawa WT110 Digital Power Meter (2534GA943J)	+/- 0.3% for DC Voltage and Current
Criterion Instrument AVC25V (7475)	+/- 0.5% for AC Voltage

According to IEC60335-1-2 Part1 5.1, if all accuracy of instruments is within the range limit stated in IEC/ISO17025, the measurement result can be directly compared with the test limit

to determine conformance with the requirement.

As mentioned in Part1 5.2, in situations where the above "accuracy method" does not apply, uncertainty of measurement values are needed to be

calculated and reported along with the variables results obtained during testing.

Follow the procedures in IEC60335-1-2 Part2 to calculate uncertainty of measurement.

1. Condition for Test: Clause 6.2

Charger and transformer model	12V High Power Charger #451002100, Transformer #400000101.
Battery model	Sigmas Lead-acid #SP6-12-T2, Beghelli #500000008.
Rating of battery	6V12Ah x 4.
Input Voltage	120\277\347VAC.
Nominal Voltage of battery	12V.
Min. end of discharge voltage	10.0V at circuit board.
Recharge time	1.5A.
Time rating	48 hours.
Charge current	90 mins.
Lamp type/load	140W, Electronic load.

21. Tests for Energy Performance—
Actual Input Power: TIL B-75, Clause
2—Type 3 exit signs containing an

integral battery-charging system shall be
tested with the charging system
connected and the battery fully charged.

Sample #1: RBO-C-12-140-LR-1U-W-
2LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)
120	0.075	7

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	Yes.
Single-sided EXIT w/charging circuit	10 W	7	

Sample #2: RBO-C-12-140-LG-1U-W-
2LRWP

Measured Voltage (Vrms)	Measured current (Arms)	Actual Power (W)
119	0.074	7

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	Yes.
Single-sided EXIT w/charging circuit	10 W	7	

Sample #3: RBO-C-12-140-LR-1U-W-
4LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual Power (W)
120	0.074	7

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	Yes.
Single-sided EXIT w/charging circuit	10 W	7	

Sample #4: RBO-C-12-140-LG-1U-W-
4LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)
120	0.075	7

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	Yes.
Single-sided EXIT w/charging circuit	10 W	7	

Appendix C: Test report RBO-C-6 on illuminated exit signs for combo units

 CSA INTERNATIONAL	TEST REPORT
Client: Beghelli Canada	Date: July 8, 2013
Master Contract: 187981	Project: Input Rating for Robusto Combo Series RBO: (Sign + charger) Base Model: RBO-C-6-120-xx-yy-zz
Network:	Model no: xx=LED colour of sign LR or LG yy=Number of face and mounting 1U or 1W zz=Number of heads 1,2,3,4LRWP
Device: Unit Equipment for Emergency Lighting	
The subject device was tested for compliance with C22.2 No 141-10	
Tests performed at 60Hz, unless otherwise noted	
Tested by: Fan Yang, P.Eng.	Signature: 
Reviewed by: Peter Shiling	Signature: 

Test Instruments Used:	Accuracy of Instruments
Fluke 73 multimeter (75970170)	+/- 0.3% for DC Voltage
Kikusui DC Electronic Load PLZ1004W (PA001402)	+/- 0.2% for Constant Current Mode
Fluke 52 Thermometer J-type (6617140)	+/- 0.2% + 0.3 ^o C
Simpson AC Current Leakage Meter (5-115695)	+/- 0.5% for AC Current
Yokogawa WT110 Digital Power Meter (2534GA943J)	+/- 0.3% for DC Voltage and Current
Criterion Instrument AVC25V (7475)	+/- 0.5% for AC Voltage

According to IEC60335-1-21 Part1 5.1, if all accuracy of instruments is within the range limit stated in IEC/ISO17025, the measurement result can be directly compared with the test limit

to determine conformance with the requirement.

As mentioned in Part1 5.2, in situations where the above "accuracy method" does not apply, uncertainty of measurement values are needed to be

calculated and reported along with the variables results obtained during testing.

Follow the procedures in IEC60335-1-21 Part2 to calculate uncertainty of measurement.

1. Condition for Test: Clause 6.2

Charger and transformer model	6V High Power Charger #451002000, Transformer #400000100.
Battery model	Sigmas Lead-acid #SP6-12-T2, Beghelli #500000008.
Rating of battery	6V12Ah x 4.
Input Voltage	120\277\347VAC.
Nominal Voltage of battery	6V.
Min. end of discharge voltage	5.0V at circuit board.
Recharge time	1.5A.
Time rating	48 hours.
Charge current	90 mins.
Lamp type/load	120W, Electronic load.

21. *Tests for Energy Performance—Actual Input Power:* TIL B-75, Clause 2—Type 3 exit signs containing an

integral battery-charging system shall be tested with the charging system connected and the battery fully charged.

Sample #1: RBO-C-6-120-LR-1U-W-2LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)
120	0.083	8

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	.....
Single-sided EXIT w/charging circuit	10 W	8	Yes

Sample #2: RBO-C-6-120-LG-1U-W-2LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)
119	0.083	8

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	.....
Single-sided EXIT w/charging circuit	10 W	8	Yes

Sample #3: RBO-C-6-120-LR-1U-W-4LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)
120	0.083	8

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	.....
Single-sided EXIT w/charging circuit	10 W	8	Yes

Sample #4: RBO-C-6-120-LG-1U-W-4LRWP

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)
120	0.082	8

Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	N/A	.....
Single-sided EXIT w/charging circuit	10 W	8	Yes

Appendix D: Test report RBO on illuminated exit signs for exit signs units

 CSA INTERNATIONAL	TEST REPORT
Client: Beghelli Canada	Date: Aug 21, 2013
Master Contract: 187981	Project: Input Rating for Robusto Sign Series Base Model: RBO-E or RBO-RM
Network:	Model no: E=EXIT sign, colour of sign LR or LG RM=Running Man sign Single or double faces sign use the same LED board
Device: Unit Equipment for Emergency Lighting	
The subject device was tested for compliance with C22.2 No 141-10	
Tests performed at 60Hz, unless otherwise noted	
Tested by: Fan Yang, P.Eng.	Signature: 
Reviewed by: Peter Shiling	Signature: 

Test Instruments Used:	Accuracy of Instruments
Fluke 73 multimeter (75970170)	+/- 0.3% for DC Voltage
Kikusui DC Electronic Load PLZ1004W (PA001402)	+/- 0.2% for Constant Current Mode
Fluke 52 Thermometer J-type (6617140)	+/- 0.2% + 0.3°C
Simpson AC Current Leakage Meter (5-115695)	+/- 0.5% for AC Current
Yokogawa WT110 Digital Power Meter (2534GA943J)	+/- 0.3% for DC Voltage and Current
Criterion Instrument AVC25V (7475)	+/- 0.5% for AC Voltage

BILLING CODE 6450-01-C

According to IECCE-CTL Guide001 Part1 5.1, if all accuracy of instruments is within the range limit stated in IEC/ISO17025, the measurement result can be directly compared with the test limit

to determine conformance with the requirement.

As mentioned in Part1 5.2, in situations where the above “accuracy method” does not apply, uncertainty of measurement values are needed to be

calculated and reported along with the variables results obtained during testing.

Follow the procedures in IECCE-CTL Guide001 Part2 to calculate uncertainty of measurement.

1. *Condition for Test:* Clause 6.2

Charger and transformer model	LED board models tested: RBO-E-SALG1, RBO-E-HTLG1, RBO-E-HTLG1UDC.
Battery model	
Rating of battery	
Input Voltage	120\277\347VAC.
Nominal Voltage of battery	4.8V Ni-Cd.
Min. end of discharge voltage	4.0V at circuit board.
Recharge time	48 hours.
Time rating	90 mins.
Charge current	65mA.
Lamp type/load	W, Electronic load.

21. *Tests for Energy Performance—Actual Input Power:* TIL B-75, Clause 2—Type 3 exit signs containing an

integral battery-charging system shall be tested with the charging system connected and the battery fully charged.

Single or double faces use the same power consumptions

Sample #1: RBO-E-SALG1

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)	Battery-powered sign
120	0.12	1.4	.....
Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	1.4	Yes
Single-sided EXIT w/charging circuit	10 W	N/A	.....

Sample #2: RBO-E-HTLG1

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)	AC only sign
119	0.029	0.67	.....
Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	0.67	Yes
Single-sided EXIT w/charging circuit	10 W	N/A	.....

Sample #3: RBO-E HTLG1UDC

Measured voltage (Vrms)	Measured current (Arms)	Actual power (W)	Universal DC sign
120	0.028	0.55	.....
Type of sign	Max actual input power	Measured input power	Compliance
Single-sided EXIT	5 W	0.55	Yes
Single-sided EXIT w/charging circuit	10 W	N/A	.....

[FR Doc. 2019-01241 Filed 2-5-19; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho Cleanup Project

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho Cleanup Project. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, April 25, 2019; 8:00 a.m.–5:00 p.m.

The opportunities for public comment are at 10:15 a.m. and 2:00 p.m. This time is subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Hilton Garden Inn Twin Falls, 1741 Harrison Street North, Twin Falls, ID 83301.

FOR FURTHER INFORMATION CONTACT: Brad Bugger, Federal Coordinator, Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS-1203, Idaho Falls, Idaho 83415. Phone (208) 526-0833; or email: buggerbp@id.doe.gov or visit the Board's internet home page at: <https://energy.gov/em/icpcab/>.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE-EM and site management in the areas of environmental restoration,

waste management, and related activities.

Tentative Topics (agenda topics may change up to the day of the meeting; please contact Brad Bugger for the most current agenda):

- Recent Public Outreach
- Idaho Cleanup Project (ICP) Overview
- Update on Integrated Waste Treatment Unit (IWTU)
- Update on Fiscal Year 2020 Budget Proposal
- Subsurface Disposal Area (SDA) Cap 90 Percent Design
- Update on Groundwater and Snake River Plain Aquifer
- Report from Subcommittee on Calcine
- Reports from Other Subcommittees and Board Organizational Topics

Public Participation: The meeting is open to the public. The EM SSAB, Idaho Cleanup Project, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons

with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Brad Bugger at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Brad Bugger at the address or telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Brad Bugger, Federal Coordinator, at the address and phone number listed above. Minutes will also be available at the following website: <https://energy.gov/em/icpcab/listings/cab-meetings>.

Signed in Washington, DC on January 31, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019-01236 Filed 2-5-19; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19-837-000]

C.P. Crane 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 C.P. Crane 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 February 11, 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 above. 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: January 22, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019-01158 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

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: ER19-910-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: APCo-Gulf TFCAT Amended and Restated Service Agreements Filing to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5088.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-911-000.

Applicants: Public Service Company of Colorado.

Description: § 205(d) Rate Filing: 2019-01-30 SPS Wholesale Real Power Losses-Filing to be effective 4/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5089.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-912-000.

Applicants: Georgia Power Company.
Description: § 205(d) Rate Filing: GPC-Gulf Scherer 3 TFCAT Amended and Restated Service Agreement Filing to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5091.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-913-000.

Applicants: PacifiCorp.

Description: Tariff Cancellation: Termination of EWEB Non-Conf PTP Agreement to be effective 2/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5123.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-914-000.

Applicants: San Diego Gas & Electric Company.

Description: § 205(d) Rate Filing: Service Agreement No. 59 FERC Electric Tariff Volume No. 11 Mesquite Solar 5 to be effective 2/3/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5124.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-915-000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019-01-30_RAN Outage Coordination Filing to be effective 4/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5125.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-916-000.

Applicants: Selmer Farm, LLC.

Description: Compliance filing: Compliance Filing—Category 2 Seller to be effective 3/31/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5130.

Comments Due: 5 p.m. ET 2/20/19.

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: January 30, 2019.

Kimberly D. Bose,
Secretary.

[FR Doc. 2019-01152 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19-55-000]

Notice of Request Under Blanket Authorization: Southern Natural Gas Company, LLC

Take notice that on January 22, 2019, Southern Natural Gas Company, LLC (Southern) 569 Brookwood Village, Suite 749, Birmingham, Alabama 35209, filed in Docket No. CP19-55-000 a prior notice request pursuant to sections 157.205 and 157.210 of the Commission's regulations under the Natural Gas Act (NGA), and Southern's blanket certificate issued in Docket No. CP82-406-000, seeking authorization to replace a tap and suction line tied to its North Main System in order to increase capacity (North Main Upgrade Project). Southern states that as a result of Southern's open season posted on September 18, 2018, the shipper Southern Company Services, Inc. amended their Service Agreement with Southern to provide an additional 5,000 dekatherm per day of firm transportation on Southern's North Main System. Southern determined that operational capacity is available on a short term basis at this location, however, additional facilities will be required to provide this service throughout the term of the agreement.

Specifically, Southern proposes to replace the 12-inch tap and suction line located at its McConnells Compressor Station with a 20-inch tap and suction line. This tap and suction line connects to Southern's 22-inch North Main System at Milepost 260.742 in Tuscaloosa County, Alabama. This proposed tap and suction line replacement will take place entirely within the footprint of Southern's property located at its McConnells Compressor Station. The North Main Upgrade Project will increase the efficiency of Southern's North Main

System without the need for additional compression or pipeline looping. Southern estimates the cost of the Project to be \$1.7 million, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this application may be directed to T. Brooks Henderson, Director, Rates & Regulatory Affairs Department, PO Box 2563, Birmingham, Alabama 35202-2563, by telephone at (205)325-3843, or by email at brooks_henderson@kindermorgan.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, will receive copies of the environmental documents, and will be notified of 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 (except for the mailing of environmental documents 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 seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Dated: January 30, 2019.

Kimberly D. Bose,
Secretary.

[FR Doc. 2019-01149 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19-846-000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization: Antelope DSR 3, LLC

This is a supplemental notice in the above-referenced proceeding of Antelope DSR 3, 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 February 12, 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 above. 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: January 23, 2019.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. 2019-01155 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19-847-000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization: San Pablo Raceway, LLC

This is a supplemental notice in the above-referenced proceeding of San Pablo Raceway, 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 February 12, 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 above. 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: January 23, 2019.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. 2019-01163 Filed 2-5-19; 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 corporate filings:

Docket Numbers: EC19-50-000.

Applicants: Frontier Utilities Northeast LLC, NextEra Energy Services, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Frontier Utilities Northeast LLC, et al.

Filed Date: 1/25/19.

Accession Number: 20190125-5181.

Comments Due: 5 p.m. ET 2/15/19.

Docket Numbers: EC19-51-000.

Applicants: Bloom Energy Corporation, Diamond State Generation Partners, LLC, Yellow Jacket Energy, LLC, 2014 ESA Project Company, LLC, 2015 ESA Project Company, LLC, Canada Pension Plan Investment Board.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Bloom Energy Corporation, et al.

Filed Date: 1/28/19.

Accession Number: 20190128-5109.

Comments Due: 5 p.m. ET 2/19/19.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19-52-000.

Applicants: Crystal Lake Wind Energy I, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Crystal Lake Wind Energy I, LLC.

Filed Date: 1/28/19.

Accession Number: 20190128-5120.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: EG19-53-000.

Applicants: Crystal Lake Wind Energy II, LLC.

Description: Self-Certification of Self-Certification of Exempt Wholesale Generator Status of Crystal Lake Wind Energy II, LLC.

Filed Date: 1/28/19.

Accession Number: 20190128-5121.

Comments Due: 5 p.m. ET 2/19/19.

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

Docket Numbers: ER17-615-003; ER10-2184-027; ER10-2192-032; ER10-2178-032; ER11-2014-025; ER11-2013-025 ER13-1536-016; ER11-2005-025.

Applicants: Albany Green Energy, LLC, CER Generation, LLC,

Constellation Energy Commodities Group Maine, LLC, Constellation NewEnergy, Inc., Cow Branch Wind Power, LLC, CR Clearing, LLC, Exelon Generation Company, LLC, Wind Capital Holdings, LLC.

Description: Supplement to December 22, 2017 Updated Market Power Analysis for the Southeast Region of the Exelon Southeast Entities.

Filed Date: 1/24/19.

Accession Number: 20190124–5212.

Comments Due: 5 p.m. ET 2/7/19.

Docket Numbers: ER17–2386–001.

Applicants: Great Bay Solar I, LLC.

Description: Report Filing: Refund Report (ER17–2386 and EL18–8) to be effective N/A.

Filed Date: 1/28/19.

Accession Number: 20190128–5137.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER18–1708–001.

Applicants: Copenhagen Wind Farm, LLC.

Description: Notice of Non-Material Change in Status of Copenhagen Wind Farm, LLC.

Filed Date: 1/24/19.

Accession Number: 20190124–5229.

Comments Due: 5 p.m. ET 2/14/19.

Docket Numbers: ER18–1954–002.

Applicants: Gulf Power Company.

Description: Compliance filing: Notice of Effective Date & Compliance Filing (NITSA/NOA) ER18–1954 to be effective 1/1/2019.

Filed Date: 1/25/19.

Accession Number: 20190125–5141.

Comments Due: 5 p.m. ET 2/15/19.

Docket Numbers: ER18–2352–002.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: Tariff Amendment: 2019–01–28 Amendment to Real-Time Buybacks of Spinning and Offline Supplemental to be effective 2/14/2019.

Filed Date: 1/28/19.

Accession Number: 20190128–5041.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–871–000.

Applicants: Southwestern Electric Power Company.

Description: § 205(d) Rate Filing: SWEPCO–Etec Contracting Services Agreements (Monitor, Op, Dispatch) to be effective 1/1/2019.

Filed Date: 1/25/19.

Accession Number: 20190125–5113.

Comments Due: 5 p.m. ET 2/15/19.

Docket Numbers: ER19–872–000.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019–01–28_SA 1925 ITC Midwest-Interstate Power and Light 4th Rev DTIA to be effective 3/30/2019.

Filed Date: 1/28/19.

Accession Number: 20190128–5104.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–873–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX-Lighthouse EC-Golden Spread EC Interconnection Agreement to be effective 1/15/2019.

Filed Date: 1/28/19.

Accession Number: 20190128–5108.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–874–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original WMPA, SA No. 5260; Queue No. AD1–060 to be effective 1/2/2019.

Filed Date: 1/28/19.

Accession Number: 20190128–5119.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19–875–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019–01–28_Cyber Security Coordination to be effective 3/30/2019.

Filed Date: 1/28/19.

Accession Number: 20190128–5135.

Comments Due: 5 p.m. ET 2/19/19.

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: January 29, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–01168 Filed 2–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10684–000]

Lansing Board of Water and Light; Notice of Existing Licensee's Failure To File a Notice of Intent To File a Subsequent License Application, and Soliciting Notices of Intent To File a License Application and Pre-Application Documents

The current license for the Lansing Board of Water and Light's Moores Park Project No. 10684 (Moores Park Project) was issued on January 5, 1994, for a term of 30 years, ending December 31, 2023.¹ The 600-kilowatt (kW) project is located on the Grand River in the City of Lansing, in Ingham County, Michigan.

The principal project works consist of: (1) A 240-acre reservoir with 2,000-acre-feet of storage at a normal water surface elevation of 833.6 feet National Geodetic Vertical Datum; (2) a 190-foot-long, 21-foot-high reinforced concrete gravity dam divided into a 120-foot-long flashboard-crested spillway section and a 70-foot-long, three-bay Taintor-gate section, each gate measuring 20-foot-long by 10-foot-high; (3) a 110-foot-long, 50- to 83-foot-wide, 61-foot-high integral water-impounding powerhouse constructed of reinforced concrete and brick masonry containing one horizontal axis turbine-generator unit rated at 600 kW; (4) a 200-foot-long, 4,160-volt underground transmission line connected to a step-up transformer; and (5) appurtenant equipment and facilities.

At least five years before the expiration of a license for a minor water power project in which sections 14 and 15 of the Federal Power Act were waived, the Commission's regulations require the licensee to file with the Commission a notice of intent (NOI) that contains an unequivocal statement of the licensee's intention to file or not to file an application for a subsequent license, details on the principal project works and installed plant capacity, and other information.²

If such a licensee does not inform the Commission that it intends to file an application for, in this case, a subsequent license for the project, the licensee may not file an application for a subsequent license, either individually or in conjunction with an entity or

¹ Lansing Board of Water and Light, 66 FERC 62,002 (1994).

² 18 CFR 16.19(b) (2018) (citing 18 CFR 16.6(b) (2018)).

entities that are not currently licensees of the project.³

Because the existing license expires on December 31, 2023, the NOI was due to be filed by the close of business on December 31, 2018. The Lansing Board of Water and Light, the existing licensee for the Moores Park Project, failed to file an NOI for the project by this date.⁴

Any party interested in filing a license application for the Moores Park Project No. 10684 must first file a NOI⁵ and pre-application document (PAD)⁶ pursuant to Part 5 of the Commission's regulations. Although the integrated licensing process (ILP) is the default pre-filing process, section 5.3(b) of the Commission's regulations allows a potential license applicant to request to use the traditional licensing process or alternative procedures when it files its NOI.⁷

This notice sets a deadline of 120 days from the date of this notice for interested applicants, other than the existing licensee, to file NOIs, PADs, and requests to use the traditional licensing process or alternative procedures.

Applications for a subsequent license from potential applicants must be filed with the Commission at least 24 months prior to the expiration of the existing license.⁸ Because the existing license expires on December 31, 2023, applications for license for this project must be filed by December 31, 2021.⁹

Questions concerning this notice should be directed to Lee Emery at (202) 502-8379 or lee.emery@ferc.gov.

Dated: January 31, 2019.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. 2019-01189 Filed 2-5-19; 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:

³ 18 CFR 16.24(b) (2018).

⁴ 18 CFR 16.23(b) (2018).

⁵ 18 CFR 5.5 (2018).

⁶ 18 CFR 5.6 (2018).

⁷ 18 CFR 5.3(b) (2018).

⁸ 18 CFR 16.20 (2018).

⁹ To the extent an interested applicant files an NOI and PAD and elects or is required to use the Commission's ILP, a process plan will be issued within 180 days of this notice, which accelerates the steps of the ILP to allow for filing a timely subsequent license application by the December 31, 2021 deadline.

Docket Numbers: ER11-4507-010.
Applicants: Canastota Windpower, LLC.

Description: Notice of Non-Material Change in Status of Canastota Windpower, LLC.

Filed Date: 1/29/19.

Accession Number: 20190129-5250.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER14-1421-001.

Applicants: Diamond State Generation Partners, LLC.

Description: Compliance filing: Informational Filing Pursuant to Schedule 2 of the PJM OATT & Request for Waiver to be effective N/A.

Filed Date: 1/29/19.

Accession Number: 20190129-5186.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER18-1934-001.

Applicants: Alabama Power Company.

Description: Compliance filing: OATT Compliance Filing (Relating to Sale of Gulf Power) to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5084.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER18-1938-001.

Applicants: Alabama Power Company.

Description: Compliance filing: Transmission Facility Cost Allocation Tariff Compliance Filing to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5085.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-256-002.

Applicants: Wisconsin Power and Light Company.

Description: Tariff Amendment: Amendment to WPL Wholesale Formula Rate Application to be effective 12/31/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5209.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-257-002.

Applicants: Interstate Power and Light Company.

Description: Tariff Amendment: Amendment to IPL Wholesale Formula Rate Application to be effective 12/31/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5212.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-361-000.

Applicants: Midcontinent Independent System Operator, Inc., International Transmission Company, Michigan Electric Transmission Company, LLC, ITC Midwest LLC.

Description: Report Filing: 2019-01-29 Refund Report for ITC Companies re Transco Adder (EL18-140) to be effective N/A.

Filed Date: 1/29/19.

Accession Number: 20190129-5163.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-541-001.

Applicants: ITC Midwest LLC.

Description: Tariff Amendment: Amendment to Filing of JUA with Jo-Carroll Energy to be effective 2/11/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5201.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-846-000.

Applicants: Antelope DSR 3, LLC.

Description: Supplement to January 22, 2019 Antelope DSR 3, LLC tariff filing.

Filed Date: 1/29/19.

Accession Number: 20190129-5239.

Comments Due: 5 p.m. ET 2/12/19.

Docket Numbers: ER19-847-000.

Applicants: San Pablo Raceway, LLC.

Description: Supplement to January 22, 2019 San Pablo Raceway, LLC tariff filing.

Filed Date: 1/29/19.

Accession Number: 20190129-5243.

Comments Due: 5 p.m. ET 2/12/19.

Docket Numbers: ER19-884-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: DEC-SoCo Amended and Restated Interconnection Contract Filing to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5137.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-886-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: DEF-SoCo Amended and Restated Interconnection Contract Filing to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5139.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-887-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: Filing of Interchange Contract Amendments (to remove Gulf) to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5141.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-888-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: Filing of NITSA Amendments (to remove Gulf) to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5143.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-889-000.

Applicants: Alabama Power Company.

Description: Tariff Cancellation: FPU NITSA Termination Filing to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5144.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-890-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: PowerSouth Long-Term Firm PTP Agreement Filing to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5146.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-891-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: PowerSouth NITSA 2019 Rollover Filing to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5150.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-892-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: PowerSouth Amended and Restated NITSA Filing to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5154.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-893-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: SEPA Network Agreement Amendment Filing (Revision Nos. 5 & 6) to be effective 1/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5159.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-894-000.

Applicants: Black Hills Colorado Electric, LLC.

Description: § 205(d) Rate Filing: Notice of Succession (OATT) to be effective 12/31/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5165.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-895-000.

Applicants: Black Hills Colorado Electric, LLC.

Description: § 205(d) Rate Filing: Notice of Succession (WestConnect Point-to-Point) to be effective 12/31/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5166.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-896-000.

Applicants: Black Hills Colorado Electric, LLC.

Description: § 205(d) Rate Filing: Notice of Succession (Agreements and Rate Schedules) to be effective 12/31/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5167.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-897-000.

Applicants: Public Service Company of Colorado.

Description: § 205(d) Rate Filing: 20190129 Joint Dispatch Agreement Black Hills Name Change to be effective 12/31/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5168.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-898-000.

Applicants: Midcontinent Independent System Operator, Inc., Alliant Energy Corporate Services, Inc.

Description: § 205(d) Rate Filing: 2019-01-29 SA 2605 Termination of IPL-City of Guttenberg DAFC to be effective 3/31/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5171.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-899-000.

Applicants: Midcontinent Independent System Operator, Inc., Alliant Energy Corporate Services, Inc.

Description: § 205(d) Rate Filing: 2019-01-29 SA 2604 IPL-City of Guttenberg 1st Rev IFA to be effective 3/31/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5198.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-900-000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: Amendment to Engineering and Permitting Agrmt with CA High Speed Rail (RS 247) to be effective 1/30/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5202.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-901-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of WMPA SA No. 4184; Queue No. Z2-106 to be effective 12/10/2018.

Filed Date: 1/29/19.

Accession Number: 20190129-5207.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-902-000.

Applicants: Valcour Wind Energy, LLC.

Description: Baseline eTariff Filing: MBR Application to be effective 3/15/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5214.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-903-000.

Applicants: Midcontinent Independent System Operator, Inc., Alliant Energy Corporate Services, Inc.

Description: § 205(d) Rate Filing: 2019-01-29 SA 2636 IPL-RPGI 1st Rev DAFC to be effective 3/31/2019.

Filed Date: 1/29/19.

Accession Number: 20190129-5215.

Comments Due: 5 p.m. ET 2/19/19.

Docket Numbers: ER19-904-000.

Applicants: Mulberry Farm, LLC.

Description: Compliance filing:

Compliance Filing—Category 2 Seller to be effective 3/30/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5001.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-905-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: Southern Power (Franklin 3) LGIA Amendment Filing to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5006.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-906-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: LGIA Amendments Filing #1 (to Remove Gulf) to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5007.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-907-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: LGIA Amendments Filing #2 (to Remove Gulf) to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5008.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-908-000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: LGIA Amendments Filing #3 (to Remove Gulf) to be effective 1/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130-5009.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ER19-909-000.

Applicants: Georgia Power Company, Alabama Power Company, Mississippi Power Company.

Description: Notice of Cancellation of Umbrella Service Agreements of Alabama Power Company, et al.

Filed Date: 1/29/19.

Accession Number: 20190129-5240.

Comments Due: 5 p.m. ET 2/19/19.

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: January 30, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019-01151 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19-902-000]

Valcour Wind Energy, 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 Valcour Wind Energy, 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 February 19, 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 above. 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: January 30, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019-01147 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2669-085]

Bear Swamp Power Company, LLC; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric license application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2669-085.

c. *Date filed:* March 30, 2018.

d. *Applicant:* Bear Swamp Power Company, LLC (Bear Swamp).

e. *Name of Project:* Bear Swamp Project.

f. *Location:* On the Deerfield River, in Berkshire and Franklin Counties, Massachusetts. There are no federal or tribal lands within the project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)-825(r).

h. *Applicant Contact:* Steven P. Murphy, Director of Licensing, Brookfield Renewable Energy Group, 33 West 1st Street South, Fulton, NY 13069; Telephone at (315) 593-3118.

i. *FERC Contact:* Amy Chang, (202) 502-8250 or amy.chang@ferc.gov.

j. *Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions 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-2669-085.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person 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. This application has been accepted for filing and is now ready for environmental analysis.

l. The existing Bear Swamp Project consists of a pumped storage development, the Bear Swamp Pumped Storage Development, and a conventional hydropower development, the Fife Brook Development, with a combined authorized capacity of 676 megawatts (MW). The project generates an average of 483,863 megawatt-hours (MWh) annually, and uses an average of 618,293 MWh annually to operate the pumped storage development.

Bear Swamp Pumped Storage Development

The existing Bear Swamp Pumped Storage Development consists of: (1) A 118-acre upper reservoir with a gross storage capacity of 8,300 acre-feet at the normal full water surface elevation of approximately 1,600 feet National Geodetic Vertical Datum of 1929 (NGVD), which is contained by existing topography and four dikes: (a) An approximately 1,300-foot-long, 155-foot-high curved, earth and rock-fill dike (North Dike); (b) an approximately 350-foot-long, 23-foot-high earth and rock-fill dike extending from the eastside of the North Dike (North Dike Extension); (c) an approximately 2,880-foot-long, 140-foot-high earth and rock-fill dike (South Dike); and (d) an approximately 750-foot-long, 50-foot-high earth and rock-fill dike (East Dike); (2) a 420-foot-long emergency spillway excavated into bedrock to the east of the North Dike Extension; (3) an 88-foot-long, 1.5- to 4-foot-wide, 4-foot-high submerged weir with three 5-foot-wide, 3-foot-high concrete stoplog gates; (4) a 40-foot-diameter concrete inlet/outlet structure located at the bottom of the upper reservoir to the west of the North Dike; (5) an approximately 1,430.5-foot-long tunnel system that conveys water from the upper reservoir to two 11-foot-diameter, steel-lined penstock sections; (6) a 227-foot-long, 79-foot-wide, 182-foot-high underground powerhouse containing two reversible Francis pump turbine-generator units with a total authorized capacity of 666 MW; (7) a lower reservoir inlet/outlet structure with four 15-foot-wide, 20-foot-high bays, each equipped with 16-foot-wide, 20.6-foot-high steel slide gates; (8) four 15-foot-wide, 26.7-foot-tall steel trashracks with 6-inch bar spacing; (9) two 13.8-kilovolt (kV) pump motor-generator lead electrical lines, one approximately 890 feet long (east lead), and one approximately 900 feet long (west lead); (10) two 13.8/230-kV step-up transformers; (11) two 230-kV above-ground transmission lines, one approximately 4,075 feet long (south line) and one approximately 3,960 feet long (north line), which terminate at a non-project switchyard owned by National Grid; and (12) appurtenant facilities.

Fife Brook Development

The existing Fife Brook Development consists of: (1) An 890-foot-long, 130-foot-high earthen rock-fill dam; (2) a 152-acre impoundment with a gross storage capacity of 6,900 acre-feet at a normal maximum water surface elevation of 870 feet NGVD, which also

serves as the lower reservoir for the Bear Swamp Pumped Storage Development; (3) two 36-foot-wide, 40-foot-high steel Tainter spillway gates that are integral with the dam; (4) a concrete intake structure that is integral with the dam and includes an 11.2-foot-wide, 24-foot-tall trashrack with 3-inch bar spacing and a 15-foot-wide, 18-foot-high headgate; (5) a 10-foot-diameter, 200-foot-long steel penstock; (6) an approximately 79.25-foot-long, 44-foot-wide, 94-foot-tall concrete powerhouse containing a 10-MW Francis turbine-generator unit; (7) a 21-foot-long steel-lined draft tube; (8) an approximately 325-foot-long, 30-inch-diameter minimum flow release pipe that is gated at its intake and bifurcates into an approximately 55-foot-long, 20-inch-diameter pipe and an approximately 55-foot-long, 24-inch-diameter pipe; (9) a partially buried (860-foot-long section) and partially above-ground (7,060-foot-long section) 13.8-kV transmission line that connects the turbine-generator unit to the regional grid at a non-project substation owned by Great River Hydro, LLC; and (10) appurtenant facilities.

The Bear Swamp Pumped Storage Development uses a storage capacity of 4,600 acre-feet to produce approximately 3,028 MWh of generation over approximately 5.3 hours. The Bear Swamp Pumped Storage Development normally generates and pumps back some or all of the useable storage capacity over a 24-hour period.

The Fife Brook impoundment is the lower reservoir of the Bear Swamp Pumped Storage Development, and has an allowable drawdown of 40 feet to provide a useable storage capacity of 4,600 acre-feet to the upper reservoir of the Bear Swamp Pumped Storage Development for daily peaking operations. Releases from Fife Brook dam generally match the inflow from the Station No. 5 Development of Great River Hydro LLC's Deerfield River Project (FERC No. 2323), which discharges directly into the Fife Brook impoundment.

The existing license requires Bear Swamp to release a continuous minimum flow of 125 cubic feet per second (cfs) from the Fife Brook dam. The existing license also requires Bear Swamp to provide 106 scheduled annual releases of 700 cfs for whitewater recreation downstream of the Fife Brook dam from April 1 through October 31. Bear Swamp proposes to continue the current licensed mode of operation, including the minimum flow and whitewater recreation releases. Bear Swamp proposes to increase the volume of the whitewater flow releases from 700 cfs to 800 cfs.

Bear Swamp proposes to continue to operate and maintain the existing licensed project recreation facilities. Bear Swamp also proposes several new measures to enhance recreational resources: (1) Improve the overflow parking area at the Fife Brook Fishing and Boating Access Area; (2) construct a new portage trail that begins downstream from the Showtime whitewater feature and extends upstream to the existing vehicle turnaround at the Dunbar Brook Picnic Area; (3) provide additional seasonal restroom facilities at the Zoar Picnic Area; (4) install a handrail on the stairs at the Fife Brook Fishing and Boating Access Area; (5) construct a stall-type changing facility at the Zoar Picnic Area; and (6) install additional signage to educate recreationists on safety and the Deerfield River flow regime. Finally, Bear Swamp proposes to continue to include 201 acres of river corridor lands downstream from the Fife Brook Development in the project boundary for the protection of wildlife and riverine habitat.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. Copies are also available for inspection and reproduction at the Rowe Town Library, 318 Zoar Road, Rowe, Massachusetts 01367; and the North Adams Public Library, 74 Church Street, North Adams, Massachusetts 01247.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure, 18 CFR 385.210, .211, 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.

All filings must (1) bear in all capital letters the title "PROTEST," "MOTION TO INTERVENE," "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (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, recommendations, terms and conditions, or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). 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. 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.

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

o. Procedural Schedule:

The application will be processed according to the following revised schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Filing of interventions, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions.	April 2019.
Commission issues Draft Environmental Assessment	October 2019.
Comments on Draft Environmental Assessment	November 2019.
Modified terms and conditions	January 2020.
Commission issues Final Environmental Assessment	April 2020.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

p. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: January 30, 2019.

Kimberly D. Bose,
Secretary.

[FR Doc. 2019-01150 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19-51-000]

Columbia Gas Transmission, LLC; Notice of Application

Take notice that on January 17, 2019, Columbia Gas Transmission, LLC (Columbia), 700 Louisiana Street, Suite 700, Houston, Texas 77002-2700, filed an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations for authorization to replace and upgrade its VNG Suffolk No. 3 Meter Station, located in Suffolk, Virginia. Columbia states that the proposed project will increase the delivery capability of that meter station by 8,270 dekatherms per day while maintaining Columbia's current certificated capacity levels. Columbia asserts that there will be no change in

pipeline system capacity as a result of the proposed project. Columbia estimates the cost of the project to be approximately \$6.3 million, all as more fully set forth in the application, which is on file with the Commission and open for 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, please contact FERC at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or TTY, (202) 502-8659.

Any questions regarding the proposed project should be directed to Jonathan Scullion, Regulatory and Commercial Law, TransCanada Corporation, 700 Louisiana Street, Houston, Texas 77002, by telephone at (832) 320-5520.

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.

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

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

Persons who wish to comment only on the environmental review of this

project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental 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.

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

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: February 21, 2019.

Dated: January 31, 2019.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. 2019-01187 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

	Project No.
King Mountain Upton Wind, LLC ..	EG19-1-000
SR Millington, LLC	EG19-2-000
R-WS Antelope Valley Gen-Tie, LLC	EG19-3-000
Phoebe Energy Project, LLC	EG19-4-000
Fluvanna Wind Energy 2, LLC	EG19-5-000

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

² 18 CFR 385.214(d)(1).

	Project No.
Conemaugh Power Pass-Through Holders LLC	EG19-6-000
Keystone Power Pass-Through Holders LLC	EG19-7-000
GRP Madison, LLC	EG19-8-000
GRP Franklin, LLC	EG19-9-000
North Rosamond Solar, LLC	EG19-10-000
Indian Mesa Wind, LLC	EG19-11-000
Woodward Mountain Wind, LLC ..	EG19-12-000
Gateway Energy Storage, LLC	EG19-13-000
Carson Hybrid Energy Storage LLC	EG19-14-000
Lockett Windfarm LLC	EG19-15-000

Take notice that during the month of December 2018, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2018).

Dated: January 9, 2019.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. 2019-01159 Filed 2-5-19; 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: CP19-54-000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: Application of Transcontinental Gas Pipe Line Company, LLC under 7(b) to abandon certain firm transportation services.
Filed Date: 1/22/19.
Accession Number: 20190122-5266.
Comments Due: 5 p.m. ET 2/12/19.
Docket Numbers: RP11-1711-000.
Applicants: Texas Gas Transmission, LLC.

Description: Report Filing: 2018 Cash Out Filing.
Filed Date: 1/29/19.
Accession Number: 20190129-5006.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP18-923-005.
Applicants: Enable Mississippi River Transmission, LLC.

Description: Compliance filing MRT Compliance Filing After 12-31-18 Order to be effective 1/1/2019.
Filed Date: 1/30/19.
Accession Number: 20190130-5195.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-76-001.
Applicants: Kern River Gas Transmission Company.

Description: Report Filing: TRC Refund Report.
Filed Date: 1/30/19.
Accession Number: 20190130-5049.
Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19-584-000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated rate—Chevron release to Colonial 8955902 to be effective 2/1/2019.

Filed Date: 1/29/19.
Accession Number: 20190129-5005.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-585-000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate—Bay 510066 to BBPC 798601 eff 2-1-19 to be effective 2/1/2019.

Filed Date: 1/29/19.
Accession Number: 20190129-5035.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-586-000.
Applicants: Aux Sable Canada LP, PetroChina International (Canada) Trading.

Description: Joint Petition for Temporary Waivers of Capacity Release Regulations and Related Tariff Provisions of Aux Sable Canada LP, et al.

Filed Date: 1/28/19.
Accession Number: 20190128-5210.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-587-000.
Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Jan2019 NCF and NRA Cleanup to be effective 3/1/2019.
Filed Date: 1/29/19.
Accession Number: 20190129-5066.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-588-000.
Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Negotiated Rate—MC Global to Eco-Energy 8955933 to be effective 2/1/2019.
Filed Date: 1/29/19.

Accession Number: 20190129-5067.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-589-000.
Applicants: Dominion Energy Overthrust Pipeline, LLC.

Description: Compliance filing Compliance Filing Pursuant to Settlement Proceeding to be effective 1/1/2019.

Filed Date: 1/29/19.
Accession Number: 20190129-5087.
Comments Due: 5 p.m. ET 2/11/19.
Docket Numbers: RP19-590-000.
Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate—Boston to SFE 798610 to be effective 2/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5136.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–591–000.

Applicants: Guardian Pipeline, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate PAL Agreement—Exelon & Morgan Stanley to be effective 1/29/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5149.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–592–000.

Applicants: Midwestern Gas

Transmission Company.

Description: § 4(d) Rate Filing:

Negotiated Rate PAL Agreement—Koch Energy Services, LLC to be effective 1/29/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5152.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–593–000.

Applicants: Ruby Pipeline, L.L.C.

Description: § 4(d) Rate Filing: Filing to Update Quarterly FLU and EPC to be effective 3/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5169.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–594–000.

Applicants: Honeoye Storage

Corporation.

Description: § 4(d) Rate Filing:

20190129 Volume No. 1A Changes to be effective 3/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5197.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–595–000.

Applicants: Rockies Express Pipeline

LLC.

Description: § 4(d) Rate Filing: Neg Rate 2019–01–29 ConocoPhillips to be effective 1/29/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5206.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–596–000.

Applicants: Wyoming Interstate

Company, L.L.C.

Description: § 4(d) Rate Filing: Update to Quarterly Fuel and Lost and Unaccounted For to be effective 3/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5208.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–597–000.

Applicants: Transcontinental Gas

Pipe Line Company, LLC.

Description: § 4(d) Rate Filing: List of Non-Conforming Service Agreements (Gulf Connector) to be effective 2/1/2019.

Filed Date: 1/29/19.

Accession Number: 20190129–5216.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–598–000.

Applicants: Texas Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Assignment of SWN Master Agmt to Flywheel & Perm Rel of NC Neg Rate Agmts to be effective 3/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5014.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–599–000.

Applicants: Texas Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Update to Certain Pro Formas to be effective 3/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5015.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–600–000.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: § 4(d) Rate Filing: Update to Certain Pro Formas to be effective 3/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5016.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–601–000.

Applicants: Gulf South Pipeline Company, LP.

Description: § 4(d) Rate Filing: Update to Certain Pro Forma Agreements to be effective 3/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5017.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–602–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Negotiated Rate—Gulfport release to Eco-Energy 8955971 to be effective 2/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5048.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–603–000.

Applicants: NEXUS Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rates—Columbia 860005 releases eff 2–1–2019 to be effective 2/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5050.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–604–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Negotiated Rate—Chevron to Colonial 8955947 to be effective 2/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5129.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–605–000.

Applicants: Columbia Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Rate Schedule AS—Aggregation Area 12 to be effective 3/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5142.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–606–000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing (Luminant) to be effective 2/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5146.

Comments Due: 5 p.m. ET 2/11/19.

Docket Numbers: RP19–607–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: § 4(d) Rate Filing: Rate Schedule S–2 Tracker Filings (EPC) eff 2/1/2019 to be effective 2/1/2019.

Filed Date: 1/30/19.

Accession Number: 20190130–5181.

Comments Due: 5 p.m. ET 2/11/19.

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: January 31, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–01186 Filed 2–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Project No. 2146–250]

Alabama Power Company; Notice of Application Accepted for Filing and 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. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No:* 2146–250.

c. *Date Filed:* December 14, 2018.

d. *Applicant:* Alabama Power Company.

e. *Name of Project:* Coosa Hydroelectric Project.

f. *Location:* Logan Martin Lake on the Coosa River in Talladega County, Alabama.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Justin Bearden, Shoreline Management, Alabama Power Company, 600 North 18th Street, Birmingham, Alabama 35203, (205) 257–6769, jbearden@southernco.com.

i. *FERC Contact:* Mark Carter, (678) 245–3083, mark.carter@ferc.gov.

j. *Deadline for filing comments, motions to intervene, and protests:* March 1, 2019.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests 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–2146–250. 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:* Alabama Power Company proposes to permit the construction of Logan Martin RV Park within the project boundary. Logan Martin RV Park owns, whereas Alabama Power holds flood rights over, the land that would be permitted. The RV Park would include 16 fixed boat docks (measuring 13,980 square feet total, and to accommodate 174 boats at a time), 1 boat ramp (measuring 20 feet wide by 150 feet long), 1 road, and 119 RV pads (with associated wooden decks, concrete patios, and parking areas) within the project boundary.

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: January 30, 2019.

Kimberly D. Bose,
Secretary.

[FR Doc. 2019–01146 Filed 2–5–19; 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 exempt wholesale generator filings:

Docket Numbers: EG19–49–000.

Applicants: 41MB 8ME, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of 41MB 8ME, LLC.

Filed Date: 1/15/19.

Accession Number: 20190115–5244.

Comments Due: 5 p.m. ET 2/5/19.

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

Docket Numbers: ER10–1818–018.

Applicants: Public Service Company of Colorado.

Description: Triennial MBR Update of Public Service Company of Colorado.

Filed Date: 1/11/19.

Accession Number: 20190111–5243.

Comments Due: 5 p.m. ET 3/12/19.

Docket Numbers: ER18–1686–002.

Applicants: Blackstone Wind Farm II LLC.

Description: Report Filing: Refund Report Filing to be effective N/A.

Filed Date: 1/16/19.

Accession Number: 20190116–5025.

Comments Due: 5 p.m. ET 2/6/19.

Docket Numbers: ER18–1688–002.

Applicants: Meadow Lake Wind Farm III LLC.

Description: Report Filing: Refund Report Filing to be effective N/A.
Filed Date: 1/16/19.
Accession Number: 20190116–5026.
Comments Due: 5 p.m. ET 2/6/19.
Docket Numbers: ER19–8–000.
Applicants: Sweetwater Solar, LLC.
Description: Report Filing: Notice of Consummation of Transaction and First Energy Dates to be effective N/A.
Filed Date: 1/11/19.
Accession Number: 20190111–5172.
Comments Due: 5 p.m. ET 2/1/19.
Docket Numbers: ER19–112–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2019–01–15_SA 2395 Deficiency Response for H021 J041 4th Rev GIA to be effective 9/28/2018.
Filed Date: 1/15/19.
Accession Number: 20190115–5201.
Comments Due: 5 p.m. ET 2/5/19.
Docket Numbers: ER19–119–000.
Applicants: Techren Solar I LLC.
Description: Report Filing: Notice of Consummation of Transaction and First Energy Dates to be effective N/A.
Filed Date: 1/11/19.
Accession Number: 20190111–5171.
Comments Due: 5 p.m. ET 2/1/19.
Docket Numbers: ER19–362–001.
Applicants: Midcontinent Independent System Operator, Inc., ALLETE, Inc.
Description: Tariff Amendment: 2019–01–16_SA 3211 MP–GRE IA Substitute (Birch Lake) to be effective 11/20/2018.
Filed Date: 1/16/19.
Accession Number: 20190116–5055.
Comments Due: 5 p.m. ET 2/6/19.
Docket Numbers: ER19–369–001.
Applicants: Midcontinent Independent System Operator, Inc., ALLETE, Inc.
Description: Tariff Amendment: 2019–01–16_SA 3213 MP–GRE ICA Substitute (Stinson) to be effective 11/21/2018.
Filed Date: 1/16/19.
Accession Number: 20190116–5042.
Comments Due: 5 p.m. ET 2/6/19.
Docket Numbers: ER19–450–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 3396R1 Otter Tail Power Company NITSA and NOA (Amended) to be effective 2/1/2019.
Filed Date: 1/16/19.
Accession Number: 20190116–5074.
Comments Due: 5 p.m. ET 2/6/19.
Docket Numbers: ER19–814–000.
Applicants: Consolidated Edison Company of New York, Inc.
Description: Request for Limited One-Time Waiver of Tariff Provision, et al.

of Consolidated Edison Company of New York, Inc.
Filed Date: 1/11/19.
Accession Number: 20190111–5212.
Comments Due: 5 p.m. ET 2/1/19.
Docket Numbers: ER19–818–000.
Applicants: Duke Energy Progress, LLC.
Description: § 205(d) Rate Filing: DEP–NCEMPA RS No. 200 Revision (State ADIT) to be effective 11/1/2018.
Filed Date: 1/15/19.
Accession Number: 20190115–5213.
Comments Due: 5 p.m. ET 2/5/19.
Docket Numbers: ER19–819–000.
Applicants: Energy America, LLC.
Description: Tariff Cancellation: cancellation filing to be effective 3/16/2019.
Filed Date: 1/15/19.
Accession Number: 20190115–5225.
Comments Due: 5 p.m. ET 2/5/19.
Docket Numbers: ER19–820–000.
Applicants: Turquoise Nevada LLC.
Description: Baseline eTariff Filing: Turquoise Nevada LLC Shared Facilities Agreement to be effective 1/16/2019.
Filed Date: 1/15/19.
Accession Number: 20190115–5247.
Comments Due: 5 p.m. ET 2/5/19.
Docket Numbers: ER19–821–000.
Applicants: Pennsylvania Electric Company, Jersey Central Power & Light Company, Metropolitan Edison Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Penelec, et al submit revised WASPs, Service Agreement Nos. 4221, 4222, and 4223 to be effective 3/22/2019.
Filed Date: 1/16/19.
Accession Number: 20190116–5024.
Comments Due: 5 p.m. ET 2/6/19.
Docket Numbers: ER19–822–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: First Revised ISA SA No. 5249; Queue No. AD2–205 to be effective 12/17/2018.
Filed Date: 1/16/19.
Accession Number: 20190116–5054.
Comments Due: 5 p.m. ET 2/6/19.
 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: January 16, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–01160 Filed 2–5–19; 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 corporate filings:

Docket Numbers: EC19–31–000.
Applicants: Sempra Energy, Oncor Electric Delivery Company LLC, Sharyland Utilities, L.P., Sharyland Distribution & Transmission Services, L.L.C.
Description: Supplement to November 30, 2018 Joint Application for Authorization Under Section 203 of the Federal Power Act (Proposed Accounting Entries) of Sempra Energy, et al.

Filed Date: 1/30/19.
Accession Number: 20190130–5238.
Comments Due: 5 p.m. ET 2/13/19.
Docket Numbers: EC19–52–000.
Applicants: Allegheny Energy Supply Company, LLC, FirstEnergy Generation, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Allegheny Energy Supply Company, LLC, et al.
Filed Date: 1/30/19.

Accession Number: 20190130–5251.
Comments Due: 5 p.m. ET 2/20/19.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–54–000.
Applicants: Hillcrest Solar I, LLC.
Description: Self-Certification of EWG Hillcrest Solar I, LLC.
Filed Date: 1/31/19.

Accession Number: 20190131–5180.
Comments Due: 5 p.m. ET 2/21/19.

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

Docket Numbers: ER10–1355–007.
Applicants: Southern California Edison Company.

Description: Notice of Change in Status of Southern California Edison Company.

Filed Date: 1/30/19.
 Accession Number: 20190130-5247.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER10-2984-044.
 Applicants: Merrill Lynch
 Commodities, Inc.
 Description: Notice of Non-Material
 Change in Status of Merrill Lynch
 Commodities, Inc.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5248.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER18-47-003.
 Applicants: Voyager Wind II, LLC.
 Description: Notice of Non-Material
 Change in Status of Voyager Wind II,
 LLC.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5234.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER18-1953-002.
 Applicants: Gulf Power Company.
 Description: Compliance filing: Notice
 of Effective Date & Compliance Filing
 (OATT) ER18-1953 to be effective 1/1/
 2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5180.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-917-000.
 Applicants: Innovative Solar 37, LLC.
 Description: Compliance filing:
 Compliance Filing—Category 2 Seller to
 be effective 3/31/2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5156.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-918-000.
 Applicants: Gulf Power Company.
 Description: Initial rate filing: City of
 Blountstown, Florida NITSA/NOA to be
 effective 1/1/2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5158.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-919-000.
 Applicants: Gulf Power Company.
 Description: Initial rate filing: Florida
 Public Utilities Company NITSA/NOA
 to be effective 1/1/2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5159.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-920-000.
 Applicants: Gulf Power Company.
 Description: Initial rate filing:
 PowerSouth Energy Cooperative NITSA/
 NOA to be effective 1/1/2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5160.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-921-000.
 Applicants: Gulf Power Company.
 Description: Initial rate filing: Duke
 Energy Florida, LLC Interconnection
 Contract to be effective 1/1/2019.
 Filed Date: 1/30/19.

Accession Number: 20190130-5161.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-922-000.
 Applicants: Southern California
 Edison Company.
 Description: § 205(d) Rate Filing: GIA
 & Distrib Serv Agmt Alta Mesa 640,
 LLC—Alta Mesa Wind I SA Nos. 1061–
 1062 to be effective 1/1/2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5162.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-923-000.
 Applicants: Southern California
 Edison Company.
 Description: § 205(d) Rate Filing:
 Amended GIA, True-Up County
 Sanitation District No. 2 of Los Angeles
 County to be effective 4/1/2019.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5165.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-924-000.
 Applicants: Arizona Public Service
 Company.
 Description: § 205(d) Rate Filing: Rate
 Schedule No. 274, Notice of Succession
 to be effective 12/31/2018.
 Filed Date: 1/30/19.
 Accession Number: 20190130-5176.
 Comments Due: 5 p.m. ET 2/20/19.
 Docket Numbers: ER19-925-000.
 Applicants: PJM Interconnection,
 L.L.C.
 Description: § 205(d) Rate Filing: 4th
 Quarterly 2018 Revisions to OA, Sch. 12
 and RAA, Sch. 17 Members List to be
 effective 12/31/2018.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5060.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-926-000.
 Applicants: Dominion Energy
 Generation Marketing, Inc.
 Description: Compliance filing:
 Compliance Filing—Category 2 Seller to
 be effective 4/1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5061.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-927-000.
 Applicants: Moffett Solar 1, LLC.
 Description: Compliance filing:
 Compliance Filing—Category 2 Seller to
 be effective 4/1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5078.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-928-000.
 Applicants: Estill Solar I, LLC.
 Description: § 205(d) Rate Filing:
 Revised MBR Tariff to be effective 2/1/
 2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5087.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-929-000.

Applicants: Hog Creek Wind Project,
 LLC.
 Description: § 205(d) Rate Filing:
 Revised MBR Tariff to be effective 2/1/
 2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5090.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-930-000.
 Applicants: Meadow Lake Wind Farm
 VI LLC.
 Description: § 205(d) Rate Filing:
 Revised MBR Tariff to be effective 2/1/
 2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5091.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-931-000.
 Applicants: Alabama Power
 Company.
 Description: § 205(d) Rate Filing:
 SCE&G Amended and Restated
 Interconnection Agreement Filing to be
 effective 1/1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5116.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-932-000.
 Applicants: Georgia Power Company.
 Description: § 205(d) Rate Filing:
 SCE&G Interconnection Agreement
 Filing to be effective 1/1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5120.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-933-000.
 Applicants: Mississippi Power
 Company.
 Description: § 205(d) Rate Filing:
 SCE&G Interconnection Agreement
 Filing to be effective 1/1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5124.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-934-000.
 Applicants: Consumers Energy
 Company.
 Description: § 205(d) Rate Filing: 2019
 Blackstart Rate Change to be effective 6/
 1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5134.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-935-000.
 Applicants: PJM Interconnection,
 L.L.C.
 Description: § 205(d) Rate Filing:
 Revisions to OA, Schedule 12 RE:
 Membership Terminations for Default to
 be effective 4/1/2019.
 Filed Date: 1/31/19.
 Accession Number: 20190131-5139.
 Comments Due: 5 p.m. ET 2/21/19.
 Docket Numbers: ER19-936-000.
 Applicants: New England Power Pool
 Participants Committee.
 Description: § 205(d) Rate Filing:
 February 2019 Membership Filing to be
 effective 1/1/2019.

Filed Date: 1/31/19.

Accession Number: 20190131–5182.

Comments Due: 5 p.m. ET 2/21/19.

Docket Numbers: ER19–937–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3474R1 Clarksville Light & Water NITSA NOA to be effective 1/1/2019.

Filed Date: 1/31/19.

Accession Number: 20190131–5195.

Comments Due: 5 p.m. ET 2/21/19.

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

Docket Numbers: ES19–14–000.

Applicants: South Carolina Electric & Gas Company, South Carolina Generating Company, Inc.

Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of South Carolina Electric & Gas Company, et al.

Filed Date: 1/30/19.

Accession Number: 20190130–5253.

Comments Due: 5 p.m. ET 2/20/19.

Docket Numbers: ES19–15–000.

Applicants: El Paso Electric Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of El Paso Electric Company.

Filed Date: 1/30/19.

Accession Number: 20190130–5271.

Comments Due: 5 p.m. ET 2/20/19.

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: January 31, 2019.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. 2019–01188 Filed 2–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP17–20–000, CP17–21–000, CP17–21–001, CP18–7–000]

Notice of Availability of the Final Environmental Impact Statement for the Proposed Port Arthur Liquefaction Project, Texas Connector Project, and Louisiana Connector Project: Port Arthur LNG, LLC, PALNG Common Facilities Company LLC, and Port Arthur Pipeline, LLC

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared a final environmental impact statement (EIS) for the Port Arthur Liquefaction Project proposed by Port Arthur LNG, LLC and PALNG Common Facilities Company LLC (collectively referred to as PALNG), and the Texas Connector Project and Louisiana Connector Project proposed by Port Arthur Pipeline, LLC (PAPL) in the above-referenced dockets. PALNG requests authorization pursuant to section 3(a) of the Natural Gas Act (NGA) to construct and operate liquefied natural gas (LNG) export facilities in Jefferson County, Texas, and PAPL requests a Certificate of Public Convenience and Necessity pursuant to section 7(c) of the NGA to construct, operate, and maintain certain natural gas pipeline facilities in Jefferson and Orange Counties, Texas and Cameron, Calcasieu, Beauregard, Allen, Evangeline, and St. Landry Parishes, Louisiana. Together, these proposed facilities are referred to as the Projects.

The final EIS assesses the potential environmental effects of the construction and operation of the Projects in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed Projects, with the mitigation measures recommended in the EIS, would have some adverse environmental impact; however, these impacts would be avoided or reduced to less-than-significant levels.

The U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Department of Energy, U.S. Environmental Protection Agency, and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration participated as cooperating agencies in the preparation of the EIS. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. Although the

cooperating agencies provided input to the conclusions and recommendations presented in the final EIS, the agencies will present their own conclusions and recommendations in their respective Records of Decision for the Projects.

The final EIS addresses the potential environmental effects of the construction and operation of the following proposed facilities:

- Two liquefaction trains, each with a capacity of 6.73 million tons per annum of LNG for export;
- three LNG storage tanks, each with a capacity of 160,000 cubic meters;
- a refrigerant storage area and truck unloading facilities;
- a condensate storage area and truck loading facilities;
- a new marine slip with two LNG vessel berths, an LNG vessel and support vessel maneuvering area, and an LNG transfer system;
- a materials off-loading facility and Pioneer Dock;
- approximately 38.9 miles of 42-inch-diameter pipeline to bring feed gas from interconnections with Kinder Morgan Louisiana Pipeline LLC, Natural Gas Pipeline Company of America, Houston Pipeline Company LP, Texas Eastern Transmission, LP (TETCO), Florida Gas Transmission Company, LLC, and Golden Triangle Storage, Inc./ Centana Intrastate Pipeline, LLC to the terminal site;
- approximately 131.3 miles of 42-inch-diameter pipeline to bring feed gas from interconnections with Centana Interstate Pipeline, LP, TETCO, Tennessee Gas Pipeline Company, Market Hub Partners—Egan, Pine Prairie Energy Center, Texas Gas Transmission, LLC, ANR Pipeline Company, and Columbia Gulf Transmission, LLC to the terminal site;
- three compressor stations;
- meter stations at the pipeline interconnects; and
- other associated utilities, systems, and facilities (mainline valves, pig launchers/receivers, contractor yards, access roads, etc.).

The Commission mailed a copy of the *Notice of Availability* to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The final EIS is only available in electronic format. It may be viewed and downloaded from the FERC's website (www.ferc.gov), on the Environmental Documents page (<https://www.ferc.gov/industries/gas/enviro/eis.asp>). In addition, the final EIS may

be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (<https://www.ferc.gov/docs-filing/elibrary.asp>), click on General Search, and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.*, CP17-20, CP17-21, or CP18-7). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

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

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

Dated: January 31, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019-01190 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19-828-000]

Solomon Forks Wind Project, 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 Solomon Forks Wind Project, 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 February 7, 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 above. 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: January 18, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019-01162 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER19-854-000]

Innolith Snook 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 Innolith

Snook 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 February 13, 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 above. 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: January 24, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019-01164 Filed 2-5-19; 8:45 am]

BILLING CODE 6717-01-P

**FEDERAL ACCOUNTING STANDARDS
ADVISORY BOARD****Notice of Comment Deadline
Extensions**

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92-463), as amended, and the FASAB Rules Of Procedure, as amended in October 2010, notice is hereby given that, in light of the partial government shutdown, the Federal Accounting Standards Advisory Board (FASAB) has extended the comment deadlines of documents that have been released for public comment. Because some departments and agencies may not have been able to comment, FASAB is extending the deadline to March 11, 2019, for the following documents:

- Exposure draft (ED) of an Interpretation of Federal Financial Accounting Standards titled *Guidance on Recognizing Liabilities Involving Multiple Component Reporting Entities: An Interpretation of SFFAS 5*
- ED of a Statement of Federal Financial Accounting Concepts titled *Materiality*
- *2018 Annual Report and Three-Year Plan*

These documents are available on the FASAB website at <https://fasab.gov/board-activities/documents-for-comment/>. Copies can be obtained by contacting FASAB at (202) 512-7350.

Respondents are encouraged to comment on any part of the documents and to provide the reasons for their positions. Written comments are requested by March 11, 2019, and should be sent to fasab@fasab.gov or Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street NW, Suite 1155, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy M. Payne, Executive Director, 441 G Street NW, Suite 1155, Washington, DC 20548, or call (202) 512-7350.

Authority: Federal Advisory Committee Act, Pub. L. 92-463.

Dated: January 31, 2019.

Wendy M. Payne,
Executive Director.

[FR Doc. 2019-01306 Filed 2-5-19; 8:45 am]

BILLING CODE 1610-02-P

**FEDERAL ACCOUNTING STANDARDS
ADVISORY BOARD****Notice of 2019 Federal Accounting
Standards Advisory Board Meetings**

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and the FASAB Rules Of Procedure, as amended in October 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) will hold its meetings on the following dates throughout 2019, unless otherwise noted.

February 27, 2019
April 24-25, 2019
June 26-27, 2019
August 28-29, 2019
October 23-24, 2019
December 17-18, 2019

A portion of each meeting will be closed to the public. The purpose of the meetings is to discuss issues related to the following topics:

Accounting and Reporting of Government Land Classified Activities
DoD Implementation Guidance Request
Evaluation of Existing Standards
Leases
Note Disclosures
Public-Private Partnerships
Reporting Model Phase I: MD&A and Stewardship Investments
Reporting Model Phase II
Risk Reporting
Appointments Panel
Any other topics as needed

Notice is hereby given that FASAB may meet in closed session for a portion of each of its scheduled meetings listed above for purposes of discussing the Classified Activities topic. The reason for the closures is that matters covered by 5 U.S.C. 552b(c)(1) will be discussed. The discussions will involve matters of national defense that have been classified by appropriate authorities pursuant to Executive Order.

In addition, the Appointments Panel, a subcommittee of FASAB that makes recommendations to the sponsors regarding appointments for non-federal member positions, is expected to meet during these meetings. A portion of each Appointments Panel meeting will be closed to the public. The reason for the closures is that matters covered by 5 U.S.C. 552b(c)(2) and (6) will be discussed. Any such discussions will involve discussions that relate solely to

internal personnel rules and practices of the sponsor agencies and the disclosure of information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. Such discussions will be segregated into separate discussions so that a portion of each meeting will be open to the public.

Pursuant to section 10(d) of the Federal Advisory Committee Act (FACA), portions of advisory committee meetings may be closed to the public where the head of the agency to which the advisory committee reports determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. The determination shall be in writing and shall contain the reasons for the determination. A determination has been made in writing by the U.S. Government Accountability Office, the U.S. Department of the Treasury, and the Office of Management and Budget, as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that such portions of the meetings may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.

Unless otherwise noted, FASAB meetings begin at 9 a.m. and conclude before 5 p.m. and are held at the U.S. Government Accountability Office (GAO) Building at 441 G St. NW in Room 7C13. Agendas and briefing materials will be available at <https://www.fasab.gov/briefing-materials/> approximately one week before each meeting.

Any interested person may attend the meetings as an observer. Board discussion and reviews are open to the public except for those portions that are closed. GAO Building security requires advance notice of your attendance. If you wish to attend a FASAB meeting, please pre-register on our website at <https://www.fasab.gov/pre-registration/> no later than 12 p.m. the Monday before the meeting to be observed.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy M. Payne, Executive Director, 441 G Street NW, Suite 1155, Washington, DC 20548, or call (202) 512-7350.

Authority: Federal Advisory Committee Act (5 U.S.C. App.), Government in the Sunshine Act (5 U.S.C. 552b).

Dated: February 1, 2019.

Wendy M. Payne,
Executive Director.

[FR Doc. 2019-01302 Filed 2-5-19; 8:45 am]

BILLING CODE 1610-02-P

**FEDERAL COMMUNICATIONS
COMMISSION**
[OMB 3060–1044]
**Information Collection Being
Submitted for Review and Approval to
the Office of Management and Budget**
AGENCY: Federal Communications
Commission.

ACTION: Notice and request for
comments.

SUMMARY: As part of its continuing effort
to reduce paperwork burdens, and as
required by the Paperwork Reduction
Act (PRA) of 1995, the Federal
Communications Commission (FCC or
the Commission) invites the general
public and other Federal agencies to
take this opportunity to comment on the
following information collection.

Comments are requested concerning:
Whether the proposed collection of
information is necessary for the proper
performance of the functions of the
Commission, including whether the
information shall have practical utility;
the accuracy of the Commission's
burden estimate; ways to enhance the
quality, utility, and clarity of the
information collected; ways to minimize
the burden of the collection of
information on the respondents,
including the use of automated
collection techniques or other forms of
information technology; and ways to
further reduce the information
collection burden on small business
concerns with fewer than 25 employees.

The Commission may not conduct or
sponsor a collection of information
unless it displays a currently valid
Office of Management and Budget
(OMB) control number. No person shall
be subject to any penalty for failing to
comply with a collection of information
subject to the PRA that does not display
a valid OMB control number.

DATES: Written comments should be
submitted on or before March 8, 2019.
If you anticipate that you will be
submitting comments, but find it
difficult to do so within the period of
time allowed by this notice, you should
advise the contacts listed below as soon
as possible.

ADDRESSES: Direct all PRA comments to
Nicholas A. Fraser, OMB, via email
Nicholas_A_Fraser@omb.eop.gov; and
to Nicole Ongele, FCC, via email *PRA@
fcc.gov* and to *Nicole.Ongele@fcc.gov*.
Include in the comments the OMB
control number as shown in the
SUPPLEMENTARY INFORMATION below.

FOR FURTHER INFORMATION CONTACT: For
additional information or copies of the

information collection, contact Nicole
Ongele at (202) 418–2991. To view a
copy of this information collection
request (ICR) submitted to OMB: (1) Go
to the web page *http://www.reginfo.gov/
public/do/PRAMain*, (2) look for the
section of the web page called
“Currently Under Review,” (3) click on
the downward-pointing arrow in the
“Select Agency” box below the
“Currently Under Review” heading, (4)
select “Federal Communications
Commission” from the list of agencies
presented in the “Select Agency” box,
(5) click the “Submit” button to the
right of the “Select Agency” box, (6)
when the list of FCC ICRs currently
under review appears, look for the OMB
control number of this ICR and then
click on the ICR Reference Number. A
copy of the FCC submission to OMB
will be displayed.

SUPPLEMENTARY INFORMATION: As part of
its continuing effort to reduce
paperwork burdens, and as required by
the Paperwork Reduction Act (PRA) of
1995 (44 U.S.C. 3501–3520), the Federal
Communications Commission (FCC or
the Commission) invites the general
public and other Federal agencies to
take this opportunity to comment on the
following information collection.

Comments are requested concerning:
Whether the proposed collection of
information is necessary for the proper
performance of the functions of the
Commission, including whether the
information shall have practical utility;
the accuracy of the Commission's
burden estimate; ways to enhance the
quality, utility, and clarity of the
information collected; ways to minimize
the burden of the collection of
information on the respondents,
including the use of automated
collection techniques or other forms of
information technology; and ways to
further reduce the information
collection burden on small business
concerns with fewer than 25 employees.

OMB Control Number: 3060–1044.

Title: Review of the Section 251

Unbundling Obligations of Incumbent
Local Exchange Carriers, CC Docket No.
01–338 and WC Docket No. 04–313,
Order on Remand.

Form Number: N/A.

Type of Review: Extension of a
currently approved collection.

Respondents: Business or other for-
profit entities, Not-for-profit institutions
and State, Local or Tribal Government.

*Number of Respondents and
Reponses:* 645 respondents; 645
responses.

Estimated Time per Response: 8
hours.

Frequency of Response:

Recordkeeping requirement, third party
disclosure requirement and on occasion
reporting requirement.

Obligation to Respond: Required to
obtain or retain benefits. Statutory
authority for this information collection
is contained in 47 U.S.C. 251 of the
Communications Act of 1934, as
amended.

Total Annual Burden: 5,160 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No
impact(s).

Nature and Extent of Confidentiality:
The Commission is not requesting
respondents to submit or disclose
confidential information. However, in
certain circumstances, respondents may
voluntarily choose to submit
confidential information pursuant to
applicable confidentiality rules.

Needs and Uses: In the Order on
Remand, the Commission imposed
unbundling obligations in a more
targeted manner where requesting
carriers have undertaken their own
facilities-based investments and will be
using UNEs (unbundled network
elements) in conjunction with self-
provisioned facilities. The Commission
also eliminated the subdelegation of
authority to state commissions adopted
in the previous order. Prior to the
issuance of the Order, the Commission
sought comment on issues relating to
combinations of UNEs, called
“enhanced extended links” (EELs), in
order to effectively tailor access to EELs
to those carriers seeking to provide
significant local usage to end users. In
the Order, the Commission adopted
three specific service eligibility criteria
for access to EELs in accordance with
Commission rules.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–01316 Filed 2–5–19; 8:45 am]

BILLING CODE 6712–01–P

**FEDERAL DEPOSIT INSURANCE
CORPORATION**
Notice of Termination of Receivership

The Federal Deposit Insurance
Corporation (FDIC or Receiver), as
Receiver for the following insured
depository institution, was charged with
the duty of winding up the affairs of the
former institution and liquidating all
related assets. The Receiver has fulfilled
its obligations and made all dividend
distributions required by law.

NOTICE OF TERMINATION OF RECEIVERSHIP

Fund	Receivership name	City	State	Termination date
10451	Georgia Trust Bank	Buford	GA	2/1/2019

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary, including but not limited to releases, discharges, satisfactions, endorsements, assignments, and deeds. Effective on the termination date listed above, the Receivership has been terminated, the Receiver has been discharged, and the Receivership has ceased to exist as a legal entity.

Dated at Washington, DC, on February 1, 2019. Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

[FR Doc. 2019-01310 Filed 2-5-19; 8:45 am]

BILLING CODE 6714-01-P

FEDERAL HOUSING FINANCE AGENCY

[No. 2019-N-1]

Notice of Annual Adjustment of the Cap on Average Total Assets That Defines Community Financial Institutions

AGENCY: Federal Housing Finance Agency.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Agency (FHFA) has adjusted the cap on average total assets that is used in determining whether a Federal Home Loan Bank (Bank) member qualifies as a “community financial institution” (CFI) to \$1,199,000,000, based on the annual percentage increase in the Consumer Price Index for all urban consumers (CPI-U), as published by the Department of Labor (DOL). These changes took effect on January 1, 2019.

FOR FURTHER INFORMATION CONTACT: James Hedrick, Division of Federal Home Loan Bank Regulation, (202) 649-3319, James.Hedrick@fhfa.gov; or Eric M. Raudenbush, Associate General Counsel, (202) 649-3084, Eric.Raudenbush@fhfa.gov, (not toll-free numbers), Federal Housing Finance Agency, Constitution Center, 400 Seventh Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

The Federal Home Loan Bank Act (Bank Act) confers upon insured depository institutions that meet the statutory definition of a CFI certain advantages over non-CFI insured depository institutions in qualifying for Bank membership, and in the purposes for which they may receive long-term advances and the collateral they may pledge to secure advances.¹ Section 2(10)(A) of the Bank Act and § 1263.1 of FHFA’s regulations define a CFI as any Bank member the deposits of which are insured by the Federal Deposit Insurance Corporation and that has average total assets below the statutory cap.² The Bank Act was amended in 2008 to set the statutory cap at \$1 billion and to require FHFA to adjust the cap annually to reflect the percentage increase in the CPI-U, as published by the DOL.³ For 2018, FHFA set the CFI asset cap at \$1,173,000,000, which reflected a 2.2 percent increase over 2017, based upon the increase in the CPI-U between 2016 and 2017.⁴

II. The CFI Asset Cap for 2019

As of January 1, 2019, FHFA has increased the CFI asset cap to \$1,199,000,000, which reflects a 2.2 percent increase in the unadjusted CPI-U from November 2017 to November 2018. Consistent with the practice of other Federal agencies, FHFA bases the annual adjustment to the CFI asset cap on the percentage increase in the CPI-U from November of the year prior to the preceding calendar year to November of the preceding calendar year, because the November figures represent the most recent available data as of January 1st of the current calendar year. The new CFI asset cap was obtained by applying the percentage increase in the CPI-U to the unrounded amount for the preceding year and rounding to the nearest million, as has been FHFA’s practice for all previous adjustments.

In calculating the CFI asset cap, FHFA uses CPI-U data that have not been seasonally adjusted (*i.e.*, the data have not been adjusted to remove the

estimated effect of price changes that normally occur at the same time and in about the same magnitude every year). The DOL encourages use of unadjusted CPI-U data in applying “escalation” provisions such as that governing the CFI asset cap, because the factors that are used to seasonally adjust the data are amended annually, and seasonally adjusted data that are published earlier are subject to revision for up to five years following their original release. Unadjusted data are not routinely subject to revision, and previously published unadjusted data are only corrected when significant calculation errors are discovered.

Dated: January 16, 2019.

Andre D. Galeano,

Deputy Director, Division of Federal Home Loan Bank Regulation, Federal Housing Finance Agency.

[FR Doc. 2019-01154 Filed 2-5-19; 8:45 am]

BILLING CODE 8070-01-P

FEDERAL MARITIME COMMISSION

Agency Information Collection Activities: 60-Day Public Comment Request

AGENCY: Federal Maritime Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, the Federal Maritime Commission (Commission) invites comments on the continuing information collection (extension of the information collection with no changes) listed below in this notice.

DATES: Written comments must be submitted on or before April 8, 2019.

ADDRESSES: You may send comments to: Karen Gregory, Managing Director, Office of the Managing Director, Federal Maritime Commission, 800 North Capitol Street NW, Washington, DC 20573, (202) 523-5800, omd@fmc.gov.

Please reference the information collection’s title and OMB number in your comments.

FOR FURTHER INFORMATION CONTACT: Copies of the information collection and instructions, or copies of any comments

¹ See 12 U.S.C. 1424(a), 1430(a).

² See 12 U.S.C. 1422(10)(A); 12 CFR 1263.1.

³ See 12 U.S.C. 1422(10)(B); 12 CFR 1263.1 (defining the term *CFI asset cap*).

⁴ See 83 FR 2153 (Jan. 16, 2018).

received, may be obtained by contacting Donna Lee at (202) 523-5800 or email: omd@fmc.gov.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Federal Maritime Commission, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the continuing information collection listed in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments. We invite comments on: (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.

Information Collection Open for Comment

Title: 46 CFR 515—Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries and Related Forms.

OMB Approval Number: 3072-0018 (Expires March 31, 2019).

Abstract: The Shipping Act of 1984 (the "Act"), 46 U.S.C. 40101-41309 (2006), as modified by Public Law 105-258 (The Ocean Shipping Reform Act of 1998) and Section 424 of Public Law 105-383 (The Coast Guard Authorization Act of 1998), provides that no person in the United States may act as an ocean transportation intermediary (OTI) unless that person holds a license issued by the Commission. The Commission shall issue an OTI license to any person that the Commission determines to be qualified by experience and character to act as an OTI. Further, no person may act as an OTI unless that person furnishes a bond, proof of insurance or other surety in a form and amount determined by the Commission to ensure financial responsibility. The Commission has implemented the provisions of section 19 in regulations

contained in 46 CFR part 515, including financial responsibility Forms FMC-48, FMC-67, FMC-68, and FMC-69, Optional Rider Forms FMC-48A and FMC-69A, its related license application Form, FMC-18, and the related foreign-based unlicensed NVOCC registration/renewal Form FMC-65.

Current Actions: There are no changes to this information collection, and it is being submitted for extension purposes only.

Type of Review: Extension.

Needs and Uses: The Commission uses information obtained under this part and through Form FMC-18 to determine the qualifications of OTIs and their compliance with shipping statutes and regulations and to enable the Commission to discharge its duties under the Act by ensuring that OTIs maintain acceptable evidence of financial responsibility. If the collection of information were not conducted, there would be no basis upon which the Commission could determine if applicants are qualified for licensing. The Commission would also not be able to effectively assess the compliance of foreign-based unlicensed NVOCCs without the required registration information.

Frequency: This information is collected when applicants apply for a license or registration, complete the triennial renewal, or when existing licensees or registrants change certain information in their application forms.

Type of Respondents: The types of respondents are persons desiring to obtain or maintain a license or registration to act as an OTI. Under the Act, OTIs may be either an ocean freight forwarder, a non-vessel-operating common carrier, or both.

Number of Annual Respondents: The Commission estimates a potential annual respondent universe of 6,475 entities.

Estimated Time per Response: The time per response for completing application Form FMC-18 averages 2 hours and to complete the triennial renewal is 10 minutes. The time to complete a financial responsibility form averages 20 minutes. The time to complete Form FMC-65 to register or renew a registration as a foreign-based NVOCC averages 10 minutes.

Total Annual Burden: The Commission estimates the total annual person-hour burden at 3,941 person-hours.

Rachel Dickon,
Secretary.

[FR Doc. 2019-01171 Filed 2-5-19; 8:45 am]

BILLING CODE 6731-AA-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

**Board of Scientific Counselors,
National Center for Health Statistics;
Notice of Charter Renewal**

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of charter renewal.

SUMMARY: This gives notice under the Federal Advisory Committee Act of October 6, 1972, that the Board of Scientific Counselors, National Center for Health Statistics, Department of Health and Human Services, has been renewed for a 2-year period through January 19, 2021.

FOR FURTHER INFORMATION CONTACT: Sayheedha Uddin, M.D., M.P.H., Designated Federal Officer, Board of Scientific Counselors, National Center for Health Statistics, Department of Health and Human Services, 3311 Toledo Road, Room 2627, Mailstop P08, Hyattsville, Maryland 20782, telephone (301) 458-4303 or fax (301) 458-4020.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019-01208 Filed 2-5-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92-463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as

patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)–RFA–TS–19–001, Identify, Analyze and Evaluate Potential Risk Factors for Amyotrophic Lateral Sclerosis (ALS).

Date: April 24, 2019.

Time: 11:00 a.m.–5:00 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Kimberly Leeks, Ph.D., M.P.H., Scientific Review Official, NCIPC, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341, Telephone (770) 488–6562, KLeeks@cdc.gov.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–01211 Filed 2–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP) PAR13–129; Amended Notice of Meeting

Notice is hereby given of a change in the name of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP) PAR13–129; February 26, 2019, 12:00 p.m.–4:00 p.m., EST which was published in the **Federal Register** on December 21, 2018 Volume 83, Number 245, page 65675.

The meeting is being amended to change the funding opportunity announcement to PAR18–812.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Nina Turner, Ph.D., Scientific Review Officer, Office of Extramural Programs, 1095 Willowdale Road, Morgantown, West Virginia 26506, Telephone: (304) 285–5976; Email: nxt2@cdc.gov.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to

announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–01206 Filed 2–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)–DD19–002, The Muscular Dystrophy Surveillance, Tracking, and Research Network (MD STARnet).

Dates: April 2–3, 2019.

Times: 10:00 a.m.–6:00 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Jaya Raman Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway, Mailstop 80, Atlanta, Georgia 30341, Telephone: (770) 488–6511, kva5@cdc.gov.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–01210 Filed 2–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Request for Nominations of Potential Reviewers To Serve on the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)

ACTION: Notice of request for nominations.

SUMMARY: The Centers for Disease Control and Prevention (CDC) is soliciting nominations for possible membership on the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP) in the National Center for Injury Prevention and Control (NCIPC), the National Center for Environmental Health (NCEH), and the Agency for Toxic Substances and Disease Registry (ATSDR).

DATES: Nominations for membership on the NCIPC, NCEH and ATSDR SEPs must be received no later than April 1, 2019. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nominations should be mailed to NCIPC Extramural Program Office (ERPO): Centers for Disease Control and Prevention, 4770 Buford Highway, Mailstop F–63, Atlanta, GA 30341, emailed (recommended) to NCIPC_PeerReview@cdc.gov, or faxed to (770) 488–4529.

FOR FURTHER INFORMATION CONTACT: Kenneth Roberts, Public Health Analyst, CDC/NCIPC/ERPO, 4770 Buford Highway, Mailstop F–63, Atlanta, GA 30341; Telephone: (404) 498–1427; Email: KRoberts3@cdc.gov.

SUPPLEMENTARY INFORMATION: The Disease, Disability, and Injury Prevention and Control Special Emphasis Panel provides advice and guidance to the Secretary, Department of Health and Human Services (HHS); the Director, Centers for Disease Control and Prevention (CDC), and the Administrator, Agency for Toxic Substances and Disease Registry (ATSDR) regarding the concept review, scientific and technical merit of grant and cooperative agreement assistance applications, and contract proposals relating to the causes, prevention, and control of diseases, disabilities, injuries, and impairments of public health significance; exposure to hazardous substances in the environment; health promotion and education; and other related activities that promote health and well-being. Nominations are being

sought for individuals who have expertise and qualifications necessary to contribute to the accomplishment of NCIPC, NCEH and ATSDR SEP objectives. Reviewers with expertise in research for injury and violence prevention are sought to serve on the NCIPC SEPs, for research and evaluation related, but not limited to the following program fields: Child abuse and neglect, opioid use disorder and overdose, polysubstance use and impaired driving, suicide/self-directed violence, intimate partner violence, mechanisms of injury and violence research, motor vehicle injury, older adult falls, elder maltreatment, sexual violence, substance use and abuse, traumatic brain injury, teen dating violence, and youth violence related to NCIPC research priorities (see www.cdc.gov/injury/researchpriorities). Reviewers with expertise in the following research fields for prevention and reduction of adverse effects related to environmental hazards are sought to serve on the NCEH and ATSDR SEPs for research and evaluation related, but not limited to: Amyotrophic Lateral Sclerosis (ALS), perfluoroalkyl substances (PFAS) contamination in drinking water, environmental health, newborn screening, environmental pollutants (air/water), toxic substances most commonly found at facilities on the National Priorities List (NPL) (see www.atsdr.cdc.gov/spl), chemical releases, natural disasters, and other potential NCEH or ATSDR research priorities. In addition, reviewers with expertise in the following general and methodological fields are sought to serve on the NCIPC, NCEH and ATSDR SEPs: Economic evaluation, epidemiology, etiology of disease, community participatory research, implementation and translation science, intervention research, policy evaluation, research evaluation, qualitative research design, quantitative research design, statistics, and surveillance.

Members and Chairs shall be selected by the Secretary, HHS, or other official to whom the authority has been delegated, on an "as needed" basis in response to specific applications being reviewed with expertise to provide advice. Members will be selected from authorities in the various fields of prevention and control of diseases, disabilities, and injuries. Members of other chartered HHS advisory committees may serve on the panel if their expertise is required. Consideration is given to professional training and background, points of view represented, and upcoming applications to be reviewed by the committee.

Information about nominated potential reviewers will be maintained in the NCIPC Extramural Research Program Office (ERPO) Scientific Reviewer and Advisor Database. The work of reviewers' appointed to NCIPC, NCEH and ATSDR SEPs includes the initial review, discussion, and written critique and evaluation of applications. This work will enable the CDC/NCIPC, NCEH and ATSDR to fulfill its mission of funding meritorious research that provides vital knowledge about underlying risk and protective factors and strategies for: Violence and injury prevention (www.cdc.gov/injury), health effects from exposures to environmental agents and hazardous substances (www.atsdr.cdc.gov), and the environmental public health impact caused by intentional or unintentional events (www.cdc.gov/nceh).

The U.S. Department of Health and Human Services policy stipulates that committee membership be balanced in terms of points of view represented, and the committee's function. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government. Current participation on federal workgroups or prior experience serving on a federal advisory committee does not disqualify a candidate; however, HHS policy is to avoid excessive individual service on advisory committees and multiple committee memberships. CDC reviewers appointed to a SEP are not considered Special Government Employees and will not be required to file financial disclosure reports.

Nominees interested in serving as a potential reviewer on a SEP, CDC for NCIPC, NCEH, or ATSDR programs should submit the following items:

- Current *curriculum vitae*, highlighting specific areas of research interest and expertise as well as complete contact information (name, affiliation, mailing address, telephone number, and email address).

Nomination materials must be postmarked by April 1, 2019 and sent by U.S. mail to: NCIPC Extramural Research Program Office (ERPO): Centers for Disease Control and Prevention, 4770 Buford Highway, Mailstop F-63, Atlanta, Georgia 30341 or to the ERPO electronic mailbox NCIPC_PeerReview@cdc.gov.

Nominations may be submitted by the candidate him- or herself, or by the person/organization recommending the candidate.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019-01212 Filed 2-5-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Healthcare Infection Control Practices Advisory Committee (HICPAC); Notice of Charter Renewal

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of charter renewal.

SUMMARY: This gives notice under the Federal Advisory Committee Act of October 6, 1972, that the Healthcare Infection Control Practices Advisory Committee, Department of Health and Human Services, has been renewed for a 2-year period through January 19, 2021.

FOR FURTHER INFORMATION CONTACT: Erin Stone, M.A., HICPAC, Division of Healthcare Quality Promotion, NCEZID, CDC, 1600 Clifton Road NE, Mailstop A-07, Atlanta, Georgia 30329-4027, Telephone (404) 639-4045. Email; hicpac@cdc.gov.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019-01207 Filed 2-5-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Council for the Elimination of Tuberculosis (ACET) Meeting; Correction

Notice is hereby given of a change in the meeting of the Advisory Council for the Elimination of Tuberculosis (ACET): December 11, 2018, 8:30 a.m. to 4:30 p.m., EDT which was published in the **Federal Register** on November 2, 2018 Volume 83, Number 213, pages 55172.

The time for December 11, 2018, 8:30 a.m. to 4:30 p.m., EST should read as follows: 10:00 a.m. to 4:30 p.m., EST.

FOR FURTHER INFORMATION CONTACT:

Margie Scott-Cseh, Committee Management Specialist, CDC, 1600 Clifton Road NE, Mailstop: E-07, Atlanta, Georgia 30329, telephone (404) 639-8317; zkr7@cdc.gov.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019-01205 Filed 2-5-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Health Statistics (NCHS), ICD-10 Coordination and Maintenance (C&M) Committee Meeting

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: The CDC, National Center for Health Statistics (NCHS), Classifications and Public Health Data Standards Staff, announces the following meeting of the ICD-10 Coordination and Maintenance (C&M) Committee meeting. This meeting is open to the public, limited only by the space available. The meeting room accommodates approximately 240 people. We will be broadcasting the meeting live via Webcast at <http://www.cms.gov/live/>.

DATES: The meeting will be held on March 5, 2019, 9:00 a.m. to 5:00 p.m. EST and March 6, 2019, 9:00 a.m. to 5:00 p.m. EST.

ADDRESSES: Centers for Medicare and Medicaid Services (CMS) Auditorium, 7500 Security Boulevard, Baltimore, Maryland 21244.

FOR FURTHER INFORMATION CONTACT:

Traci Ramirez, Program Specialist, CDC, 3311 Toledo Rd. Hyattsville, Maryland 20782 telephone (301) 458-4454; TRamirez@cdc.gov.

SUPPLEMENTARY INFORMATION:

Purpose: The ICD-10 Coordination and Maintenance (C&M) Committee is a public forum for the presentation of proposed modifications to the International Classification of Diseases, Tenth Revision, Clinical Modification and ICD-10 Procedure Coding System.

Matters To Be Considered: The tentative agenda includes discussions on ICD-10-CM and ICD-10-PCS topics listed below. Agenda items are subject to change as priorities dictate.

Please refer to the posted agenda for updates one month prior to the meeting.

ICD-10-PCS Topics

Administration of caplacizumab
Administration of fosfomycin (CONTEPO®)
Administration of gilteritinib (XOSPATA®)
Administration of imipenem, cilastatin, relbactam (fixed dose combination) (IMI/REL)
Administration of imlifidase (Idefirix™)
Administration of iobenguane I 131 (AZEDRA®)
Administration of ruxolitinib (Jakafi®)
Administration of tagraxofusp; SL-401 (ELZONRIS™)
Administration of venetoclax (VENCLEXTA®)
Brachytherapy Device (CivaSheet®)
Cerebral Embolic Protection Device (CEPD) (TriGuard 3™)
Endovascular Arteriovenous Fistula (endoAVF) Creation with magnetic-Guided Radiofrequency Energy and Embolization
Extracorporeal Membrane Oxygenation (ECMO) (intraoperative ECMO) injectable Implantable Allograft (FlöGraft®) (XWRAP®) (FlöGraft®Neogenesis)
Insertion of Sustained Release Drug-Eluting Stent (ELUVIA™) multiplex diagnostic panel (T2 Bacteria Test Panel)
Addenda and Key Updates

ICD-10-CM Topics

Babesiosis
Congenital Vascular Hematomas and Hemangiomas

Corneal Dystrophy

Juvenile Osteochondrosis of Tibia and Fibula

Macular Hole Expansion

Neonatal Cerebral Infarction

Osteopenia of Hip

Sjogren Syndrome

Social Determinants of Health

Unspecified Use of Alcohol or Cocaine with Withdrawal

ICD-10-CM Addendum

Security Considerations: Due to increased security requirements, CMS has instituted stringent procedures for entrance into the building by non-government employees. Attendees will need to present valid government-issued picture identification, and sign-in at the security desk upon entering the building.

Attendees who wish to attend the March 5-6, 2019, ICD-10-CM C&M meeting must submit their name and organization by February 22, 2019, for inclusion on the visitor list. This visitor list will be maintained at the front desk of the CMS building and used by security to admit visitors to the meeting.

To request reasonable accommodation, please contact the CMS Reasonable Accommodation Program at Email reasonableaccommodationprogram@cms.hhs.gov.

Participants who attended previous Coordination and Maintenance meetings will no longer be automatically added to the visitor list. You must request inclusion of your name prior to each meeting you wish attend.

Please register to attend the meeting on-line at: <http://www.cms.hhs.gov/apps/events/>.

Please contact Mady Hue (410) 786-4510 or Marilu.hue@cms.hhs.gov for questions about the registration process.

Note: CMS and NCHS no longer provide paper copies of handouts for the meeting. Electronic copies of all meeting materials will be posted on the CMS and NCHS websites prior to the meeting at http://www.cms.hhs.gov/ICD9ProviderDiagnosticCodes/03_meetings.asp#TopOfPage and https://www.cdc.gov/nchs/icd/icd10cm_maintenance.htm.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and

Prevention, and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019-01213 Filed 2-5-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Chief Operating Officer, CDC, pursuant to Public Law 92-463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)-DD19-001, Research Approaches to Improve the Care and Outcomes of People Living with Spina Bifida Component C.

Dates: April 11, 2019

Times: 10:00 a.m.–6:30 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Jaya Raman Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway, Mailstop F80, Atlanta, Georgia 30341, Telephone: (770) 488-6511, kva5@cdc.gov.

The Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Sherri Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019-01209 Filed 2-5-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Privacy Act of 1974; System of Records

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice of a Modified System of Records.

SUMMARY: The Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), proposes to modify an existing system of records subject to the Privacy Act, System No. 09-70-0541, titled Medicaid Statistical Information System (MSIS). This system of records covers the national Medicaid dataset, consisting of standardized enrollment, eligibility, and paid claims data about Medicaid recipients which is used to administer Medicaid at the federal level, produce statistical reports, support Medicaid related research, and assist in the detection of fraud and abuse in the Medicare and Medicaid programs. CMS is changing the name of the system of records to Transformed-Medicaid Statistical Information System (T-MSIS) and making other modifications which are explained below.

DATES: In accordance with 5 United States Code (U.S.C.) 552a(e)(4) and (11), this notice is applicable February 6, 2019, subject to a 30-day period in which to comment on the routine uses. Submit any comments by March 8, 2019.

ADDRESSES: Written comments should be submitted by mail or email to: CMS Privacy Act Officer, Division of Security, Privacy Policy & Governance, Information Security & Privacy Group, Office of Information Technology, CMS, Location N1-14-56, 7500 Security Blvd., Baltimore, MD 21244-1870, or walter.stone@cms.hhs.gov.

FOR FURTHER INFORMATION CONTACT: General questions about the system of records may be submitted to Darlene Anderson, Health Insurance Specialist, Data and Systems Group, Center for Medicaid and CHIP Services (CMCS), CMS, Mail Stop S2-22-16, 7500 Security Blvd., Baltimore, MD 21244; telephone number (410) 786-9828; email address Darlene.Anderson@cms.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Program and IT System Changes Prompting this SORN Modification

The Transformed Medicaid Statistical Information System (T-MSIS) is replacing the Medicaid Statistical

Information System (MSIS) as the information technology (IT) system that houses the national Medicaid dataset. It is a joint effort by the states and CMS to build an improved Medicaid dataset that addresses problems identified with Medicaid data in MSIS. T-MSIS provides improved program monitoring and oversight, technical assistance with states, policy implementation, and data-driven and high-quality Medicaid and CHIP programs that ensure better care, access to coverage, and improved health.

To improve Medicaid program oversight, CMS is requiring states to submit new files and data elements in T-MSIS which were not collected in MSIS, for the purpose of improving the quality of the data extracts the states submit to CMS on a quarterly or other periodic basis. Following consultation with a wide array of stakeholders, CMS established over 1,000 data elements for T-MSIS. This expands on the approximately 400 data elements collected in MSIS. T-MSIS builds on the original five MSIS files, consisting of eligibility files and four types of claims files (inpatient, long-term care, pharmacy, and other), by adding files for third-party liability, managed-care plans, and Medicaid providers, and by adding T-MSIS analytic files (TAF).

Currently, each state submits five extracts to CMS on a quarterly basis. These data are used by CMS to assist in federal reporting for the Medicaid and Children's Health Insurance Program (CHIP). Several reasons culminated in the CMS mission to improve the Medicaid dataset repository, including incomplete data, questionable results, multiple data collections from states, multiple federal data platforms and analytic difficulties in interpreting and presenting the results. In addition, timeliness issues have prompted CMS to re-evaluate its processes and move toward a streamlined delivery, along with an enhanced data repository. The new T-MSIS extract format is expected to further CMS goals for improved timeliness, reliability and robustness through monthly updates and an increase in the amount of data requested.

II. Modifications to SORN 09-70-0541

The following modifications have been made to SORN 09-70-0541 in order to reflect changes to the system of records resulting from the IT system change from MSIS to T-MSIS and to update the SORN generally:

- The SORN has been reformatted to conform to the revised template prescribed in OMB Circular A-108, issued December 23, 2016.

- The name of the system of records has been changed from “Medicaid Statistical Information System (MSIS)” to “Transformed—Medicaid Statistical Information System (T–MSIS), HHS/CMS/CMCS.”
 - Address information in the System Location and System Manager(s) sections has been updated.
 - The Authority section now cites 42 U.S.C. 1396b(r) in place of a public law citation and includes one new authority, 42 U.S.C. 18001, *et seq.*
 - The Purpose section has been revised to omit a summary of the routine uses and to include additional purposes for which T–MSIS records may be used (“reduce the number of reports CMS requires of the states, provide data needed to improve beneficiary quality of care, improve program integrity, and support the states, the private market, and stakeholders with key information”).
 - The Categories of Individuals section, which was previously limited to Medicaid recipients and Medicaid providers, now also includes non-Medicaid individuals, third party data submitters, and contact persons.
 - The Categories of Records section now specifies categories of records in addition to listing data elements; groups the data elements by category of individual; adds name, address, phone number, TIN/EIN, NPI, MBI and “information about health care services the clinician provided to Medicaid recipients and the measures and activities the clinician used in providing the services;” and omits “information used to determine whether a sanction or suspension is warranted.”
 - The Record Source Categories section now describes the sources as “state Medicaid agencies or territories, which collect the information directly from Medicaid recipients or their providers or other authorized representatives” (instead of as state Medicaid agencies and systems and CMS Form 2082).
 - The following changes have been made to the Routine Uses section:
 - In routine use 2, at c., redundant wording (“within the state”) has been removed after the phrase “assist federal/state Medicaid programs.”
 - Routine use 5 has been revised to omit unnecessary wording limiting the disclosures to uses “compatible with the purpose for which the agency collected the records.” (The wording is unnecessary because it restates the definition of a routine use.)
 - One new routine use has been added, numbered as 3, which permits disclosures to support federally-funded benefit programs.

- The fraud, waste, and abuse routine use which was added May 29, 2013 is now numbered as 8.
- The two breach response-related routine uses which were added February 14, 2018 are now numbered as 9 and 10.
 - The Storage section now states that records are stored “in an information technology (IT) system” (instead of “on computer diskette and magnetic media”).
 - The Retrieval section previously listed these personal identifiers: beneficiary identification number, social security number (SSN), HICN, and provider identification number. It now groups the identifiers by category of individual and includes additional identifiers (*e.g.*, MBI and NPI).
 - The Retention and Disposal section has been revised to state that identifiable “T–MSIS” data will be retained “for a period of 10 years” after the final determination of “the applicable enrollment, eligibility, or claim” is completed (instead of stating that identifiable “MSIS” data will be retained “for a total period not to exceed 10 years” after the final determination of “the case” is completed).
 - The Safeguards section has been updated to list examples of applicable safeguards (security guards, badges and cameras, locks, limiting user access based on roles and two-factor authentication, encryption, firewalls, intrusion detection systems).
 - The procedures for making access, correction and amendment, and notification requests have been revised. In the previous iteration of the SORN, the verification procedures required the individual’s name (woman’s maiden name, if applicable). The individual had the option of furnishing the SSN to prevent delay in locating the record(s). The new process to verify identity requires a notarized signature or a statement under penalty of perjury (instead of requiring name and woman’s maiden name if applicable). Additionally, in order to locate the record(s), the individual’s name and SSN are now required (previously, SSN was optional for this purpose).

Barbara Demopolos,

Privacy Advisor, Division of Security, Privacy Policy and Governance, Information Security and Privacy Group, Office of Information Technology, Centers for Medicare & Medicaid Service.

SYSTEM NAME AND NUMBER:

Transformed—Medicaid Statistical Information System (T–MSIS), HHS/CMS/CMCS, System No. 09–07–0541.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The address of the agency component responsible for the system of records is: The CMS Data Center, 7500 Security Blvd, North Bldg., First Floor, Baltimore, MD 21244–1850.

SYSTEM MANAGER(S):

Director, Data and Systems Group, Center for Medicaid and CHIP Services, CMS Mail Stop S2–22–16, 7500 Security Boulevard, Baltimore, MD 21244–1850, telephone number (410) 786–9361.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 1396a(a)(6), 1396b(r), and 18001 *et seq.*

PURPOSE(S) OF THE SYSTEM:

The primary purpose of the system is to establish an accurate, current, and comprehensive database containing standardized enrollment, eligibility, and paid claims data about Medicaid recipients to be used for the administration of Medicaid at the federal level, produce statistical reports, support Medicaid related research, and assist in the detection of fraud and abuse in the Medicare and Medicaid programs. T–MSIS will also reduce the number of reports CMS requires of the states, provide data needed to improve beneficiary quality of care, improve program integrity, and support the states, the private market, and stakeholders with key information.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records in this system of records are about the following categories of individuals:

- Medicaid recipients (including individuals in the dual eligible population, individuals enrolled in the CHIP program, and non-Medicaid individuals);
- Medicaid providers (*i.e.*, physicians and providers of healthcare services to the Medicaid and CHIP population);
- Any non-Medicaid individuals whose information is contained in a record about a Medicaid recipient or Medicaid provider;
- Third party data submitters; *i.e.*, third party administrators or independent insurance company personnel who are required to report claims information pertaining to Medicaid recipients; and
- Contact persons such as parents and guardians of Medicaid recipients who are minors, CHIP recipients, and non-Medicaid individuals.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records are:

- Original MSIS files:
 - Eligibility files
 - claims files (for inpatient, long-term care, pharmacy, and other claims)

• New files added to T-MSIS database:

- Third-party liability
- managed care plans
- Medicaid providers
- New T-MSIS analytic files (TAF):
 - Beneficiary files (monthly beneficiary summary, annual beneficiary summary)
 - claims files (for inpatient, long-term care, pharmacy, and other claims)
 - providers of healthcare services to the Medicaid and CHIP population; and
 - managed care plans

Data elements about each category of individual may include the following:

- *Medicaid recipients*: Name, address, assigned Medicaid identification number, social security number (SSN), Medicare beneficiary identifier (MBI), date of birth, gender, ethnicity and race, medical services, equipment, and supplies for which Medicaid reimbursement is requested, individually identifiable health information (*i.e.*, health care utilization and claims data), and health insurance claim number (HICN).

- *Medicaid providers*: Name, address, phone number, email address, business address, date of birth, tax identification number/employer identification number (TIN/EIN), national provider identifier (NPI), SSN, prescriber identification number, and other assigned clinician numbers, and information about health care services the clinician provided to Medicaid recipients and the measures and activities the clinician used in providing the services.

- *Any non-Medicaid individuals*: Name, address, phone number, email address, and SSN or other identifying number.

- *Third party data submitters*: Name, address, phone number, and email address.

- *Contact persons*: Name, address, phone number, email address, TIN/EIN, or other identifying number.

RECORD SOURCE CATEGORIES:

Information in the system of records is obtained from state Medicaid agencies or territories, which collect the information directly from Medicaid recipients or their providers or other authorized representatives (such as parents and guardians of Medicaid recipients who are minors).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The agency may disclose a record about an individual record subject from

this system of records to parties outside HHS, without the individual's prior written consent, pursuant to these routine uses:

1. To support agency contractors, consultants, or CMS grantees who have been engaged by the agency to assist in the performance of a service related to the collection and who need to have access to the records in order to perform the activity.

2. To assist another federal or state agency, agency of a state government, an agency established by state law, or its fiscal agent to:
 - a. Contribute to the accuracy of CMS' proper management of Medicare/Medicaid benefits;

- b. enable such agency to administer a federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a federal statute or regulation that implements a health benefits program funded in whole or in part with federal funds; and/or

- c. assist federal/state Medicaid programs.

3. To assist another federal or state agency, agency of a state government, an agency established by state law, or its fiscal agent to enable such agency to administer a federal benefits program, or as necessary to enable such agency to fulfill a requirement of a federal statute or regulation funded in whole or in part with federal funds.

4. To an individual or organization for a research project or in support of an evaluation project related to the prevention of disease or disability, the restoration or maintenance of health, or payment related projects.

5. To the Department of Justice (DOJ), court or adjudicatory body when:
 - a. The agency or any component thereof;

- b. any employee of the agency in his or her official capacity;

- c. any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee; or

- d. the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation.

6. To a CMS contractor (including fiscal intermediaries and carriers) assisting in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise

combat fraud, waste, and abuse in such program.

7. To another federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any state or local governmental agency), that administers, or that has the authority to investigate potential fraud, waste, and abuse in, a health benefits program funded in whole or in part by federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste, and abuse in such programs.

8. To disclose to health plans, defined for this purpose as plans or programs that provide health benefits, whether directly, through insurance, or otherwise, and including—(1) a policy of health insurance; (2) a contract of a service benefit organization; and (3) a membership agreement with a health maintenance organization or other prepaid health plan, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste, or abuse in such programs. Disclosures may include provider and beneficiary-identifiable data.

9. To appropriate agencies, entities, and persons when (a) HHS suspects or has confirmed that there has been a breach of the system of records; (b) HHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HHS (including its information systems, programs, and operations), the federal government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HHS' efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

10. To another federal agency or federal entity, when HHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the federal government, or national security, resulting from a suspected or confirmed breach.

Additional Circumstances Affecting Routine Use Disclosures: To the extent this system contains Protected Health

Information (PHI) as defined by HHS regulation “Standards for Privacy of Individually Identifiable Health Information” (45 CFR parts 160 and 164, Subparts A and E), disclosures of such PHI that are otherwise authorized by these routine uses may only be made if and as permitted or required by the “Standards for Privacy of Individually Identifiable Health Information” (see 45 CFR 164.512(a)(1)).

The disclosures authorized by publication of the above routine uses pursuant to 5 U.S.C. 552a(b)(3) are in addition to other disclosures authorized directly in the Privacy Act at 5 U.S.C. 552a(b)(2) and (b)(4)–(11).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

All records are stored in an information technology (IT) system.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

All data collected on Medicaid recipients, Medicare beneficiaries, and any non-Medicaid individuals are retrieved by the individual’s name, Medicare beneficiary identifier (MBI), health insurance claim number (HICN), SSN, address, and date of birth. The data collected on Medicaid providers will be retrieved by the provider’s name, address, National Provider Identifier (NPI), TIN/EIN and other identifying provider numbers. Information about third party data submitters who are individuals will be retrieved by name, address, and TIN/EIN. Records about contact persons will be retrieved by name, email address and business address.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

CMS will retain identifiable T–MSIS data for a period of 10 years after the final determination of the applicable enrollment, eligibility, or claim is completed. Any claims-related records encompassed by a document preservation order may be retained longer (*i.e.*, until notification is received from the Department of Justice).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

CMS has safeguards in place to prevent records from being accessed by unauthorized persons and monitors authorized users to ensure against excessive or unauthorized use. Examples of these safeguards include: protecting the facilities where records are stored or accessed with security guards, badges and cameras, securing hard-copy records in locked file cabinets, file rooms or offices during off-duty hours, limiting access to electronic

databases to authorized users based on roles and two-factor authentication (user ID and password), using a secured operating system protected by encryption, firewalls, and intrusion detection systems, requiring encryption for records stored on removable media, and training personnel in Privacy Act and information security requirements. Records that are eligible for destruction are disposed of using destruction methods prescribed by NIST SP 800–88. Before disclosing records to a party outside CMS, CMS requires the intended recipient to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems, and to prevent unauthorized access.

RECORD ACCESS PROCEDURES:

An individual seeking access to a record about him/her in this system of records must submit a written request to the System Manager indicated above. The request must contain the individual’s name and particulars necessary to distinguish between records on subject individuals with the same name, such as NPI or TIN, and should also reasonably specify the record(s) to which access is sought. To verify the requester’s identity, the signature must be notarized or the request must include the requester’s written certification that he/she is the person he/she claims to be and that he/she understands that the knowing and willful request for or acquisition of records pertaining to an individual from an agency under false pretenses is a criminal offense subject to a \$5,000 fine. Additionally, in order to locate the record(s), the individual’s name and SSN are required.

CONTESTING RECORD PROCEDURES:

Any subject individual may request that his/her record be corrected or amended if he/she believes that the record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function. A subject individual making a request to amend or correct his record shall address his request to the System Manager indicated, in writing, must verify his/her identity in the same manner required for an access request, and must provide his/her name and SSN for the purpose of locating the record. The subject individual shall specify in each request: (1) The system of records from which the record is retrieved; (2) The particular record and specific portion which he/she is seeking to correct or amend; (3) The corrective action sought

(*e.g.*, whether he/she is seeking an addition to or a deletion or substitution of the record); and, (4) His/her reasons for requesting correction or amendment of the record. The request should include any supporting documentation to show how the record is inaccurate, incomplete, untimely, or irrelevant.

NOTIFICATION PROCEDURES:

Individuals wishing to know if this system contains records about them should write to the System Manager indicated above and follow the same instructions under Record Access Procedures.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

71 FR 65527 (Nov. 8, 2006), 78 FR 32257 (May 29, 2013), 83 FR 6591 (Feb. 14, 2018).

[FR Doc. 2019–01157 Filed 2–5–19; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–0060]

Joint Meeting of the Psychopharmacologic Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Psychopharmacologic Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee. The general function of the committees is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document. Consistent with FDA’s regulation, notice is being published with less than 15 days prior to the date of the meeting based on a determination that an immediate meeting of the Psychopharmacologic Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee is needed. This **Federal Register** notice could not be published 15 days prior to

the date of the meeting due to the lapse of appropriations that began on December 22, 2018. Notice was provided on the Agency website on February 1, 2019, at <https://www.fda.gov/AdvisoryCommittees/Calendar/ucm630167.htm>.

DATES: The meeting will be held on February 12, 2019, from 8 a.m. to 5 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993-0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA-2019-N-0060. The docket will close on February 11, 2019. Submit either electronic or written comments on this public meeting by February 11, 2019. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 11, 2019. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 11, 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.

Comments received on or before February 11, 2019, will be provided to the committees.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

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

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2019-N-0060 for "Joint Meeting of the Psychopharmacologic Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments." 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." FDA 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:

Kalyani Bhatt, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993-0002, 301-796-9001, Fax: 301-847-8533, email: PDAC@fda.hhs.gov; or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The committees will discuss the efficacy, safety, and risk-benefit profile of new drug application (NDA) 211243, esketamine 28 mg single-use nasal spray device, submitted by Janssen Pharmaceuticals, Inc., for the treatment of treatment-resistant depression.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at <https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the

appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before February 11, 2019, will be provided to the committees. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before February 7, 2019. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 8, 2019.

Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at fdaoama@fda.hhs.gov or 301-796-4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Kalyani Bhatt (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: February 1, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019-01232 Filed 2-5-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2005-N-0101]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Prescription Drug User Fee Cover Sheet; Form FDA 3397

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.

DATES: Fax written comments on the collection of information by March 8, 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 oir_submission@omb.eop.gov. All comments should be identified with the OMB control number 0910-0297. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

JonnaLynn Capezzuto, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-3794, 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.

Prescription Drug User Fee Cover Sheet; Form FDA 3397

OMB Control Number 0910-0297—Extension

Under the prescription drug user fee provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (sections 735 and 736 (21 U.S.C. 379g and 379h)), as amended, FDA has the authority to assess and collect user fees for certain drug and biologics license applications (BLAs). Under this authority,

pharmaceutical companies pay a fee for certain new human drug applications (NDAs) and BLAs submitted to the Agency for review. Because the submission of prescription drug user fees concurrently with applications is required, review of an application by FDA cannot begin until the fee is submitted. The Prescription Drug User Fee Cover Sheet, Form FDA 3397, 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 of the fee submitted for an application by using a unique number tracking system. The information collected is used by FDA's Center for Drug Evaluation and Research (CDER) and Center for Biologics Evaluation and Research (CBER) to initiate the administrative screening of NDAs and BLAs.

Respondents to this collection of information are drug and biologics manufacturers that submit NDAs and BLAs. Based on FDA's database system for fiscal year (FY) 2017, there are an estimated 155 manufacturers of products subject to the Prescription Drug User Fee Act (Pub. L. 105-115), as amended by the FDA Reauthorization Act of 2017 (Pub. L. 115-52.)

The total number of annual responses is based on the number of application submissions received by FDA in FY 2017. CDER received 250 annual responses that included the following submissions: 218 NDAs and 32 BLAs. CBER received 12 BLAs. The estimated hours per response are based on past FDA experience with the various submissions.

In the **Federal Register** of August 24, 2018 (83 FR 42900), we published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

FDA form	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
3397	155	1.6903	262	0.5 (30 minutes)	131

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 decrease of 1,724 hours and a corresponding decrease of 3,448 responses. We attribute this program change to the restructuring of the Prescription Drug Use Fee Program fees. The FD&C Act, as amended by the Prescription Drug User Fee Amendments of 2017, authorizes FDA to collect application fees for certain applications for the review of human drug and biological products and discontinued the supplement fee. This resulted in the removal of supplements from the Prescription Drug User Fee Cover Sheet, therefore reducing the burden for this collection of information.

Dated: February 1, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019-01249 Filed 2-5-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2019-D-0078]

Principles of Premarket Pathways for Combination Products; 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 entitled “Principles of Premarket Pathways for Combination Products.” This draft guidance presents FDA’s current thinking on principles for premarket review of combination products, including how to determine which type of premarket submission is appropriate. FDA is publishing this draft guidance as part of its efforts to implement the 21st Century Cures Act (Cures Act) and in keeping with the Agency’s long-standing commitment to transparency, efficiency, and regulatory consistency to facilitate development of safe and effective combination products.

DATES: Submit either electronic or written comments on the draft guidance by May 7, 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-2019-D-0078 for “Principles of

Premarket Pathways for Combination Products.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, 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: John Barlow Weiner, Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20993-0002, 301-796-8930.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Principles of Premarket Pathways for Combination Products.” This draft guidance presents FDA’s current thinking on principles for premarket review of combination products, including how to determine which type of premarket submission is appropriate. This draft guidance provides general, high-level information relevant to combination products.

Section 3038 of the Cures Act (Pub. L. 114-255), enacted in December 2016, substantially amended section 503(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 353(g)), the principal section of the FD&C Act expressly addressing combination products. General themes of these amendments include enhancing clarity, predictability, efficiency, and consistency of premarket regulatory expectations for combination products, including by ensuring that Agency components and staff coordinate appropriately on premarket review of these products, and that Agency thinking is aligned in conducting these reviews. This guidance is part of FDA’s efforts to implement section 3038 of the Cures Act.

The draft guidance describes premarket pathways available for combination products and related considerations as well as illustrative examples on how these principles can be applied.

This draft guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on “Principles of Premarket Pathways for Combination Products.” 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. Other Issues for Consideration

The FD&C Act (section 503(g)(1)(B)) provides that the Secretary of HHS shall conduct the premarket review of any combination product under a single application, whenever appropriate. FDA requests public comment on those circumstances when a single application may not be appropriate, and thus two applications—one to the lead center and one to the non-lead center—should be submitted. In those circumstances, are there steps FDA should take to avoid duplication of effort or duplicate data submission and to minimize unnecessary burden? As described in the draft guidance, FDA’s current thinking is that a single application is generally appropriate for a combination product. However, the Agency anticipates that a single application may not be appropriate in limited cases; for example, when the characteristics of the non-lead constituent part give rise to safety and effectiveness or regulatory oversight issues that may be best addressed through separate applications. Such cases may include, for example, when a complex device-led co-packaged or cross-labeled combination product includes a constituent part that is a new molecular entity (NME) that potentially has, or is intended to have, systemic effects. In this case, the NME may need to be reviewed in a separate application. FDA requests public comment on this issue.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> or <https://www.regulations.gov>.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations and guidance. 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 3 have been approved under OMB control number 0910-0523 and the collections of information in the guidance “How to Prepare a Pre-Request for Designation (Pre-RFD)” have been approved under OMB control number 0910-0845. The collections of information for applications for FDA

approval to market a new drug (certain provisions of 21 CFR part 314) have been approved under OMB control number 0910-0001; the collections of information in 21 CFR part 601 have been approved under 0910-0338; and the collections of information in section 351(k) of the Public Health Service Act (42 U.S.C. 262) have been approved under 0910-0719. The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910-0120; the collections of information in 21 CFR part 814, subparts A through E, have been approved under OMB control number 0910-0231; the collections of information in 21 CFR part 860 have been approved under OMB control number 0910-0138; the collections of information in the guidance document “Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff” have been approved under OMB control number 0910-0756; and the collections of information in the guidance “De Novo Classification Process (Evaluation of Automatic Class III Designation)” have been approved under OMB control number 0910-0844.

Dated: January 17, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019-01196 Filed 2-5-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2019-D-0177]

Eosinophilic Esophagitis: Developing Drugs for Treatment; 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 entitled “Eosinophilic Esophagitis: Developing Drugs for Treatment.” This draft guidance is intended to serve as a focus for continued discussions among the Division of Gastroenterology and Inborn Error Products, pharmaceutical sponsors, the academic community, and the public.

DATES: Submit either electronic or written comments on the draft guidance by April 8, 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-2019-D-0177 for "Eosinophilic Esophagitis: Developing Drugs for Treatment." 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 this 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: Erica Lyons, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave, Silver Spring, MD 20993-0002, 301-796-8023.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled

"Eosinophilic Esophagitis: Developing Drugs for Treatment." This draft guidance addresses FDA's current recommendations regarding clinical trials for drugs and therapeutic biologics for the treatment of eosinophilic esophagitis including attributes of patients for enrollment, efficacy assessments, safety assessments, and pediatric considerations.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "Eosinophilic Esophagitis: Developing Drugs for Treatment." 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. Paperwork Reduction Act of 1995

The 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 312 (investigational new drug applications) and 21 CFR part 314 (new drug applications) have been approved under OMB control number 0910-0014 and 0910-0001, respectively. The collections of information in 21 CFR parts 50 and 56 (Protection of Human Subjects: Informed Consent; Institutional Review Boards) have been approved under OMB control number 0910-0755. The collections of information in the guidance for industry entitled "Expedited Programs for Serious Conditions—Drugs and Biologics" (available at <https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-drugs-gen/documents/document/ucm358301.pdf>) have been approved under OMB control number 0910-0765.

III. 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: January 24, 2019.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2019-01238 Filed 2-5-19; 8:45 am]

BILLING CODE 4164-01-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 Section 2112(b)(2) of the Public Health Service (PHS) Act, as amended. While the Secretary of Health and Human Services 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 Health and Human Services, 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 December 1, 2018, through December 31, 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: January 31, 2019.

George Sigounas,
Administrator.

List of Petitions Filed

1. Irma Linton
Yonkers, New York
Court of Federal Claims No: 18-1849V
2. Ronny Echeverri
Santa Clara, California
Court of Federal Claims No: 18-1850V
3. Roland S. Einer
Cody, Wyoming
Court of Federal Claims No: 18-1857V
4. Daniel E. Mielke
Stevens Point, Wisconsin
Court of Federal Claims No: 18-1858V
5. Bonnie Calvin on behalf of Richard Calvin, Deceased
Marco Island, Florida
Court of Federal Claims No: 18-1859V
6. Eric Williams
Orting, Washington
Court of Federal Claims No: 18-1860V
7. Charles Bakeman
Sun Lakes, Arizona
Court of Federal Claims No: 18-1861V
8. September Creager
Lockbourne, Ohio
Court of Federal Claims No: 18-1863V
9. Janet Halstenson
Sioux Falls, South Dakota
Court of Federal Claims No: 18-1865V
10. Shannyn Barnard
Marietta, Georgia
Court of Federal Claims No: 18-1866V
11. Amy Jordan
Santa Fe, New Mexico
Court of Federal Claims No: 18-1867V
12. Colleen Althaus
Chesterfield, Missouri
Court of Federal Claims No: 18-1868V
13. Richard Adam Downing
Rocklin, California
Court of Federal Claims No: 18-1869V
14. Michelle Craycraft
Washington, District of Columbia
Court of Federal Claims No: 18-1870V
15. Dianna Krueger
Minneapolis, Minnesota
Court of Federal Claims No: 18-1871V
16. Kelvin Hernandez Gonzalez

- Barceloneta, Puerto Rico
Court of Federal Claims No: 18-1872V
17. Timothy Goddard
Portsmouth, New Hampshire
Court of Federal Claims No: 18-1873V
18. Doreen Wyffels
Alexandria, Minnesota
Court of Federal Claims No: 18-1874V
19. Carole Weeks
Verona, Virginia
Court of Federal Claims No: 18-1876V
20. Michelle Danielson
Washington, District of Columbia
Court of Federal Claims No: 18-1878V
21. Aubrey M. Illig
Overland Park, Kansas
Court of Federal Claims No: 18-1879V
22. Jeffrey Cooper
Boston, Massachusetts
Court of Federal Claims No: 18-1885V
23. Tiffany Helton
Summersville, Missouri
Court of Federal Claims No: 18-1886V
24. Juan Manuel Silva
Los Angeles, California
Court of Federal Claims No: 18-1887V
25. Janice Dobbs
Pinehurst, North Carolina
Court of Federal Claims No: 18-1888V
26. Doretha Deveer
Chiefland, Florida
Court of Federal Claims No: 18-1889V
27. Shannon Fennell
Washington, District of Columbia
Court of Federal Claims No: 18-1890V
28. Pamela Fox
Somerset, New Jersey
Court of Federal Claims No: 18-1891V
29. Laura Lind
Pittsburgh, Pennsylvania
Court of Federal Claims No: 18-1892V
30. Darrick Stopczynski
Muskegon Heights, Michigan
Court of Federal Claims No: 18-1893V
31. Sharon Hughes
Calera, Alabama
Court of Federal Claims No: 18-1895V
32. Courtney Graham
Rochester Hills, Michigan
Court of Federal Claims No: 18-1896V
33. David Gerard Harvey, II
Fayetteville, North Carolina
Court of Federal Claims No: 18-1897V
34. Sharon Colaianne-Abbott on behalf
of Wray Paul Abbott, Deceased
Boston, Massachusetts
Court of Federal Claims No: 18-1898V
35. Cindy Barrientos
Round Rock, Texas
Court of Federal Claims No: 18-1899V
36. Vickie Oates
Germantown, Tennessee
Court of Federal Claims No: 18-1901V
37. Sherri Diaz
Ashburn, Virginia
Court of Federal Claims No: 18-1903V
38. Karen Kyger
Boise, Idaho
Court of Federal Claims No: 18-1905V
39. Lynn Meyer
Middle Granville, New York
Court of Federal Claims No: 18-1906V
40. Juney Stokley
Elizabeth City, North Carolina
Court of Federal Claims No: 18-1911V
41. Donald Perry
Fort Worth, Texas
Court of Federal Claims No: 18-1912V
42. Tina M. Dilbeck
Niagara Falls, New York
Court of Federal Claims No: 18-1913V
43. Sally Achramowicz
Fort Wayne, Indiana
Court of Federal Claims No: 18-1914V
44. Anita Anderson
Harrisburg, Arkansas
Court of Federal Claims No: 18-1915V
45. Eric Barr
Birmingham, Alabama
Court of Federal Claims No: 18-1916V
46. Jennifer Ward
Lincoln, Nebraska
Court of Federal Claims No: 18-1918V
47. Patricia Botic
Milwaukee, Wisconsin
Court of Federal Claims No: 18-1919V
48. Christine Hammans on behalf of I.
H.
Omaha, Nebraska
Court of Federal Claims No: 18-1920V
49. Marilyn Lavender
Myrtle Beach, South Carolina
Court of Federal Claims No: 18-1921V
50. Jonathan Harris
Shreveport, Louisiana
Court of Federal Claims No: 18-1924V
51. Kathlyn Haynes
Fairfax, Virginia
Court of Federal Claims No: 18-1925V
52. Jannica Paraschiv
Kirkland, Washington
Court of Federal Claims No: 18-1926V
53. Donna Jennings
King of Prussia, Pennsylvania
Court of Federal Claims No: 18-1927V
54. Jill Carpenter
Newburgh, Indiana
Court of Federal Claims No: 18-1928V
55. Yatri Kadakia
Washington, District of Columbia
Court of Federal Claims No: 18-1930V
56. Efreem J. Johnson
Milwaukee, Wisconsin
Court of Federal Claims No: 18-1932V
57. Robert Galante
Malden, Massachusetts
Court of Federal Claims No: 18-1933V
58. Sarah Zins and Leib Zins on behalf
of Jonathan Zins
Monsey, New York
Court of Federal Claims No: 18-1934V
59. Susan Hoefling on behalf of Ashley
Schoop, Deceased
Annapolis, Maryland
Court of Federal Claims No: 18-1935V
60. Kirsten Somarelli
Honesdale, Pennsylvania
Court of Federal Claims No: 18-1937V
61. Dennis Andric and Bonnie Andric
on behalf of E. A.
Sicklerville, New Jersey
Court of Federal Claims No: 18-1938V
62. Christine Gualtier
Sacramento, California
Court of Federal Claims No: 18-1939V
63. Sharon Mueller
Washington, District of Columbia
Court of Federal Claims No: 18-1941V
64. Stacy Clayton
Henderson, Tennessee
Court of Federal Claims No: 18-1944V
65. Diana Karanxha
Waterbury, Connecticut
Court of Federal Claims No: 18-1945V
66. Cynthia Jenkins
Hamilton, New Jersey
Court of Federal Claims No: 18-1946V
67. Heather Thomas
Elgin, Illinois
Court of Federal Claims No: 18-1948V
68. Winston Chun
Reno, Nevada
Court of Federal Claims No: 18-1950V
69. Barbara Rowell
Seminary, Mississippi
Court of Federal Claims No: 18-1951V
70. April Warner on behalf of Andrew
Warner, Deceased
Pottsville, Pennsylvania
Court of Federal Claims No: 18-1952V
71. David D. Greer
Plattsmouth, Nebraska
Court of Federal Claims No: 18-1953V
72. Diana Castaneda on behalf of S. E.
C.
New York, New York
Court of Federal Claims No: 18-1958V
73. Cynthia Jennette
Kinston, North Carolina
Court of Federal Claims No: 18-1959V
74. Katherine P. Carter
Albany, Georgia
Court of Federal Claims No: 18-1966V
75. Sarah Anne Piscitello
Tampa, Florida
Court of Federal Claims No: 18-1970V
76. Keely Knudsen
Hamden, Connecticut
Court of Federal Claims No: 18-1971V
77. Dawne Harris
Nashville, Tennessee
Court of Federal Claims No: 18-1972V
78. Barbara Longo
Keizer, Oregon
Court of Federal Claims No: 18-1973V
79. Stella Marine
Baltimore, Maryland
Court of Federal Claims No: 18-1974V
80. Michael Mezzacapo
Washington, District of Columbia
Court of Federal Claims No: 18-1977V
81. Gloria Blocker Clark
Marietta, Georgia
Court of Federal Claims No: 18-1981V
82. Lisa J. Groeneweg
Rock Valley, Iowa
Court of Federal Claims No: 18-1987V

83. Anne Marie Wilford-Graham
Middletown, New York
Court of Federal Claims No: 18-1991V
84. Douglas Rankin
Washington, District of Columbia
Court of Federal Claims No: 18-1996V
85. Gretchen Zufall
New York, New York
Court of Federal Claims No: 18-1997V
[FR Doc. 2019-01240 Filed 2-5-19; 8:45 am]
BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

RIN 0917-AA16

Reimbursement Rates for Calendar Year 2019

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: Notice is given that the Principal Deputy Director of the Indian Health Service (IHS), under the authority of sections 321(a) and 322(b) of the Public Health Service Act, and the Indian Health Care Improvement Act, has approved the following rates for inpatient and outpatient medical care provided by IHS facilities for Calendar Year 2019 for Medicare and Medicaid beneficiaries, beneficiaries of other federal programs, and for recoveries under the Federal Medical Care Recovery Act. The inpatient rates for Medicare Part A are excluded from the table below, as Medicare inpatient payments for IHS hospital facilities are made based on the prospective payment system or reasonable costs when IHS facilities are designated as Medicare Critical Access Hospitals. Since the inpatient per diem rates set forth below do not include all physician services and practitioner services, additional payment shall be available to the extent that those services are provided.

Inpatient Hospital Per Diem Rate (Excludes Physician/Practitioner Services)

Calendar Year 2019

Lower 48 States \$3,442
Alaska \$3,434

Outpatient Per Visit Rate (Excluding Medicare)

Calendar Year 2019

Lower 48 States \$455
Alaska \$682

Outpatient Per Visit Rate (Medicare)

Calendar Year 2019

Lower 48 States \$405
Alaska \$646

Medicare Part B Inpatient Ancillary Per Diem Rate

Calendar Year 2019

Lower 48 States \$789
Alaska \$1,144

Outpatient Surgery Rate (Medicare)

Established Medicare rates for freestanding Ambulatory Surgery Centers.

Effective Date for Calendar Year 2019 Rates

Consistent with previous annual rate revisions, the Calendar Year 2019 rates will be effective for services provided on/or after January 1, 2019, to the extent consistent with payment authorities, including the applicable Medicaid State plan.

Michael D. Weahkee,

RADM, Assistant Surgeon General, U.S. Public Health Service, Principal Deputy Director, Indian Health Service.

[FR Doc. 2019-01181 Filed 2-5-19; 8:45 am]

BILLING CODE 4165-16-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2018-1085]

RIN 1625-AA09

Notice of Availability of Draft Environmental Assessment for the Proposed Construction of Railroad Bridges Across Sand Creek and Lake Pend Oreille at Sandpoint, Bonner County, Idaho.

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability and request for comments; notice of public meetings.

SUMMARY: The United States Coast Guard announces the availability of a draft Environmental Assessment (EA) in accordance with National Environmental Policy Act of 1969 (NEPA), as amended, and the National Historic Preservation Act (NHPA), as amended, for the proposed construction of railroad bridges across Lake Pend Oreille and Sand Creek at Sandpoint, Bonner County, Idaho. The proposed bridges will be built parallel to existing railroad bridges crossing the same waterbodies. As structures over navigable waters of the United States, the proposed bridges will require a Coast Guard Bridge Permit. The Coast Guard is making the draft EA available for public review and requests public comments. In order to ensure the widest dissemination possible, the Coast Guard distributed a separate document announcing this Notice of Availability to a mailing list that includes seasonal residents and visitors to the Lake Pend Oreille region.

DATES: Comments and related material must be submitted to the online docket at <http://www.regulations.gov> or reach the Docket Management Facility on or before March 25, 2019. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

ADDRESSES: You may submit comments identified by docket number USCG-2018-1085 using the Federal eRulemaking Portal at <http://www.regulations.gov>.

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice or the public meetings, please contact Mr. Steven Fischer, District Bridge Manager, Thirteenth Coast Guard District, U.S. Coast Guard; telephone 206-220-7282.

SUPPLEMENTARY INFORMATION:

I. Background, Purpose and Legal Basis

The BNSF Railway Company (BNSF) has proposed to construct a second mainline track and associated bridges across Lake Pend Oreille and Sand Creek parallel to existing BNSF railroad track and bridges in and around Sandpoint, Bonner County, Idaho (Project). The present single-track configuration has become a constraint to

efficient rail movement, resulting in congestion on the BNSF main line, rail yards and on sidings as trains await clearance to cross the existing single track bridges. Moreover, trains awaiting an opportunity to cross the bridge often block vehicular traffic at both public and private at-grade rail crossings. The delays attributable to this congestion hinder the timely transport and delivery of people, goods and services to local and regional destinations. According to BNSF, the Project will relieve this congestion and allow for the more efficient movement of trains through the Lake Pend Oreille region. Alternatives considered for the Project include a “No Action Alternative” that simply preserves the status quo and a Proposed Action Alternative that satisfies the purpose and need of the Project. Several additional alternatives including (a) a second main line track placed east of the existing main track line, (b) alternate routes and (c) shifting rail traffic to other railroads were considered and dismissed based on infeasibility or impracticability.

The federal bridge statutes, including the River and Harbors Act of 1899, as amended, the Act of March 23, 1906, as amended, and the General Bridge Act of 1946 (33 U.S.C. 525 *et seq.*), require that the location and plans of bridges in or over navigable waters of the United States be approved by the Secretary of Homeland Security, who has delegated that responsibility to the Coast Guard. Lake Pend Oreille and Sand Creek are navigable waters of the U.S. as defined in 33 CFR 2.36(a). In exercising these bridge authorities, the Coast Guard considers navigational and environmental impacts, which include historic and tribal effects. The Coast Guard’s primary responsibility regarding BNSF’s proposed railroad bridges is to ensure the structures do not unreasonably obstruct navigation.

Because the intent of the bridge statutes is to preserve navigation, the Coast Guard’s permit authority is limited to the bridge and its essential components including approaches and abutments. Consequently, the Coast Guard does not have the authority to approve or disapprove broader aspects of a project beyond the bridges themselves. For example, if a project sponsor proposes to build a new highway or rail line and the project includes a bridge, the Coast Guard’s permit authority is limited to the bridge and its effect upon navigation, but does not extend to the connecting highway or rail line.

The Coast Guard is the lead federal agency for this Project and, as such, responsible for the review of its

potential effects on the human environment, including historic properties and tribal impacts, pursuant to NEPA and NHPA. The Coast Guard is therefore required by law to ensure potential environmental effects are carefully evaluated in each bridge permitting decision. As part of this evaluation process, the Coast Guard solicits comments from State and Federal agencies with expertise in, and authority over, particular resources that may be impacted by a project. Additionally, the Coast Guard seeks input from any tribes that may be affected or otherwise have expertise or equities in the Project. Following tribal and expert agency outreach, the Coast Guard revises its evaluation, and then seeks comments from the general public. Agencies that have already participated in the environmental review of this Project include the U.S. Army Corps of Engineers (USACE), the U.S. Fish and Wildlife Service (USFWS), the U.S. Environmental Protection Agency (EPA), Idaho Department of Lands (IDL) and the Idaho Department of Environmental Quality (IDEQ). In addition to the Coast Guard Bridge Permit, this Project requires the following permits:

- An Individual Permit from USACE under Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) to temporarily and permanently discharge rock into water and wetlands, all discharges being associated with construction of the proposed bridges.
- An Encroachment Permit from IDL in accordance with the Idaho Lake Protection Act. BNSF submitted an application for the Encroachment Permit to IDL on February 22, 2018, and IDL subsequently convened two local public hearings on May 23, 2018, to solicit comments from the public. A Final Order approving the application for Encroachment Permit No. L-96-S-0096E was signed June 21, 2018.
- A Section 401 Water Quality Certification, which was issued by IDEQ on September 21, 2018, in accordance with Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. 1251 *et seq.*).

On February 26, 2018, USACE and IDL issued respective public notices informing members of the public that BNSF had submitted a joint USACE-IDL application for the Project. During the comment period, the agencies received approximately 5,000 comments in favor of and opposed to the Project. The comments in favor of the Project generally spoke to economic benefits and requests to expedite the

environmental review and issue required permits. The opposition comments identified a variety of concerns including, but not limited to, (a) requests to elevate the level of federal environmental review to an Environmental Impact Statement (EIS); (b) the potential for derailments within the Lake Pend Oreille region and preparedness for response to a derailment causing a spill of coal or petroleum products; (c) fugitive coal dust emissions and the effects upon air and water quality; and (d) the potential for increased rail traffic through the Lake Pend Oreille rail corridor. Although this is the Coast Guard’s initial effort to obtain public comment for the proposed Project, it has reviewed all previous comments received by IDL and USACE and incorporated that information in the draft EA. Additionally, the comments provided by USACE, EPA, USFWS, IDEQ and the Kootenai Tribe were incorporated in the draft EA, which is now available for public comment.

Based on the information received to date, the Coast Guard has determined that an Environmental Assessment is an appropriate level of environmental documentation for this Project. After consideration of all additional comments, the Coast Guard may issue a Finding of No Significant Impact or may determine the Project will have significant impacts requiring an EIS. If the Coast Guard determines at EIS is required, there will be additional opportunity for public comment in accordance with NEPA procedures for the preparation of an EIS.

We are seeking public input on the Draft EA, including comments on completeness and adequacy of the document, and on other environmental and historic preservation concerns that may be related to the proposed Project. While you may submit any comments to the docket to communicate information or views regarding this Project, please know that we have already considered the comments submitted during the USACE-IDL public comment period, and those comments are now part of the official Coast Guard record for BNSF’s Bridge Permit application. We specifically request you submit comments related to relevant information or topics missing from or not adequately addressed in the draft EA, and how we can obtain that information. This includes suggesting analyses and methodologies for use in the Draft EA or possible sources of data or information not included in the Draft EA. The most informative comments for the Coast Guard in making a permit decision are those that provide detailed,

resource-specific information about the size, nature or effect of the impacts the bridge permit will have on the human environment. Public comments will be considered in determining the environmental impacts and preparation of a final environmental document.

The East Bonner County Library at 1407 Cedar Street, Sandpoint, Idaho 83864 will maintain a printed copy of the draft EA for public review. The document will be available for inspection at this location between 9 a.m. and 7 p.m. Monday through Thursday and 10 a.m. and 5 p.m. Friday and Saturday, except Federal holidays. The Thirteenth Coast Guard District Bridge Office at 915 2nd Avenue, Seattle, WA 98174-1067 will also maintain a printed copy of the draft EA for public review. The document will be available for inspection at this location between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

II. Public Participation and Request for Comments

The Coast Guard views public participation as essential and will consider all comments and materials received during the comment period. If you submit a comment, please include the docket number identified in this notice, indicate the specific section of the document to which each comment applies and provide a reason for each suggestion or recommendation. Please submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your comment or materials cannot be submitted using <http://www.regulations.gov>, please contact the person noted in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Anonymous comments will be accepted. All comments will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more information about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management system in the March 24, 2005 issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this notice as being available in this docket and all public comments will be included in our online docket at <http://www.regulations.gov> and may be viewed by following that website's instructions. Additionally, if you sign up for email alerts, you will be notified when comments are posted.

III. Public Meetings

The Coast Guard intends to hold two public meetings to provide the public

opportunity to submit oral and written comments on the draft EA. The two meetings will be held on Wednesday, March 13, 2019 at 8 a.m. and 6 p.m. at the Ponderay Events Center, 401 Bonner Mill Way, Ponderay, Idaho 83852. Each meeting is anticipated to last approximately two hours.

The meetings are open to the public. Those who plan to attend a meeting and wish to present comments may request to do so through the online docket at <http://www.regulations.gov>, and will be called in order of requests received. Attendees who have not previously made a request to present comments will follow those who have already submitted a request, as time permits. If a large number of persons wish to speak, the presiding officer may be required to limit the time allotted to each speaker. The public meetings may end early if all present wishing to speak have done so.

A transcript of the meetings will be made available for public review approximately 30 days after the meeting. All comments will be incorporated into the official case record. Written comments and related material may also be submitted to Coast Guard personnel identified at that meeting for placement into the docket.

Information on Service for Individuals With Disabilities: For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting contact Mr. Steven Fischer at the telephone number under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

This notice is issued under the authority of 5 U.S.C. 552 (a).

Dated: January 31, 2019.

Brian L. Dunn,
Chief, Office of Bridge Programs, U.S. Coast Guard.

[FR Doc. 2019-01134 Filed 2-5-19; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651-0015]

Agency Information Collection Activities: Application for Extension of Bond for Temporary Importation

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

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than March 8, 2019) to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to dhsdeskofficer@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number (202) 325-0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (83 FR 52498) on October 17, 2018, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application for Extension of Bond for Temporary Importation.

OMB Number: 1651–0015.

Form Number: CBP Form 3173.

Abstract: Imported merchandise which is to remain in the customs territory for a period of one year or less without the payment of duties is entered as a temporary importation, as authorized under the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202). When this time period is not sufficient, it may be extended by submitting an application on CBP Form 3173, “*Application for Extension of Bond for Temporary Importation.*” This form is provided for by 19 CFR 10.37 and is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=3173>.

Current Actions: CBP proposes to extend the expiration date of this information collection with no changes to the burden hours or to Form 3173.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 1,200.

Estimated Number of Annual Responses per Respondent: 14.

Estimated Total Annual Responses: 16,800.

Estimated Time per Response: 13 minutes.

Estimated Total Annual Burden Hours: 3,646.

Dated: February 1, 2019.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2019–01200 Filed 2–5–19; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[LC RR03040000, 19XR0680A1, RX.18786000.5009000; UC RR04090000, 19XR0680A1, RX.19830001.0010000]

Responding to Historic Drought and Ongoing Dry Conditions in the Colorado River Basin: Request for Input

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice; request for input.

SUMMARY: Consistent with past practice, through this Notice, the Department of the Interior (Department) is taking the initial step of requesting input from the Governors of each of the seven Colorado River Basin States (Basin States) for their specific recommendations on prompt Departmental actions that would be appropriate to take to reduce the risks the Colorado River Basin is facing, and can be adopted prior to the August 2019 determinations of operations for Lake Powell and Lake Mead in 2020.

DATES: Input will be accepted beginning March 4, 2019, for a 15-day period ending March 19, 2019.

ADDRESSES: Send input pursuant to this notice by email to crbasin_drought@usbr.gov, or via facsimile to (202) 513–0308. More information regarding the DCPs is available on the Bureau of Reclamation’s website at <https://www.usbr.gov/dcp/>.

FOR FURTHER INFORMATION CONTACT: To request additional information about this Notice, contact James Hess by email at jhess@usbr.gov, or by telephone at (202) 513–0543.

SUPPLEMENTARY INFORMATION: The Colorado River is the most important water resource in the southwestern United States and northwestern Mexico—irrigating nearly 5.5 million acres of farmland and serving approximately 40 million people in major metropolitan areas such as Albuquerque, Cheyenne, Denver, Las Vegas, Los Angeles, Phoenix, Salt Lake City, San Diego, Tucson, and Tijuana. The waters of the Colorado River are shared among seven states within the United States: Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. The Secretary of the Interior, pursuant to applicable provisions of federal law including, in particular, the Boulder Canyon Project Act of 1928 (authorizing, among other actions, construction and operation of Hoover Dam and Lake Mead) and the Colorado River Storage Project Act of

1956 (authorizing, among other actions, construction and operation of Glen Canyon Dam and Lake Powell), is vested with the responsibility to manage the waters of the Colorado River through operations of federal facilities in the Colorado River Basin. Under applicable federal law, the Secretary of the Interior’s authorities to manage the waters of the Lower Colorado River Basin are broader than his authorities in the Upper Basin, but the importance of federal facilities in the management of the Colorado River extends throughout the Basin.

Since 2000, the Colorado River Basin has experienced historic drought and dry conditions; the combined storage in Lakes Powell and Mead has reached its lowest level since Lake Powell initially began filling in the 1960s.

In recent decades, recognizing the limited resources of the Colorado River, the Department of the Interior has undertaken numerous actions to manage the waters of the Colorado River including, in particular, development of the 2001 Interim Surplus Guidelines (see 66 FR 7772 dated January 25, 2001) and development of the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (see 73 FR 19873 dated April 11, 2008) (2007 Interim Guidelines).

The 2007 Interim Guidelines represent important additional operational guidelines and tools that were adopted to meet the challenges of the drought in the Colorado River Basin. As the Department noted at the time: “While water storage in the massive reservoirs afforded great protection against the drought, the Department set a goal to have detailed, objective operational tools in place by the end of 2007 in order to be ready to make informed operational decisions if the reservoirs continued to decline,” 73 FR 19873. Implementation of the 2007 Interim Guidelines required consultation with the Basin States in multiple provisions, expressly providing that: “Beginning no later than December 31, 2020, the Secretary shall initiate a formal review for purposes of evaluating the effectiveness of these Guidelines. The Secretary shall consult with the Basin States in initiating this review,” 73 FR 19892 (April 11, 2008).

Since adoption of the 2007 Interim Guidelines, given the persistence and intensity of the current drought, the risk of reaching critically low elevations at Lakes Powell and Mead has increased nearly four-fold. In response to these conditions of continued drought and increasing risk, Reclamation and officials in the Basin States have been

working for a period of years on DCPs. The Upper and Lower Basin DCPs contain actions in addition to those authorized or required by the 2007 Interim Guidelines, and are designed to reduce the risk of Lake Powell and Lake Mead declining to critical elevations.¹ The Basin States made significant progress in 2018 on draft DCP agreements that would implement Upper and Lower Basin DCPs,² but work on the DCPs remains unfinished, particularly among the Lower Colorado River Basin states of Arizona, California and Nevada. While unfinished, the Department takes particular cognizance of the fact that on January 31, 2019, the Arizona Legislature passed legislation authorizing the Arizona Department of Water Resources Director to execute the relevant interstate DCP agreements. Arizona is unique in the need for state legislative action to approve the DCPs, and this important step may indicate that finalization of the DCPs is imminent.

While the Department supports the ongoing efforts of the Basin States and remains cautiously optimistic that the Basin States will successfully complete their efforts promptly in early 2019, the Department is highly concerned that continued delays regarding adoption of the DCPs inappropriately increases risk for all that rely on the waters of the Colorado River.

In the circumstance that the DCPs cannot be promptly completed in early 2019, the Department must be prepared to take actions—if needed—to respond to the increasing risks facing the Colorado River Basin.

Engagement with the Governors of the Basin States and appropriate consultation with such state representatives as each Governor may designate is appropriate given the Secretary's recognition of "the special role of the Basin States in matters relating to the Long-Range Operating Criteria," 64 FR 27009 (May 18, 1999), as codified in Section 602 of the Colorado River Basin Project Act of 1968. The Department's history and actions in recent decades fully reflect and underscore the importance of

¹ Completion of the DCPs, and associated reduction in risk of Lakes Powell and Mead declining to critically low elevations, will also benefit the activities, analyses and interstate discussions associated with the formal review and evaluation of the effectiveness of the 2007 Interim Guidelines. Under the applicable provisions of the 2007 Interim Guidelines the Secretary shall consult with the Basin States in initiating this review beginning no later than December 31, 2020.

² Draft versions of the DCPs and information on the Upper and Lower Basin DCPs are available on the Bureau of Reclamation's website at: <https://www.usbr.gov/dcp/>.

working closely with the Basin States in developing operational tools for management of the Colorado River. For example, the Secretary of the Interior noted at the time of the adoption of the 2007 Interim Guidelines: "In recent years, in a number of settings, and facing a broad range of water management challenges, the Department has highlighted the important role of the Basin States in the statutory framework for administration of Basin entitlements and the significance that a seven-state consensus represents. Multi-state consensus is a rare and unique achievement that should continue to be recognized and facilitated," 73 FR 19878 (April 11, 2008). The Department fully endorses this Secretarial statement of policy as this approach continues to represent the best manner to address future controversies on the Colorado River through consultation and negotiation. Simply put, this approach minimizes the likelihood that controversies will increase and intensify as water supplies diminish.

Through this Notice, and at this time, the Department is seeking input from the Governors' representatives of the Basin States. The Department will ensure that the information received from the Governors' representatives is promptly shared with tribes, interested parties and the general public for their review. In the event that the Department proposes to take further action following receipt of such input, the Department will also provide an opportunity for further input from tribes, interested parties and the general public.

Across Administrations, the Department has invested extraordinary time, effort and resources to facilitate development of the DCPs. While adoption of consensus-based DCPs in early 2019 would appropriately and promptly reduce the risk facing the Colorado River Basin, the Basin States may not complete the actions necessary to put the DCPs into effect this year. Accordingly, the Department must be prepared to act without undue delay to reduce the risk of continued declines in the critical water supplies of the Colorado River Basin in the unfortunate event that the Basin States are unable to complete their work on the DCPs.

In conclusion, the Colorado River Basin has experienced historically dry conditions since 2000 and the combined storage in Lakes Powell and Mead has reached its lowest level since Lake Powell initially began filling in the 1960s. Given the persistence and intensity of the current drought, the risk of reaching critically low elevations at Lakes Powell and Mead has increased nearly four-fold over the past decade.

The Department, recognizing this increased risk, called on the Basin States to put DCPs in place before the end of 2018. Each of the Governors' representatives of the Basin States endorsed the goal of completion of the DCPs by the end of 2018.³

The DCPs remain unfinished at this time, and given the current unfinished status of the DCPs, combined with declining reservoir storage in the Basin, the Department is considering potential federal actions to revise Colorado River operations in an effort to enhance and ensure sustainability of Colorado River water supplies for the southwestern United States. This Notice requests input from the Governors of the Basin States (and appropriate consultation with such state representatives as each Governor may designate) regarding recommendations for potential Departmental actions in the event that the DCPs cannot be completed and promptly adopted that: (a) Would be appropriate to take to reduce the risks the Colorado River Basin is facing, and (b) can be adopted prior to the August 2019 determinations of operations for Lake Powell and Lake Mead in 2020.

Dated: February 1, 2019.

Timothy R. Petty,

Assistant Secretary—Water & Science, U.S. Department of the Interior.

Brenda W. Burman,

Commissioner, Bureau of Reclamation, U.S. Department of the Interior.

[FR Doc. 2019-01340 Filed 2-5-19; 8:45 am]

BILLING CODE 4332-90-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-1123 (Second Review)]

Steel Wire Garment Hangers From China; Institution of a Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted a review pursuant to the Tariff Act of 1930 ("the Act"), as amended, to determine whether revocation of the antidumping duty order on steel wire garment hangers from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to

³ See statement of Commissioner of Reclamation and representatives of the Seven Colorado River Basin States at <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=62170>.

respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted February 1, 2019. To be assured of consideration, the deadline for responses is March 6, 2019. Comments on the adequacy of responses may be filed with the Commission by April 16, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—On October 6, 2008, the Department of Commerce (“Commerce”) issued an antidumping duty order on imports of steel wire garment hangers from China (73 FR 58111). Following the first five-year reviews by Commerce and the Commission, effective March 11, 2014, Commerce issued a continuation of the antidumping duty order on imports of steel wire garment hangers from China (79 FR 13613). The Commission is now conducting a second review pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the

scope of the five-year review, as defined by the Department of Commerce.

(2) The *Subject Country* in this review is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise*. In its original determination and its expedited first five-year review determination, the Commission defined a single *Domestic Like Product* consisting of all the various types of steel wire garment hangers, co-extensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product*, or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination, the Commission defined a single *Domestic Industry* consisting of all domestic producers of steel wire garment hangers, with the exception of two domestic firms (Laidlaw Company LLC (“Laidlaw”) and United Wire Hangers Corporation (“United Wire”)), which were excluded from the *Domestic Industry* by a majority of the Commission in the Commission's original determination based on the firms' related party status and their importation of subject merchandise. In its expedited first five-year review determination, however, the Commission defined a single *Domestic Industry* consisting of all domestic producers of steel wire garment hangers.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they

may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding 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, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is March 6, 2019. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct an expedited or full review. The deadline for filing such comments is April 16, 2019. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's website at <https://edis.usitc.gov>, elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget ("OMB") number is not displayed; the OMB number is 3117 0016/USITC No. 19–5–423, expiration date June 30, 2020. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide

equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determination in the review.

Information to be Provided in Response to this Notice of Institution: As used below, the term "firm" includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product*. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the

United States or other countries after 2012.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product*, provide the following information on your firm's operations on that product during calendar year 2018, except as noted (report quantity data in number of hangers and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country*, provide the following information on your firm's(s') operations on that product during

calendar year 2018 (report quantity data in number of hangers and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country*; and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country*.

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2018 (report quantity data in number of hangers and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the

market for the *Subject Merchandise* in the *Subject Country* after 2012, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country*, and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry*; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: February 1, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019-01301 Filed 2-5-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-597 and 731-TA-1407 (Final)]

Cast Iron Soil Pipe From China; Revised Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: January 31, 2019.

FOR FURTHER INFORMATION CONTACT:

Junie Joseph (202-205-3363), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-

205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION: On September 10, 2018, the Commission established a schedule for the conduct of the final phase of investigations (83 FR 46519, September 13, 2018). Due to the lapse in appropriations and ensuing cessation of Commission operations, the Commission is revising its schedule.

The Commission's revised dates in the schedule are as follows: the hearing is on Tuesday, February 12, 2019 at 9:30 a.m.; requests to appear at the hearing should be filed on or before February 7, 2019; the deadline for filing posthearing briefs is February 20, 2019; final release of information is on March 14, 2019; and final party comments are due on March 18, 2019.

For further information concerning these reviews, see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Authority

These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: February 1, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019-01233 Filed 2-5-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[USITC SE-19-001]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: February 8, 2019 at 12:30 p.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205-2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. Nos. 701–TA–481 and 731–TA–1190 (Review) (Crystalline Silicon Photovoltaic Cells and Modules from China). The Commission is currently scheduled to complete and file its determinations and views of the Commission by March 1, 2019.

5. Outstanding action jackets: None.
In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting. Earlier announcement of this meeting was not possible.

By order of the Commission.
Issued: February 4, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–01486 Filed 2–4–19; 4:15 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–481; 731–TA–1190 (Review)]

Crystalline Silicon Photovoltaic Cells and Modules From China; Revised Schedule for Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: January 31, 2019.

FOR FURTHER INFORMATION CONTACT:

Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION: On July 16, 2018, the Commission established a schedule for the conduct of the full five-year reviews (83 FR 34873, July 23, 2018). On October 22, 2018, the

Commission revised its schedule (83 FR 54138, October 26, 2018). Due to the lapse in appropriations and ensuing cessation of Commission operations, the Commission is revising its schedule.

The Commission's revised dates in the schedule are as follows: Final release of information is on January 31, 2019; and final party comments are due on February 5, 2019.

For further information concerning these reviews, see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.
Issued: February 1, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–01255 Filed 2–5–19; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–450 and 731–TA–1122 (Second Review)]

Laminated Woven Sacks From China; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (“the Act”), as amended, to determine whether revocation of the antidumping and countervailing duty orders on laminated woven sacks from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted February 1, 2019. To be assured of consideration, the deadline for responses is March 6, 2019. Comments on the adequacy of responses may be filed with the Commission by April 16, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain

information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—On August 7, 2008, the Department of Commerce (“Commerce”) issued antidumping and countervailing duty orders on imports of laminated woven sacks from China (73 FR 45941 and 73 FR 45955). Following the first five-year reviews by Commerce and the Commission, Commerce issued a continuation of the antidumping duty order, effective March 26, 2014, on imports of laminated woven sacks from China (79 FR 16770) and a continuation of the countervailing duty order, effective March 27, 2014, on imports of laminated woven sacks from China (79 FR 17134). The Commission is now conducting second reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Country* in these reviews is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise*. In its original

determinations and its expedited first five-year review determinations, the Commission defined a single *Domestic Like Product* consisting of laminated woven sacks, coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product*, or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* as all producers of the *Domestic Like Product*. Certain Commissioners defined the *Domestic Industry* differently in the original determinations. In its expedited first five-year review determinations, however, the Commission defined the *Domestic Industry* as all U.S. producers of laminated woven sacks.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not

required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding 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, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is March 6, 2019. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the

Commission should conduct expedited or full reviews. The deadline for filing such comments is April 16, 2019. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's website at <https://edis.usitc.gov>, elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget ("OMB") number is not displayed; the OMB number is 3117 0016/USITC No. 19–5–424, expiration date June 30, 2020. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: As used below, the term "firm" includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product*. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2012.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product*, provide the following information on your firm's operations on that product during calendar year 2018, except as noted (report quantity data in number of sacks and value data in U.S. dollars, f.o.b.

plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2018 (report quantity data in number of sacks and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country*; and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country*.

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2018 (report quantity data in number of sacks and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2012, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider

include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country*, and such merchandise from other countries.

(13) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry*; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: February 1, 2019.

By order of the Commission.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019-01299 Filed 2-5-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-749 (Fourth Review)]

Persulfates From China; Institution of a Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted a review pursuant to the Tariff Act of 1930 ("the Act"), as amended, to determine whether revocation of the antidumping duty order on persulfates from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted February 1, 2019. To be assured of consideration, the deadline for responses is March 6, 2019. Comments on the adequacy of responses may be filed with the Commission by April 16, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202-205-3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special

assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—On July 7, 1997, the Department of Commerce ("Commerce") issued an antidumping duty order on imports of persulfates from China (62 FR 36259). Following the first five-year reviews by Commerce and the Commission, effective December 24, 2002, Commerce issued a continuation of the antidumping duty order on imports of persulfates from China (67 FR 78415). Following the second five-year reviews by Commerce and the Commission, effective April 21, 2008, Commerce issued a continuation of the antidumping duty order on imports of persulfates from China (73 FR 21318). Following the third five-year reviews by Commerce and the Commission, effective March 28, 2014, Commerce issued a continuation of the antidumping duty order on imports of persulfates from China (79 FR 17506). The Commission is now conducting a fourth review pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR parts 201, subparts A and B and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year review, as defined by the Department of Commerce.

(2) The *Subject Country* in this review is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in

characteristics and uses with, the *Subject Merchandise*. In its original determination, its expedited first and second five-year review determinations, and its full third five-year review determination, the Commission found a single *Domestic Like Product* consisting of ammonium, sodium, and potassium persulfates, coextensive with the scope of the order.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product*, or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination, its expedited first and second five-year review determinations, and its full third five-year review determination, the Commission defined the *Domestic Industry* as producers of ammonium, sodium, and potassium persulfates.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not

required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding 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, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is March 6, 2019. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the

Commission should conduct an expedited or full review. The deadline for filing such comments is April 16, 2019. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's website at <https://edis.usitc.gov>, elaborates upon the Commission's rules with respect to electronic filing. Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

No response to this request for information is required if a currently valid Office of Management and Budget ("OMB") number is not displayed; the OMB number is 3117 0016/USITC No. 19–5–422, expiration date June 30, 2020. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determination in the review.

Information to be Provided in Response to this Notice of Institution: As used below, the term "firm" includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number,

fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product*. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2012.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product*, provide the following information on your firm's operations on that product during calendar year 2018, except as noted

(report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2018 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country*; and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country*.

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2018 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2012, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute

products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country*, and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry*; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: February 1, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019-01300 Filed 2-5-19; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Amendment to Consent Decree Under the Clean Air Act

On January 31, 2019, the Department of Justice lodged a proposed amendment to the Consent Decree lodged on May 30, 2017, with the United States District Court for the Northern District of Texas, Abilene Division, in the lawsuit entitled *United States v. Alon USA, LP*, Case No. 1:17-cv-00087.

The proposed amendment alters the previously lodged Decree, which resolves U.S. claims under the Clean Air Act (CAA), against Alon USA, LP, concerning its petroleum refinery located in Big Spring, Texas. The amendment would: Adjust dates for completion of SO₂ and NO_x control devices in order to address issues that included technical and feasibility considerations related to those controls raised by Alon; account for transfer of ownership of identified tanks and loading racks related to the Big Spring refinery; account for changes in anticipated turnaround schedule for the refinery; and identify elements of the Decree the performance of which is either restitution or required in order to come into compliance with the law.

The publication of this notice opens a period for public comment on the proposed amendment. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Alon USA, LP*, D.J. Ref. No. 90-5-2-1-09157. All

comments must be received no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	<i>pubcomment-ees.enrd@usdoj.gov</i> .
By mail	Assistant Attorney General, U.S. DOJ–ENRD P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed amendment to the Consent Decree may be examined and downloaded at this Justice Department website: http://www.usdoj.gov/enrd/Consent_Decrees.html. We will provide a paper copy of the proposed amendment upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$3.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Thomas Carroll,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–01216 Filed 2–5–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0131]

Proposed Extension of Information Collection; Training Plans, New Miner Training, Newly-Hired Experienced Miner Training

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly

understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection for Training Plans, New Miner Training, Newly-hired Experienced Miner Training.

DATES: All comments must be received on or before April 8, 2019.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below.

- *Federal E-Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments for docket number MSHA–2018–0040.

- *Regular Mail:* Send comments to USDOL–MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452.

- *Hand Delivery:* USDOL–Mine Safety and Health Administration, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist’s desk on the 4th floor via the East elevator.

FOR FURTHER INFORMATION CONTACT: Sheila McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at MSHA.information.collections@dol.gov (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, Section 101(a) of the Mine Act, 30 U.S.C. 811, authorizes the Secretary to develop, promulgate, and revise as may be appropriate, improved mandatory safety and health standards for the protection of life and prevention of injuries in coal or other mines.

Training informs miners of safety and health hazards inherent in the workplace and enables them to identify and avoid such hazards. Training becomes even more important in light of certain conditions that can exist when production demands increase, such as an influx of new and less experienced miners and mine operators; longer work hours to meet production demands; and increased demand for contractors who may be less familiar with the dangers on mine property.

MSHA’s safety and health training requirements ensure that all miners

receive the required training, which would result in a decrease in accidents, injuries, and fatalities. The information obtained from mine operators is used by MSHA during inspections to determine compliance with the requirements concerning the training and retraining of miners engaged in shell dredging, or employed at sand, gravel, surface stone, surface clay, colloidal phosphate, and surface limestone mines.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection related to Training Plans, New Miner Training, Newly-hired Experienced Miner Training. MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;

- Evaluate the accuracy of MSHA’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The information collection request will be available on <http://www.regulations.gov>. MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on www.regulations.gov and www.reginfo.gov.

The public may also examine publicly available documents at USDOL–Mine Safety and Health Administration, 201 12th Street, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist’s desk on the 4th floor via the East elevator.

Questions about the information collection requirements may be directed to the person listed in the FOR FURTHER INFORMATION section of this notice.

III. Current Actions

This request for collection of information contains provisions for Training Plans, New Miner Training, Newly-hired Experienced Miner

Training. MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219-0131.

Affected Public: Business or other for-profit.

Number of Respondents: 11,438.

Frequency: On occasion.

Number of Responses: 1,133,415.

Annual Burden Hours: 155,765 hours.

Annual Respondent or Recordkeeper

Cost: \$349,204.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Sheila McConnell,

Certifying Officer.

[FR Doc. 2019-01195 Filed 2-5-19; 8:45 am]

BILLING CODE 4520-43-P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health

AGENCY: Office of Workers' Compensation Programs.

ACTION: Announcement of telephonic meeting of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

SUMMARY: The Advisory Board will meet February 28, 2019, via teleconference, from 2:00 p.m. to 5:00 p.m. Eastern time.

Submissions of comments and materials for the record, and requests for special accommodations: You must submit (postmark, send, transmit) comments, materials, and requests for special accommodations for the meetings by February 21, 2019.

FOR FURTHER INFORMATION CONTACT: For press inquiries: Ms. Laura McGinnis, Office of Public Affairs, U.S. Department of Labor, Room S-1028, 200 Constitution Ave. NW, Washington, DC 20210; telephone (512) 396-6652; email mcginnis.laura@dol.gov.

SUPPLEMENTARY INFORMATION: The Advisory Board will meet telephonically on Thursday, February

28, 2019, from 2:00 p.m. to 5:00 p.m. Eastern time. Advisory Board members will attend the meeting by teleconference. The teleconference number and other details for participating remotely will be posted on the Advisory Board's website, <http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm>, 72 hours prior to the commencement of the first meeting date. Advisory Board meetings are open to the public.

The Advisory Board is mandated by Section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; and (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency. The Advisory Board sunsets on December 19, 2024.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102-3).

Agenda: The tentative agenda for the Advisory Board meeting includes:

- Discuss the recommendation responses and requests for information provided by the program;
- Discuss the draft Occupational History Questionnaire;
- Discuss recent Procedure Manual changes;
- Discuss status of working group projects; and
- Administrative issues raised by Advisory Board functions and future Advisory Board activities.

OWCP transcribes and prepares detailed minutes of Advisory Board meetings. OWCP will post the transcripts and minutes on the Advisory Board web page, <http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm>, along with written comments, speaker presentations, and other materials submitted to the Advisory Board or presented at Advisory Board meetings.

Public Participation, Submissions, and Access to the Public Record

Advisory Board meetings: The Advisory Board will meet via

teleconference on Thursday, February 28, 2019, from 2:00 p.m. to 5:00 p.m. Eastern time. All Advisory Board meetings are open to the public. The teleconference number and other details for listening to the meeting will be posted on the Advisory Board's website no later than 72 hours prior to the meeting, at <http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm>.

Requests for special accommodations: Please submit requests for special accommodations to access the telephonic Advisory Board meeting by email, telephone, or hard copy to Ms. Carrie Rhoads, OWCP, Room S-3524, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210; telephone (202) 343-5580; email EnergyAdvisoryBoard@dol.gov.

Submission of written comments for the record: You may submit written comments, identified as for the Advisory Board and with the meeting date of February 28, 2019, by any of the following methods:

- *Electronically:* Send to: EnergyAdvisoryBoard@dol.gov (specify in the email subject line, "Advisory Board Meeting February 28, 2019").

- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S-3522, 200 Constitution Ave. NW, Washington, DC 20210. Due to security-related procedures, receipt of submissions by regular mail may experience significant delays.

Comments must be received by February 21, 2019. OWCP will make available publically, without change, any written comments, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Electronic copies of this **Federal Register** notice are available at <http://www.regulations.gov>. This notice, as well as news releases and other relevant information, are also available on the Advisory Board's web page at <http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm>.

FOR FURTHER INFORMATION CONTACT: You may contact Douglas Fitzgerald, Designated Federal Officer, at fitzgerald.douglas@dol.gov, or Carrie Rhoads, Alternate Designated Federal Officer, at rhoads.carrie@dol.gov, U.S. Department of Labor, 200 Constitution Avenue NW, Suite S-3524, Washington,

DC 20210, telephone (202) 343-5580. This is not a toll-free number.

Signed at Washington, DC.

Julia K. Hearthway,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2019-01165 Filed 2-5-19; 8:45 am]

BILLING CODE 4510-24-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 19-001]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA)

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 Laurette Brown, National Aeronautics and Space Administration, Mail Code IT-C2, Kennedy Space Center, FL 32899.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Laurette L. Brown, KSC Paperwork Reduction Act Clearance Coordinator, John F. Kennedy Space Center, Mail Code IT-C2, Kennedy Space Center, FL 32899 or email Laurette.L.Brown@NASA.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The NASA Kennedy Space Center (KSC) manages and facilitates the center-specific Job Shadowing Program (JSP). The program targets high school and undergraduate students and offers an opportunity to experience the practical application of STEM, business, and other disciplines aligned to NASA's long-term workforce needs, in a NASA-unique workplace setting. Program participants receive insight into NASA and KSC's history, current activities, and other student opportunities through briefings, tours, and career panels. Each participant is then matched with a subject matter expert to gain direct exposure to the implementation of their

respective fields of interest and related career paths.

II. Methods of Collection

The information will be collected via an electronic process.

III. Data

Title: Job Shadowing Program.

OMB Number: 2700-0135.

Type of review: Renewal of a currently approved collection.

Affected Public: High school and college students, and faculty.

Average Expected Annual Number of activities: 4.

Average Number of Respondents per Activity: 20.

Annual Responses: 80.

Frequency of Responses: Quarterly.

Average Minutes Per Response: 30.

Burden Hours: 26.

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.

Laurette Brown,

KSC PRA Clearance Coordinator.

[FR Doc. 2019-01221 Filed 2-5-19; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

Arts Advisory Panel Meetings

AGENCY: National Endowment for the Arts, National Foundation on the Arts and the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that 6 meetings of

the Arts Advisory Panel to the National Council on the Arts will be held by teleconference.

DATES: See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate:

ADDRESSES: National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT:

Further information with reference to these meetings can be obtained from Ms. Sherry Hale, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506; hales@arts.gov, or call 202/682-5696.

SUPPLEMENTARY INFORMATION: The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of July 5, 2016, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of title 5, United States Code.

The upcoming meetings are:

State Partnership Agreements (review of applications): This meeting will be open.

Date and time: February 7, 2019; 3:00 p.m. to 5:00 p.m.

Regional Partnership Agreements (review of applications): This meeting will be open.

Date and time: February 11, 2019; 3:00 p.m. to 4:00 p.m.

International Activities: Performing Arts Global Exchange, U.S. Artist International, Performing Arts Discovery, Shakespeare in American Communities (review of applications): This meeting will be closed.

Date and time: February 12, 2019; 2:00 p.m. to 4:00 p.m.

Folk and Traditional Arts Partnership (review of applications): This meeting will be closed.

Date and time: February 12, 2019; 1:00 p.m. to 3:00 p.m.

Research: Art Works (review of applications): This meeting will be closed.

Date and time: February 25, 2019; 12:30 p.m. to 2:30 p.m.

Research: Art Works (review of applications): This meeting will be closed.

Date and time: February 25, 2019; 2:30 p.m. to 4:30 p.m.

Dated: January 31, 2019.

Sherry Hale,

Staff Assistant, National Endowment for the Arts.

[FR Doc. 2019-01161 Filed 2-5-19; 8:45 am]

BILLING CODE 4537-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-269, 50-270, and 50-287; NRC-2018-0199]

Duke Energy Carolinas, LLC; Oconee Nuclear Station, Units 1, 2, and 3

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and final finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to licenses held by Duke Energy Carolinas, LLC, (Duke Energy, the licensee) for the operation of Oconee Nuclear Station, Units 1, 2, and 3 (Oconee Nuclear Station). The proposed amendments would revise the Duke Energy Physical Security Plan for Oconee Nuclear Station to include additional protective measures during a specific infrequent short-term operating state, including a modification that provides additional access restriction. The NRC is issuing an environmental assessment (EA) and a final finding of no significant impact (FONSI) associated with the proposed license amendments.

DATES: The EA and final FONSI referenced in this document are available on February 6, 2019.

ADDRESSES: Please refer to Docket ID NRC-2018-0199 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- **Federal Rulemaking Website:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2018-0199. Address questions about Docket IDs in [Regulations.gov](http://www.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. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the "Availability of Documents" section of this document.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT:

Audrey Klett, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-0489; email: Audrey.Klett@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the issuance of amendments to Duke Energy for Renewed Facility Operating License Nos. DPR-38, DPR-47, and DPR-55 for the operation of Oconee Nuclear Station, Units 1, 2, and 3, respectively, located in Oconee County, South Carolina. Duke Energy submitted its License Amendment Request (LAR) No. 2018-01 by letter ONS-2018-014 dated February 12, 2018 (Duke Energy 2018a), as supplemented by letters RA-18-0112 dated August 8, 2018 (Duke Energy 2018b), and RA-18-0139 dated August 23, 2018 (Duke Energy 2018c). The licensee applied for changes to the Duke Energy Physical Security Plan under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities," Section 50.90, "Application for amendment of license, construction permit, or early site permit." In accordance with section 10 CFR 51.21, the NRC prepared the following EA that analyzes the environmental impacts of the proposed licensing action. Based on the results of this EA, and in accordance with 10 CFR 51.31(a), the NRC has determined not to prepare an environmental impact statement for the proposed licensing action and is issuing a final FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would revise the Duke Energy Physical Security Plan for Oconee Nuclear Station to include

additional protective measures during a specific infrequent short-term operating state, including a modification that provides additional access restriction. In its application, the licensee stated that it is voluntarily proposing these changes to further increase the margin of protection for certain associated components and equipment during certain modes of operation of the Standby Shutdown Facility.

Installation of the additional protective measure would likely include placing a floating barrier on the Keowee River. The barrier would consist of multiple segments connected by cabling and anchored by concrete abutments that are cast in place. Depending upon the final design, the concrete abutments would either sit on the ground, which would require minor clearing and grading prior to installation, or be buried in the ground, which would require excavation. Duke Energy would also need to clear and grade a limited area to build a temporary access road on the east side of the Keowee River. A temporary laydown area would be created near the access road to hold formwork, rebar, spoil, and other construction-related materials and equipment. (Duke Energy 2018b)

During construction, Duke Energy (2018b) would use a rubber tire crane that is less than 100 feet (ft) (30 meters (m)) tall when fully extended, one rubber tire front end loader, one excavator, two 10-yard dump trucks, and delivery vehicles (e.g. flatbed and concrete trucks) to complete all construction activities.

Temporarily disturbed areas from all construction activities would be less than 0.5 acre (ac) (0.2 hectare (ha)). Permanently disturbed areas associated with the abutments would be less than 0.1 ac (0.04 ha). Duke Energy would complete all construction activities within twelve weeks. Once construction is complete, the floating barrier would remain in the river, permanently attached to the abutments. (Duke Energy 2018b)

Need for the Proposed Action

Duke Energy is applying for the license amendments in accordance with 10 CFR 50.90. These amendments would further increase the margin of protection for certain associated components and equipment during certain modes of operation of the Standby Shutdown Facility.

Plant Site and Environs

Oconee Nuclear Station is located on 210 ha (510 ac) in a rural part of northwestern South Carolina. The site consists of rolling hills with several

intermittent streams flowing away from the center of the site in a radial pattern. Oconee Nuclear Station is within the drainage area of the Little and Keowee Rivers, which flow southerly into the Seneca River and subsequently discharge into the main drainage course of the Savannah River. Lake Keowee is immediately north and west of the site, and the Keowee River (a tributary coming from Lake Keowee) runs through the site. The Keowee Dam, located between the Keowee River and Lake Keowee, limits the hydrological and biological connection between these two waterbodies (NRC 1999).

The project area includes an embanked portion of the Keowee River near the headwaters of the Keowee Dam. The entire project area has been previously disturbed and is currently covered by grasses and low shrubs on the east side of the river and rip-rap on the west side of the river. Fish likely to occur within this portion of the Keowee River include centrarchids, particularly redbreast sunfish, bluegill, and redear sunfish (FERC 2016). In addition, striped bass, a South Carolina State Conservation Species of Moderate Priority, inhabits the tailwaters of the Keowee Dam and, therefore, has the potential to occur near the project area. U.S. Fish and Wildlife Service's (FWS) National Wetlands Inventory indicates that freshwater emergent wetlands, lake wetlands, and riverine wetlands occur within the project area (FWS 2018a). Federally protected species and migratory birds may occur within the vicinity of the proposed project site, although no federally protected species are known to occur within the proposed construction site (NRC 1999, Duke Energy 2018b).

Within the vicinity of the project area, vegetated areas include patches of hardwood forests with common species such as northern red oak (*Quercus rubra*), American beech (*Fagus grandifolia*), and loblolly pine (*Pinus taeda*). Common grasses and shrubs include Japanese honeysuckle (*Lonicera japonica*), fescue (*Festuca* spp.), and broomsedge (*Andropogon virginicus*).

Environmental Impacts of the Proposed Action

Radiological Impacts

The NRC staff is conducting a safety review to determine if the process changes to the licensee's physical security plan are acceptable. With regard to potential radiological environmental impacts, if the proposed changes are acceptable, the NRC staff has concluded that the proposed action would not increase the probability or

consequences of radiological accidents. Additionally, the NRC staff has concluded that the proposed changes would have no direct radiological environmental impacts. There would be no change to the types or amounts of radioactive effluents that may be released and, therefore, no change in occupational or public radiation exposure from the proposed changes. Physical changes would be limited to the construction of the floating physical barrier in the proposed action. No modifications would be made to the reactor coolant system pressure boundary, nor would the proposed action make any other physical changes to the reactor facility design, material, or construction standards. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

Land Use

All construction activities would occur within an industrial area that is part of the owner controlled area of the Oconee Nuclear Station site (Duke Energy 2018b). In addition, the permanently added floating barrier and abutments would be within the owner controlled area of the Oconee Nuclear Station site. Therefore, no change to land use would be expected.

Visual Resources

During construction activities, construction equipment and vehicles may be visible to the public from a nearby road (Walhalla Highway). The permanent floating barrier may be also be visible to the public from the nearby road, although it would not be as prominent as the construction equipment due to its low height. Due to the distance and trees within the surrounding area, the project area would not be in the viewshed of any residences.

The viewshed within the project area includes a few trees and natural areas but is generally dominated by industrial buildings and highly modified landscapes, such as mowed lawns and concrete dams. Therefore, the addition of construction vehicles, construction equipment, and the floating barrier would not significantly affect visual resources given that the viewshed already contains human-modified structures and is part of an industrial setting at the Oconee Nuclear Station site.

Air Quality

Oconee Nuclear Station is located in Oconee County, which is designated unclassifiable/attainment for all criteria pollutants (40 CFR 81.341). During

construction, earth-moving equipment, non-road vehicles, and worker and delivery vehicles would be sources of air emissions. Earth moving activities, including excavation, clearing, and compacting, would generate fugitive dust on site. However, the limited duration and size of the construction site would limit the amount of dust generated. Operation of construction equipment would emit pollutants on site from the combustion of fuels in equipment. Based on the number of vehicles required and length of construction activities, Duke Energy (2018b) estimated that air emissions would not exceed 3.5 tons of Nitrogen Oxides (NO_x) or 0.75 tons Carbon Monoxide (CO) per month during construction. Given these relatively low emission levels and the temporary nature of the construction activities (twelve weeks or less), the proposed action would not significantly affect 40 CFR 81.341.

Noise

At the construction site, Duke Energy (2018b) estimated that noise levels from construction equipment would be less than 85 A-weighted decibels (dBA). Duke Energy (2018b) estimated that the noise level at the nearest sensitive noise receptor, which is a private residence located approximately 0.4 miles (mi) (0.6 kilometers (km)) northeast of the construction site, as a result of construction equipment would not exceed 38 dBA. This level is below the normal conversational level of 50 dBA and, therefore, the impact is not expected to be significant.

Water Resources

No direct impacts to surface or ground water would be expected because no in-water construction would occur. Runoff from construction areas could potentially affect downstream surface water quality if not properly managed. Duke Energy (2018b) would use various chemicals, such as oils, diesel fuel, fuel oil, gasoline, and hydraulic fluid, during installation of the floating barrier and abutments. To minimize the potential for chemical and contaminants to spill or runoff into nearby waterbodies, such as the Keowee River, Duke Energy would follow several best management practices and permit requirements. For example, Duke Energy (2018b) would follow its nuclear fleet procedures that govern the control of chemicals, such as labeling and storage procedures. In addition, Duke Energy (2018b) would develop a detailed erosion and sedimentation control plan in accordance with South Carolina Department of Health and

Environmental Control (SCDHEC) permitting requirements. This would include the appropriate erosion control methods to prevent silt and sediment from reaching waterbodies during construction. To prevent potential spills from traveling into the river, chemicals and oil-filled equipment will be stored in temporary berms to contain any unintended spillage that may occur. Lastly, trained personnel will refuel equipment and worker vehicles within the site garage rather than at the project area to help ensure workers are trained to contain any unintended spills and to increase the distance between a potential spill and the river. Given the lack of direct impacts and mitigation measures and permit requirements to minimize runoff and erosion, the proposed action would not significantly impact water resources.

Terrestrial Resources

Construction activities would be limited to a small area (less than 0.5 ac (0.2 ha)) and would occur in a previously disturbed habitat that is currently covered by grasses and low shrubs on the east side of the river and rip-rap on the west side of the river (Duke Energy 2018b). Once construction is complete, abutments would remain on the ground adjacent to the river. This permanent disturbance would be limited to less than 0.1 ac (0.04 ha) and would remove common or weedy grasses and shrubs (Duke Energy 2018b). Directly affected vegetation would be limited to common or non-native species, which are abundant within the region and provide relatively low-quality habitat for birds and wildlife in comparison to forests and wetland habitats. Although wetlands and riparian zones along river banks can provide important habitat for certain species, wetlands and riparian zones within the project area have been highly modified from previous disturbances.

Noise from construction activities could disturb birds and wildlife. This impact would be minor because wildlife and birds within the area would likely be tolerant of human activity given that the project area is located within an industrial site that has been in operation for decades. If noise or other activities disturb wildlife and birds, such individuals could move out of the immediate area and find adequate, similar habitat within the vicinity. Once construction activities are complete, birds and wildlife could return to the area.

The closest upland forest, which provides high quality habitat for wildlife and birds, is approximately 0.5 mi (0.8 km) from the project site (NRC

1999, Duke Energy 2018b). Given the distance to this higher quality habitat, noise and other disturbances would be negligible.

FWS's Environmental Conservation Online System (ECOS) Information for Planning and Conservation (IPaC) database indicated that the following three migratory bird species may occasionally occur within the project area (FWS 2018a):

- Bald eagle (*Haliaeetus leucocephalus*): may occur in fall;
- Eastern whip-poor-will (*Antrostomus vociferous*): may occur in spring; and
- Red-headed woodpecker (*Melanerpes erythrocephalus*): may occur in fall.

These three species are protected under the Migratory Bird Treaty Act of 1918, as amended, which makes it illegal to take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird, except under the terms of a valid Federal permit. The bald eagle was previously listed as an endangered species under the Endangered Species Act, but delisted in 2007 due to an increase in population. The bald eagle continues to be protected under the Bald and Golden Eagle Protection Act of 1940, as amended.

NRC (1999) reported that migratory birds, such as bald eagles and peregrine falcons (*Falco peregrinus*), occasionally forage or rest near the Oconee Nuclear Station site for limited portions of the year. These species are not known to nest or otherwise occur within the project area (NRC 1999). The highest density of bald eagles that occur near the Oconee Nuclear Station is several miles away at the Jocassee and Bad Creek Reservoirs (NRC 1999). The closest bald eagle nests are approximately 15 miles (24 km) south and 17 miles (28 km) north of the proposed site (SCDNR 2019). It is unlikely that bald eagles or other migratory birds commonly use the project area given the minimal amount of suitable habitat within the project area and because migratory birds have only been documented as occasionally or rarely inhabiting the areas surround the site. The short construction timeframe (twelve weeks or less) further reduces the likelihood that a migratory bird, which only occurs within the area for a limited amount of time, would occur within the project area during construction. As described above, impacts to migratory birds would be minimal given the distance from the project site to higher-quality habitat, which would reduce any noise or other

activity that could cause a disturbance. In addition, Duke Energy (2018b) stated that no tree cutting would occur. Therefore, the proposed project would not result in any direct impacts to nesting habitat. Duke Energy (2018b) also stated that if construction methods changed and any tree cutting did occur, Duke Energy would follow its nuclear fleet procedures which require a natural resource evaluation be conducted prior to tree cutting. Duke Energy (2018b) would use this evaluation to determine whether it needed to conduct additional activities to comply with the Migratory Bird Treaty Act of 1918. During construction, bird collisions with construction equipment could result in increased mortality caused by the presence of tall structures, such as the rubber tire crane that is approximately 100 ft (30 m) tall when fully extended. Migratory songbirds would be most likely to collide with cranes or other equipment because of their propensity to migrate at night, their low flight altitudes, and their tendency to be trapped and disoriented by artificial light (Ogden 1996, NRC 2013). NRC (2013) reviewed bird collisions with plant structures at nuclear power plants and determined that collision rates were negligible sources of bird mortality with plants that have cooling towers 100 ft (30 m) in height. The construction equipment for this proposed action would be smaller in size and similar or smaller in height than an operating nuclear power plant; therefore, the impacts from bird collisions at the project site would be bounded by the conclusions the NRC staff reached in its review of bird collisions at operating nuclear power plants with cooling towers 100 ft (30 m) in height.

Duke Energy is not aware of any terrestrial sensitive, rare, or State-listed species known to occur near the project area due to the lack of suitable habitat (Duke Energy 2013, 2014, and 2018b). See below for a discussion of federally-listed species that could occur near the project area.

Based on the limited habitat that would be temporarily or permanently disturbed, the low-quality habitat in the project area, the lack of sensitive or rare species within the construction area, the distance to higher-quality habitats, and because any displacement of wildlife would be temporary, the NRC staff determined that the impacts on terrestrial resources would not be significant.

Aquatic Resources

Construction activities are not expected to result in any direct impacts to aquatic resources, such as habitat

loss, because no in-water construction activities would occur. Runoff could degrade water quality and aquatic habitats within the Keowee River. However, the NRC staff expects these impacts to be minor based on the best management practices and permit requirements discussed above to minimize erosion and runoff of contaminants.

Once construction is complete, the barrier would remain within the river and float on top of the water's surface. During periods of low flow, portions of the barrier may rest on each river bank. The floating barrier could interfere with the migration or foraging activities for aquatic species that could not travel past the barrier or that could get stuck within the barrier, especially during periods of low flow, where the barrier would rest on portions of river bank. Nonetheless, the barrier would be placed within an area of low-quality aquatic habitat that has been highly disturbed due to the operating dam, which limits the biological connection with Keowee Lake, and the artificially lined river bank. In addition, most fish would be able to travel below the floating barrier to avoid entrapment. In addition, nearly all of the fish within this portion of the river are common species (FERC 2016), and any injury, mortality, or loss of prey or foraging habitat would not be significant for the population.

The only rare, State, or federally listed species known to occur within the tailwaters of the Keowee Dam is the striped bass, which is a State Conservation Species of Moderate Priority. However, striped bass in the tailwaters of the Keowee Dam come from the stocked population downstream in Hartwell Lake and, therefore, are not naturally occurring nor self-sustained through natural reproduction (FERC 2016). Impacts would likely be minor to this species because fish would swim below the barrier to avoid entrapment. The project area does not provide important habitat for striped bass given the human-modified embankment and because known fish species in the project area do not appear to include preferred prey for the striped bass (e.g. clupeids) (FWS 1989).

Based on the lack of in-water construction activities, the use of best management practices and permit requirements to minimize erosion and runoff, the low-quality aquatic habitat within the project area, and the ability of fish to swim below the floating barrier to avoid entrapment, impacts to aquatic resources would not be significant.

Special Status Species and Habitats

Under section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), Federal agencies must consult with the FWS or the National Marine Fisheries Service, as appropriate, to ensure that actions the agency authorizes, funds, or carries out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

Action Area

The implementing regulations for section 7(a)(2) of the ESA define "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action" (50 CFR 402.02). The action area effectively bounds the analysis of ESA-protected species and habitats because only species that occur within the action area may be affected by the Federal action.

For the purposes of this ESA analysis, the NRC staff considers the action area to include the project site and immediate surrounding areas, including the temporary construction access road and laydown area, the area where the abutments will be permanently placed, the portion of the Keowee River where the floating barrier would be placed, and the surrounding area where runoff drains and activities would be audible to wildlife. The NRC staff expects all direct and indirect effects of the proposed action to be contained within these areas.

Protected Species

The NRC staff used FWS's ECOS IPaC database to determine species that may be present in the action area. The ECOS IPaC tool identified 7 listed species with the potential to occur in the action area (FWS 2018b) (see Table 1). No federally listed fish or mussels or any candidate species, proposed species, or designated critical habitat occurs within the project area (FERC 2016, FWS 2018b).

TABLE 1—FEDERALLY LISTED SPECIES WITH POTENTIAL TO OCCUR IN THE ACTION AREA

Species	Common name	Status ^a
Mammals: <i>Myotis septentrionalis</i> .	northern long-eared bat.	T
Reptiles: <i>Clemmys muhlenbergii</i> .	bog turtle	SAT
Plants: <i>Echinacea laevigata</i> .	smooth coneflower	E
<i>Hexastylis naniflora</i> .	dwarf-flowered heartleaf.	T

TABLE 1—FEDERALLY LISTED SPECIES WITH POTENTIAL TO OCCUR IN THE ACTION AREA—Continued

Species	Common name	Status ^a
<i>Isotria medeoloides</i> .	small whorled pogonia.	T
<i>Sarracenia rubra ssp. jonesii</i> .	mountain sweet pitcher-plant.	E
<i>Trillium persistens</i> .	persistent trillium ..	E

^aSAT = Federally listed due to similarity of appearance to another listed species, E = Federally listed as endangered, T = Federally listed as threatened at 50 CFR 17, "Endangered and threatened wildlife and plants," under the provisions of the Endangered Species Act.

Source: FWS 2018b.

Northern Long-Eared Bat

The northern long-eared bat (*Myotis septentrionalis*) is listed as federally threatened (80 FR 17974, dated 04/02/15). Duke Energy (2018b) is not aware of any northern long-eared bats within the action area. During 2012 and 2013, Duke Energy conducted bat surveys for the Keowee-Toxaway relicensing project and did not observe any bats at or near Keowee Dam, along the Lake Keowee shoreline, nor within the associated islands during the ANABAT and SONOBAT acoustic surveys (Duke Energy 2015, FERC 2016). In 2015, Duke Energy (2015) conducted summer habitat surveys for the northern long-eared bat in another portion of the Oconee Nuclear Station site but did not find any evidence of suitable summer maternity habitat. However, Duke Energy (2015) concluded that potential habitat could occur on site. Therefore, the NRC staff determined that limited potential roosting habitat for the northern long-eared bat could occur within the vicinity of the action area, including forested areas on the perimeter of the Oconee Nuclear Station site. However, the distance from the action area to potential roosting habitat indicates that construction activities would barely be audible to bats and would not disturb them. No direct impacts to roosting habitat would be expected because Duke Energy would not cut any trees during construction according to the current construction plan (Duke 2018b).

The action area does not contain important foraging habitat, which FWS defines as areas within a mature forest understory 1 to 3 m (3 to 10 ft) above the ground but below the canopy (80 FR 17974). Northern long-eared bats may occasionally forage over small forest clearings, in water, and along roads, which do occur within the project area. However, northern long-eared bats forage at night, with peak activity period within 5 hours after sunset followed by a secondary peak within 8 hours after

sunset (80 FR 17974). Construction activities would not occur at night and, therefore, the proposed action would not affect bat foraging if it were to occur on or near the action area.

Based on the distance to potential roosting habitat, the lack of tree cutting, the lack of preferred foraging habitat, and because construction activities would not occur when bats forage at night, the NRC staff determined that the proposed action would have no effect on the northern long-eared bat.

Bog Turtle

The bog turtle (*Clemmys muhlenbergii*) is federally listed because of its similarity in appearance to the northern population of bog turtles (62 FR 59605, dated 11/04/97). A species that is listed due to similarity of appearance is not biologically endangered or threatened and is not subject to Section 7 consultation. Therefore, this species is not discussed further in this assessment.

Plants

Five federally listed plants have the potential to occur within the action area (see Table 1). Duke Energy determined that suitable habitat for these five listed plants is confined to natural areas, or less disturbed high-quality habitat that occurs along the periphery of the Oconee Nuclear Station site (Duke Energy 2013, 2014, 2018b). The project area is 0.5 mi (0.8 ha) from the closest natural area that could contain suitable habitat for these species. The NRC staff also reviewed the habitat requirements for these species and determined that no suitable habitat occurs within the action area (NRC 1999, FWS 2018b). Given that suitable habitat does not occur within the action area, the proposed action would have no effect on any Federally listed plant species.

ESA Effect Determination

The NRC staff concludes that the proposed action would have no effect on Federally endangered, threatened, or candidate species. Federal agencies are not required to consult with the FWS if they determine that an action will not affect listed species or critical habitats (FWS 2013). Thus, the ESA does not require consultation for the proposed action, and the NRC considers its obligations under ESA Section 7 to be fulfilled for the proposed action.

Historic and Cultural Resources

The area of potential effect of the proposed action consists of the 0.5 ac (0.2 ha) where construction activities would occur. The area of potential effect consists of areas that have been

previously disturbed. There are no National Register of Historic Places listed or eligible within the area of potential effect. Furthermore, Duke Energy is not aware of any cultural resources within the proposed construction area (Duke Energy 2018b). If the project resulted in an unexpected discovery of a cultural resource, Duke Energy would follow its nuclear fleet procedure for land disturbing activities, which requires work to halt upon the discovery of any archeological material (e.g., pottery, arrowheads, and bones). If Duke Energy identifies these items, the work is required to stop, and the workers performing the land disturbing activities are required to immediately notify the site Environmental Field Services group. Environmental personnel are then required to engage the appropriate State agencies to determine the appropriate actions to be taken prior to resuming work activities. (Duke Energy 2018b)

Given no known historic properties and cultural resources within the area of potential effect, Duke Energy's procedures for land disturbing activities and inadvertent discovery of a cultural resource, and that construction activities would occur within previously disturbed areas, there would be no significant impacts to historic or cultural resources at Oconee Nuclear Station.

Socioeconomic

Potential socioeconomic impacts from the proposed construction activities include increased demand for short-term housing and public services and increased traffic due to the temporary increase in the size of the workforce during construction. However, Duke Energy could utilize existing resources including the onsite workforce or local contractors to conduct the proposed activities. Construction activities would be limited to twelve weeks or less, and once construction is completed, no additional workforce is anticipated. Therefore, socioeconomic impacts would not be significant.

Environmental Justice

The environmental justice impact analysis evaluates the potential for disproportionately high and adverse human health and environmental effects on minority and low-income populations that could result from activities associated with the proposed action. Such effects may include human health, biological, cultural, economic, or social impacts. Minority and low-income populations are subsets of the general public residing in the vicinity of Oconee Nuclear Station, and all are

exposed to the same health and environmental effects generated from the proposed action.

According to the 2010 Census 6.1 percent of the population residing within a 5-mile radius of Oconee Nuclear Station identified themselves as minority (MCDCCAPS 2018). Additionally, according to the U.S. Census Bureau's 2012–2016 American Survey 5 Year Estimates, 1,187 individuals (11.5 percent) residing within 5-miles of Oconee Nuclear Station live below the Federal poverty threshold (MCDCCAPS 2018). The 2016 Federal poverty threshold was \$24,563 for a family of four.

Based on the analysis of human health and environmental impacts presented in this environmental assessment, the NRC did not identify high and adverse human health or environmental impacts. Therefore, the NRC concludes that the proposed action would not result in disproportionately high or adverse impacts on minority and low-income populations.

Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed license amendments (i.e., the "no-action" alternative). Denial of the application would result in no change in current environmental conditions or impacts. However, the no-action alternative would not accomplish the need for the proposed action.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies and Persons Consulted

The NRC staff did not enter into consultation with any other Federal or State agency regarding the environmental impact of the proposed action. However, on October 10, 2018, the NRC notified the South Carolina State officials (Ms. Susan Jenkins, Mr. David Scaturo, and Mr. Crispulo Isiminger of the South Carolina Department of Health and Environmental Control) of the proposed amendments.

III. Final Finding of No Significant Impact

The licensee has requested license amendments pursuant to 10 CFR 50.90 to modify the Duke Energy Physical Security Plan for Oconee Nuclear Station to include additional protective measures during a specific infrequent short-term operating state, including a modification that provides additional access restriction. The NRC is

considering issuing the requested amendments. The proposed action would not significantly affect plant safety, would not have a significant adverse effect on the probability of an accident occurring, and would not have any significant radiological or nonradiological impacts. The environment would not be significantly affected because the proposed changes would only result in minor ground disturbing activities and occur within low-quality aquatic and terrestrial habitat, the increase in workforce would be small and temporary, and all impacts to the natural environment would be minor and confined to the Oconee Nuclear Station site. In addition, no cultural resources occur within the project area, and the proposed action would have no effect on any federally-

listed species. This final FONSI incorporates by reference the EA in Section II of this notice. Therefore, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

Previous considerations regarding the environmental impacts of operating Oconee in accordance with its renewed operating licenses are described in the following document: NUREG-1437, Supplement 2, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Oconee Nuclear Station, Units 1, 2, and 3," Final Report, dated December 1999 (ADAMS Accession No. ML003670637).

This final FONSI and other related environmental documents may be

examined and/or copied for a fee at the NRC's PDR located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Publicly-available records are also accessible online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by email to pdr.resource@nrc.gov.

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS Accession No., Federal Register Notice, or URL address
10 CFR Part 50. Code of Federal Regulations, Title 10, Energy, Part 50, "Domestic licensing of production and utilization facilities".	10 CFR 50.
10 CFR Part 51. Code of Federal Regulations, Title 10, Energy, Part 51, "Environmental protection regulations for domestic licensing and related regulatory functions".	10 CFR 51.
40 CFR 81. Code of Federal Regulations, Title 40, Protection of Environment, Part 81, "Designation of Areas for Air Quality Planning Purposes".	40 CFR 81.
50 CFR 17.3. U.S. Fish and Wildlife Service. 2006. "Endangered and Threatened Wildlife and Plants; Definitions".	50 CFR 17.
50 CFR Part 402. Code of Federal Regulations, Title 50, Wildlife and Fisheries, Part 402, "Interagency Cooperation—Endangered Species Act of 1973, as Amended".	50 CFR 402.
62 FR 59605. U.S. Fish and Wildlife Service. Endangered and Threatened Wildlife and Plants; Final Rule to List the Northern Population of the Bog Turtle as Threatened and the Southern Population as Threatened Due to Similarity of Appearance: 62 (213): 59605–59623. November 4, 1997.	62 FR 59605. 11/04/97.
80 FR 17974. U.S. Fish and Wildlife Service. <i>Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule: 80 (63): 17974–18033</i> . April 2, 2015.	80 FR 17974. 04/02/15.
Duke Energy. 2013. <i>Oconee Nuclear Station SWPPP Spoil Project Ecological Assessment Summary Report</i> . Prepared by: Duke Energy Environmental Services Water & Natural Resources, February 5, 2013 (Duke Energy 2013).	ML18225A076. 08/08/18. (see Attachment 1).
Duke Energy. 2014. <i>Oconee Nuclear Station Fukushima Flex Building Project Ecological Assessment Summary Report</i> . Prepared by: Duke Energy Environmental Services Water & Natural Resources, February 5, 2013 (Duke Energy 2014).	ML18225A076. 08/08/18. (see Attachment 1).
Duke Energy. 2015. <i>Listed Species Assessment for the Duke Energy Oconee Nuclear Station Independent Spent Fuel Storage Facility in Phase IX Expansion, Oconee County, South Carolina</i> . Duke Energy Corporation, July 20, 2015 (Duke Energy 2015).	ML18225A076. 08/08/18. (see Attachment 1).
Duke Energy. 2018. License Amendment Request for Approval of Changes to Physical Security Plan, dated February 12, 2018 (Duke Energy 2018a).	ML18046A080. 02/12/18.
Duke Energy. 2018. Supplement to License Amendment Request for Approval of Changes to Physical Security Plan, August 8, 2018 (Duke Energy 2018b).	ML18225A076. 08/08/18.
Duke Energy. 2018. Supplement 2 to License Amendment Request for Approval of Changes to Physical Security Plan, dated August 23, 2018, (Duke Energy 2018c).	ML18239A112. 08/23/18.
Federal Energy Regulatory Commission. 2016. <i>Final Environmental Assessment of Hydropower License, Keowee-Toxaway Hydroelectric Project—FERC Project No. 2503–154, South Carolina and North Carolina</i> . March 2016 (FERC 2016).	https://www.ferc.gov/industries/hydropower/enviro/eis/2016/P-2503-154-EA.pdf .
Missouri Census Data Center Circular Area Profiling System. 2018. Aggregate Census Block Group Estimates in a 5-mile radius around Oconee Nuclear Station (34.794230 Lat.; –82.898960 Long; <5 miles) (MCDCCAPS 2018).	http://mcdc.missouri.edu/applications/capsACS.html .
South Carolina Department of Natural Resources. 2019. South Carolina's Bald Eagles-Nest Locations. Accessed on January 29, 2019. (SCDNR 2019).	http://www.dnr.sc.gov/wildlife/baldeagle/locations.html .
U.S. Fish and Wildlife Service. 1983–19. Species profiles: life histories and environmental requirements of coastal fishes and invertebrates. U.S. Fish Wildl. Serv. Riol. Rep. 82(11). U.S. Army Corps of Engineers TR EL–82–4 (FWS 1989).	ML072060572. 12/01/89.
U.S. Fish and Wildlife Service. Endangered Species Consultations Frequently Asked Questions, dated July 15, 2013 (FWS 2013).	ML16120A505. 07/15/13.
U.S. Fish and Wildlife Service. 2018. IPaC Resource List for the Oconee License Amendment Request, September 11, 2018 (FWS 2018a).	ML18270A146. 09/11/18.

Document	ADAMS Accession No., Federal Register Notice, or URL address
U.S. Fish and Wildlife Service. 2018. Letter from South Carolina Ecological Services Field Office, FWS. Subject: Updated list of threatened and endangered species that may occur in your proposed project location, and/or may be affected by your proposed project, September 26, 2018 (FWS 2018b).	ML18270A144. 09/26/18.
U.S. Nuclear Regulatory Commission. 1999. NUREG-1437, Supplement 2, <i>Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Oconee Nuclear Station, Units 1, 2, and 3</i> . Final Report, December 1999 (NRC 1999).	ML003670637. 12/31/99.
U.S. Nuclear Regulatory Commission. 2013. <i>Generic Environmental Impact Statement For License Renewal Of Nuclear Plants</i> . Revision 1, Volume 1, 2, And 3. Washington, DC: NRC. NUREG-1437, June 19, 2013 (NRC 2013).	ML13107A023 (Package). 06/30/13.
Ogden L.J. 1996. <i>Collision Course: The Hazards of Lighted Structures and Windows to Migrating Birds. Fatal Light Awareness Program (FLAP)</i> . Paper 3, (Ogden 1996).	http://digitalcommons.unl.edu/flap/3?utm_source=digitalcommons.unl.edu%2Fflap%2F3&utm .

Dated at Rockville, Maryland, this 31st day of January, 2019.

For the Nuclear Regulatory Commission.

Audrey Klett,

Project Manager, Plant Licensing Branch II-1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2019-01143 Filed 2-5-19; 8:45 am]

BILLING CODE 7590-01-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:* February 6, 2019.

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 February 1, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 504 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2019-76, CP2019-81.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019-01282 Filed 2-5-19; 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:* February 6, 2019.

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 February 1, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 505 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2019-77, CP2019-82.

Elizabeth Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019-01283 Filed 2-5-19; 8:45 am]

BILLING CODE 7710-12-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85020; File No. SR-NYSEArca-2018-40]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of a Proposed Rule Change Regarding Investments of the REX BKCM ETF

January 31, 2019.

On June 26, 2018, NYSE Arca, Inc. (“NYSE Arca” or “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 seeking to modify certain investments of the REX BKCM ETF, a series of the Exchange Listed Funds Trust, the shares of which are currently listed and traded on the Exchange under NYSE Arca Rule 8.600-E.

The proposed rule change was published for comment in the **Federal Register** on July 3, 2018.³ On August 14, 2018, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On September 24, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁶ And on December 6, 2018, the Commission designated a longer period for Commission action on the proposed rule change.⁷

On January 30, 2019, NYSE Arca withdrew the proposed rule change (SR-NYSEArca-2018-40).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-01174 Filed 2-5-19; 8:45 am]

BILLING CODE 8011-01-P

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 83546 (June 28, 2018), 83 FR 31214 (July 3, 2018).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 83844 (Aug. 14, 2018), 83 FR 42178 (Aug. 20, 2018).

⁶ See Securities Exchange Act Release No. 84275 (Sept. 24, 2018), 83 FR 49142 (Sept. 28, 2018).

⁷ See Securities Exchange Act Release No. 84732 (Dec. 6, 2018), 83 FR 63919 (Dec. 12, 2018).

⁸ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85016; File No. SR–IEX–2018–23]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Modify the Resting Price of Discretionary Peg Orders

January 31, 2019.

On November 30, 2018, the Investors 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 modify the resting price of discretionary orders. The proposed rule change was published for comment in the **Federal Register** on December 19, 2018.³ The Commission has received one comment on the proposal.⁴

Section 19(b)(2) of the Act⁵ provides that, within 45 days of 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 find 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 after publication of the notice for this proposed rule change is February 2, 2019. The Commission is extending this 45-day time period.

The Commission finds it 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, the Commission, pursuant to Section 19(b)(2) of the Act,⁶ designates March 19, 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–IEX–2018–23).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019–01176 Filed 2–5–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85022; File No. SR–NASDAQ–2018–080]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 2 and 3, To List and Trade Shares of the BrandywineGLOBAL—Global Total Return ETF

January 31, 2019.

I. Introduction

On October 17, 2018, The Nasdaq Stock Market LLC (“Nasdaq” or the “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 list and trade shares (“Shares”) of the BrandywineGLOBAL—Global Total Return ETF (“Fund”), a series of Legg Mason ETF Investment Trust (“Trust”), under Nasdaq Rule 5735 (Managed Fund Shares). The proposed rule change was published for comment in the **Federal Register** on November 5, 2018.³ On December 7, 2018, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 13, 2018, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its

entirety.⁶ On January 30, 2019, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 1, in its entirety,⁷ and Amendment No. 3 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment Nos. 1 and 2, in their entirety.⁸ The Commission has received no comments on the proposed rule change. The Commission is publishing notice of the filing of Amendment No. 3 to solicit comment from interested persons and is

⁶ Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2018-080/srnasdaq2018080-477425-176816.pdf>.

⁷ Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nasdaq-2018-080/srnasdaq2018080-4858098-177308.pdf>.

⁸ In Amendment No. 3, the Exchange: (1) Provided that the Fund will not invest more than 5% of its total assets in warrants traded over-the-counter (“OTC”); (2) clarified that no more than 10% of the Fund’s total assets will be invested in listed Equity-Related Warrants (as defined below) or other exchange-listed securities or Exchange-Traded Derivatives (as defined below) that are listed on an exchange that is not a member of the Intermarket Surveillance Group (“ISG”) or with which the Exchange does not have a comprehensive surveillance sharing agreement; (3) clarified that the Fund’s investments in Equity-Related Warrants will not comply with the generic listing requirements for equity securities set forth in Nasdaq Rule 5735 but will be subject to the limits described in (1) above if traded OTC, or (2) above if listed on a non-ISG member exchange or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement; (4) clarified that no more than 25% of the total assets of the Fund will be invested in Debt (as defined below) or fixed income or equity securities of issuers in any one industry (excluding securities of sovereign issuers); (5) clarified that the Fund’s investments in convertible fixed income securities and convertible preferred securities will comply with the generic listing standards for fixed income securities set forth in Nasdaq Rule 5735 and will be limited to 20% of the Fund’s total assets; (6) clarified that the Fund will generally dispose of convertible fixed income securities and convertible preferred securities prior to conversion; however, in the event that such securities held by the Fund were to convert, the equity or fixed income securities into which such securities are converted would comply with the applicable generic listing standards set forth in Nasdaq Rule 5735; (7) clarified that for purposes of the proposed rule change, the terms “fixed income weight of the portfolio” and “weight of the fixed income portion of the portfolio” include all fixed income securities and Debt held by the Fund, as well as derivatives held by the Fund that provide exposure to fixed income securities or Debt; (8) stated that price information is generally not available for OTC warrants, and these instruments will be subject to the Fund’s fair valuation procedures unless the Fund is able to secure price information from market data vendors or broker-dealers; (9) provided additional justification as to why the listing and trading of the Shares is consistent with the Act even though certain of the Fund’s proposed holdings would not meet the generic listing standards for Managed Fund Shares set forth in Nasdaq Rule 5735(b)(1); and (10) made other clarifications, corrections, and technical changes. Amendment No. 3 is available at <https://www.sec.gov/comments/sr-nasdaq-2018-080/srnasdaq2018080-4860703-177326.pdf>.

⁷ 17 CFR 200.30–3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 84505 (Oct. 30, 2018), 83 FR 55416 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 84747, 83 FR 63915 (Dec. 12, 2018). The Commission designated February 3, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 84820 (December 13, 2018), 83 FR 65186.

⁴ See letter from Joanna Mallers, Secretary, FIA Principals Traders Group to Brent J. Fields, Secretary, Office of the Secretary, Securities and Exchange Commission, dated January 22, 2019.

⁵ 15 U.S.C. 78s(b)(2).

⁶ *Id.*

approving the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, on an accelerated basis.

II. Exchange's Description of the Proposal, as Modified by Amendment Nos. 1, 2 and 3

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares⁹ on the Exchange. The Fund will be an exchange-traded fund ("ETF") that is actively-managed. The Shares will be offered by the Trust, which was established as a Maryland statutory trust on June 8, 2015.¹⁰ The Exchange notes that other actively-managed, broad market fixed-income ETFs have been previously approved by the SEC prior to the adoption of "generic" listing standards for actively-managed ETFs.¹¹

⁹ A Managed Fund Share is a security that represents an interest in a company, which is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (the "1940 Act") and organized as an open-end investment company or similar entity, that invests in a portfolio of securities selected by its investment adviser consistent with the company's investment objective and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

¹⁰ The Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 32391 (December 13, 2016) (File No. 812-14547) (the "Exemptive Relief"). In addition, on December 6, 2012, the staff of the Commission's Division of Investment Management ("Division") issued a no-action letter ("No-Action Letter") relating to the use of derivatives by actively-managed ETFs. See No-Action Letter dated December 6, 2012 from Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Division of Investment Management. The No-Action Letter stated that the Division would not recommend enforcement action to the Commission under applicable provisions of and rules under the 1940 Act if actively-managed ETFs operating in reliance on specified orders (which include the Exemptive Relief) invest in options contracts, futures contracts or swap agreements provided that they comply with certain representations stated in the No-Action Letter.

¹¹ See, e.g., Securities Exchange Act Release Nos. 76719 (December 21, 2015), 80 FR 80859 (December 28, 2015) (SR-NYSEArca-2015-73) (granting approval for the listing of shares of the Guggenheim Total Return Bond ETF); 66321 (February 3, 2012), 77 FR 6850 (February 9, 2012) (SR-NYSEArca-2011-95) (granting approval for the listing of shares of the PIMCO Total Return Exchange Traded Fund (now known as the PIMCO Active Bond Exchange-Traded Fund)); and 72666 (July 24, 2014), 79 FR 44224 (July 30, 2014) (SR-NYSEArca-2013-122) (granting approval to the use of derivatives by the

The Trust is registered with the Commission as an investment company under the 1940 Act and has filed a registration statement on Form N-1A ("Registration Statement") with the Commission with respect to the Fund.¹² The Fund will be a series of the Trust. The Fund intends to qualify each year as a regulated investment company ("RIC") under Subchapter M of the Internal Revenue Code of 1986, as amended.

Legg Mason Partners Fund Advisor, LLC will be the investment adviser to the Fund (the "Manager").¹³ Brandywine Global Investment Management, LLC will serve as the sub-adviser to the Fund (the "Sub-Adviser").¹⁴ Legg Mason Investor Services, LLC (the "Distributor") will be the distributor of the Fund's Shares. The Manager, the Sub-Adviser and the Distributor are wholly-owned subsidiaries of Legg Mason, Inc. ("Legg Mason"). An entity that is not affiliated with Legg Mason, and which is named in the Registration Statement, will act as the administrator, accounting agent, custodian, and transfer agent to the Fund.

Paragraph (g) of Rule 5735 provides that if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect and maintain a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company's portfolio.¹⁵ In addition,

PIMCO Total Return Exchange Traded Fund); see also *infra* notes 92 and 110.

¹² See Post-Effective Amendment No. 50 to the Registration Statement on Form N-1A for the Trust (File Nos. 333-206784 and 811-23096) as filed on June 5, 2018. The Trust will file additional amendments to the Registration Statement as necessary to conform to the representations in this filing. The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

¹³ Legg Mason Partners Fund Advisor, LLC describes its role as "investment manager" rather than as "investment adviser" in applicable Fund-related documents, including the Registration Statement, in its investment management agreement with the Fund and in connection with its annual approval process by the board of trustees for the Trust (the "Board"). As a result, the defined term "Manager" is used in this filing with respect to a proposed rule change instead of the term "investment adviser," which is the term used by certain other investment advisers to ETFs in their filings with respect to proposed rule changes under Rule 19b-4 of the Act.

¹⁴ The Sub-Adviser is responsible for the day-to-day management of the Fund and, as such, typically makes all decisions with respect to portfolio holdings regardless of where the instruments are traded. The Manager has ongoing oversight responsibility.

¹⁵ An investment adviser to an investment company is required to be registered under the

paragraph (g) further requires that personnel who make decisions on the investment company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the investment company's portfolio.

Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i); however, paragraph (g) in connection with the establishment and maintenance of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable investment company's portfolio, not an underlying benchmark index, as is the case with index-based funds. Neither the Manager nor the Sub-Adviser is a broker-dealer, but each is affiliated with the Distributor, a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.

In addition, personnel who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. In the event (a) the Manager or the Sub-Adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new investment adviser or any new sub-adviser to the Fund is a registered broker-dealer or becomes affiliated with another broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable,

Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Manager and the Sub-Adviser, as registered investment advisers, and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. Rule 204A-1 requires investment advisers (such as the Manager and the Sub-Adviser) to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by the Manager and the Sub-Adviser must be consistent with the Advisers Act and Rule 204A-1 thereunder. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser (such as the Manager and the Sub-Adviser) to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

regarding access to information concerning the composition and/or changes to the Fund's portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

BrandywineGLOBAL—Global Total Return ETF

Principal Investments

The investment objective of the Fund will be to seek to maximize total return, consisting of income and capital appreciation. Although the Fund may invest in securities and Debt (as defined below) of any maturity, the Fund will normally maintain an effective duration as set forth in the prospectus.¹⁶ Effective duration seeks to measure the expected sensitivity of market price to changes in interest rates, taking into account the anticipated effects of structural complexities (for example, some bonds can be prepaid by the issuer).

Under Normal Market Conditions,¹⁷ the Fund will seek to achieve its investment objective by investing at least 80% of its assets in a portfolio comprised of U.S. or foreign fixed income securities; U.S. or foreign Debt (as defined below);¹⁸ ETFs¹⁹ that

¹⁶ The effective duration of the Fund may fall outside of its expected range due to market movements. If this happens, the Sub-Adviser will take action to bring the Fund's effective duration back within its expected range within a reasonable period of time.

¹⁷ The term "Normal Market Conditions" has the meaning set forth in Nasdaq Rule 5735(c)(5). The Fund may vary from ordinary parameters on a temporary basis, including for defensive purposes, during the initial invest-up period (*i.e.*, the six-week period following the commencement of trading of Shares on the Exchange) and during periods of high cash inflows or outflows (*i.e.*, rolling periods of seven calendar days during which inflows or outflows of cash, in the aggregate, exceed 10% of the Fund's assets as of the opening of business on the first day of such periods). In those situations, the Fund may depart from its principal investment strategies and may, for example, hold a higher than normal proportion of its assets in cash and cash equivalents. During such periods, the Fund may not be able to achieve its investment objective. The Fund may also adopt a defensive strategy and hold a significant portion of its assets in cash and cash equivalents when the Manager or the Sub-Adviser believes securities, Debt and other instruments in which the Fund normally invests have elevated risks due to political or economic factors, heightened market volatility or in other extraordinary circumstances that do not constitute "Normal Market Conditions". The Fund's investments in cash equivalents are described in greater detail in note 27 *infra*.

¹⁸ As noted below, the Fund's fixed income security and Debt investments will satisfy specific diversification requirements set forth in the Fund's prospectus that are not included in Nasdaq Rule 5735, including, without limitation, that each issuer of securities or borrower in respect to Debt have economic exposure to at least three countries. *See infra* "Investment Restrictions."

¹⁹ The ETFs in which the Fund may invest include Index Fund Shares (as described in Nasdaq

provide exposure to such U.S. or foreign fixed income securities, Debt or other Principal Investments (defined below); derivatives²⁰ that (i) provide exposure

Rule 5705(b)), Portfolio Depositary Receipts (as described in Nasdaq Rule 5705(a)), and Managed Fund Shares (as described in Nasdaq Rule 5735). The Fund will not invest in ETFs that are not registered as investment companies under the 1940 Act. The ETFs held by the Fund will invest in fixed income securities, Debt, money-market instruments and other Principal Investments to which the Fund seeks exposure. All such ETFs will trade in markets that are members of the ISG or exchanges that are parties to a comprehensive surveillance sharing agreement with the Exchange. The Fund will not invest in leveraged ETFs, inverse ETFs, or inverse leveraged ETFs. Other fixed-income funds have been approved to include ETFs in their 80% principal investment category. *See, e.g.*, Securities Exchange Act Release No. 80946 (June 15, 2017), 82 FR 28126 (June 20, 2017) (SR-NASDAQ-2017-039) (approving fund seeking to meet its investment objective of having at least 80% of assets invested in a portfolio of debt instruments in part through investments in ETFs that invest substantially all of their assets in such debt instruments).

²⁰ Derivatives will include: (i) Swaps and security-based swaps, futures, options, options on futures, and swaptions that are traded on an exchange, trading facility, swap execution facility or alternative trading system ("Exchange-Traded Derivatives") (A) that is a member of the Intermarket Surveillance Group ("ISG"), which includes all U.S. national securities exchanges and most futures exchanges, (B) that is subject to a comprehensive surveillance sharing agreement with the Exchange, or (C) that is not an ISG member and with which the Exchange does not have a comprehensive surveillance sharing agreement; and (ii) swaps and security-based swaps, options, options on futures, swaptions, forwards and similar instruments that are traded in the over-the-counter market ("OTC") and are either centrally cleared or cleared bilaterally ("OTC Derivatives"), as further described below. For the purposes of describing the scope of the Fund's potential investments in derivatives, the terms "swaps" and "security-based swaps" shall have the meanings set forth in the Commodity Exchange Act ("CEA"), as amended by The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), and regulations thereunder, and references to swaps and forwards on foreign exchange or currencies shall include "foreign exchange forwards" and "foreign exchange swaps", as such terms are defined in Sections 1a(24)–(25) of the CEA. The terms "exchange-traded" and "exchange-listed", when used with respect to swaps and security-based swaps, shall include swaps and security-based swaps that are executed on swap execution facilities and security-based swap execution facilities and cleared through regulated, central clearing facilities. The types of derivatives in which the Fund may invest and the reference assets for such derivatives are described in greater detail below. Exchange-Traded Derivatives and OTC Derivatives may reference Principal Investments and other investments. Those Exchange-Traded Derivatives and OTC Derivatives that reference Principal Investments will be treated as Principal Investments and those that do not will not be treated as Principal Investments. For purposes of the 80% Principal Investments measure, the Fund will value Exchange-Traded Derivatives and OTC Derivatives based on the market-to-market value of such derivatives. This approach is consistent with the valuation methodology for asset coverage purposes in Rule 18f-4 under the 1940 Act proposed by the Commission. *See* Investment Company Act Release No. 31933 (December 11, 2015); 80 FR 80884 (December 28, 2015) (the "Derivatives Rule Proposing Release");

to such U.S. or foreign fixed income securities, Debt and other Principal Investments, (ii) are used to risk manage the Fund's holdings, and/or (iii) are used to enhance returns, such as through covered call strategies;²¹ U.S. or foreign equity securities of any type acquired in reorganizations of issuers of fixed income securities or Debt held by the Fund ("Work Out Securities");²² U.S. or foreign non-convertible preferred securities (other than trust preferred securities, which the Fund may invest in, but which are treated as fixed income securities²³) ("Non-Convertible Preferred Securities");²⁴ warrants,²⁵ comprised of: warrants on

see also infra note 113. No more than 10% of the assets of the Fund will be invested in Exchange-Traded Derivatives and exchange-listed securities whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

²¹ *See also infra* "The Fund's Use of Derivatives."

²² Work Out Securities will generally be traded in the OTC market but may be listed on an exchange that may or may not be an ISG member. To the extent that the Work Out Securities are exchange-listed, they will be subject to the 10% limit on the Fund's total assets that can be listed on a market that is not a member of ISG or a market with which the Exchange does not have a comprehensive surveillance sharing agreement. *See infra* "Investment Restrictions."

²³ *See* Nasdaq Rule 5735(b)(1)(B).

²⁴ Non-convertible preferred stock, such as that comprising the Non-Convertible Preferred Securities, provides holders with a fixed or variable distribution and a status upon bankruptcy of the issuer that is subordinated to debt holders but preferred over common shareholders. Non-Convertible Preferred Securities may be listed on either an ISG member exchange (or an exchange with which the Exchange has a comprehensive surveillance sharing agreement) or a non-ISG member exchange or be unlisted and trade in the over-the-counter market. Non-Convertible Preferred Securities that are listed and traded on a non-ISG member exchange or on an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement, together with all other exchange-listed securities and Exchange-Traded Derivatives held by the Fund that are listed on a non-ISG member exchange or exchange with which the Exchange does not have a comprehensive surveillance sharing agreement, are limited to 10% of the Fund's total assets. *See infra* "Investment Restrictions."

²⁵ Warrants are equity securities that provide the holder with the right to purchase specified securities of the issuer of the warrants at a specified exercise price until the expiration date of the warrant. The Fund may hold warrants that provide the right to purchase fixed income securities or equity securities and expects that most of the warrants it holds will be attached to related fixed income securities. Warrants held by the Fund may be listed on an exchange or traded in the OTC market. Warrants that are listed on a non-ISG member exchange or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement, together with all other exchange-listed securities and Exchange-Traded Derivatives held by the Fund that are listed on a non-ISG member exchange or exchange with which the Exchange does not have a comprehensive surveillance sharing agreement, are limited to 10% of the Fund's total assets. Warrants traded in the

Continued

U.S. or foreign fixed income securities (“Fixed-Income Related Warrants”) and warrants on U.S. or foreign equity securities (“Equity-Related Warrants”),²⁶ both fixed income and equity securities of which are generally issued by the issuer of the warrants, and both types of warrants of which are generally attached to, accompany or are purchased alongside investments in U.S. or foreign fixed income securities; cash and cash equivalents;²⁷ and foreign currencies (together, the “Principal Investments” and the equity elements of the Principal Investments, which consist of Work Out Securities, ETFs that provide exposure to fixed income securities, Debt or other Principal Investments, Equity-Related Warrants²⁸ and Non-Convertible Preferred Securities, are referred to as the “Principal Investment Equities”).²⁹

OTC market, which will generally not be subject to price reporting, are limited to 5% of the Fund’s total assets. See *infra* “Investment Restrictions.”

²⁶ The Fund’s interests in Equity-Related Warrants are similar to the Fund’s interest in Work Out Securities in that they reflect interests in equity securities that are held solely in connection with investments in fixed income securities. Equity-Related Warrants may be traded OTC or on an exchange, subject to limits. See *infra* notes 28, 29 and 46 and *supra* note 25.

²⁷ Cash equivalents consist of the following, all of which have maturities of less than 360 days: U.S. government securities; certificates of deposit issued against funds deposited in a bank or savings and loan association; bankers’ acceptances (which are short-term credit instruments used to finance commercial transactions); repurchase agreements and reverse repurchase agreements; and bank time deposits (which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest). Cash equivalents also consist of money market funds registered under the 1940 Act and money market funds that are not registered under the 1940 Act but that comply with Rule 2a–7 under the 1940 Act (together, “Money Market Funds”), money market ETFs and commercial paper, which are short-term unsecured promissory notes, having maturities of 360 days or less. The Exchange notes that, while the Fund treats commercial paper having maturities of 360 days or less as cash equivalents for the purposes of the 80% Principal Investments measure, the Fund will apply the definition of cash equivalents in Nasdaq Rule 5735(b)(1)(C) (which is limited to instruments with maturities of less than three months) for purposes of compliance with Nasdaq Rule 5735(b)(1) and will comply with the applicable requirements of Nasdaq Rule 5735(b)(1) with respect to all commercial paper held by the Fund. Investments in cash equivalents that are Money Market Funds will be made in accordance with Rule 12d1–1 under the 1940 Act.

²⁸ For purposes of this proposed rule change, Fixed-Income Related Warrants are treated as fixed income securities and not as Principal Investment Equities. Fixed-Income Related Warrants will be subject to and comply with the generic listing requirements for fixed income securities rather than the requirements applicable to equity securities.

²⁹ The Manager and Sub-Adviser will manage the Fund to ensure that the weight of Non-Convertible Preferred Securities, Equity-Related Warrants and Work Out Securities (which are more frequently traded solely in the OTC market) together does not exceed 15% of the Fund’s assets. Equity-Related

The Manager or Sub-Adviser (as applicable) may select from any of the following types of fixed income securities: (i) U.S. or foreign corporate debt securities, including notes, bonds, debentures, trust preferred securities, and commercial paper issued by corporations, trusts, limited partnerships, limited liability companies and other types of non-governmental legal entities; (ii) U.S. government securities, including obligations of, or guaranteed by, the U.S. government, its agencies or government-sponsored entities (other than MBS described below); (iii) sovereign debt securities, which include fixed income securities issued by governments, agencies or instrumentalities and their political subdivisions, securities issued by government-owned, controlled or sponsored entities, interests in entities organized and operated for the purpose of restructuring the investment instruments issued by such entities, Brady Bonds,³⁰ and fixed income securities issued by supranational entities such as the World Bank;³¹ (iv) municipal securities, which include general obligation bonds, revenue bonds, housing authority bonds, private activity bonds, industrial development bonds, residual interest bonds, tender option bonds, tax and revenue anticipation notes, bond anticipation notes, tax-exempt commercial paper, municipal leases, participation certificates and custodial receipts; (v) zero coupon securities, which are securities that pay no interest during the life of the obligation but are issued at prices below their stated maturity value; (vi) pay-in-kind securities, which have a stated coupon, but the interest is generally paid in the form of obligations of the same type as the underlying pay-in-kind securities (e.g., bonds) rather than in cash; (vii) deferred interest securities, which are obligations that generally provide for a period of delay before the regular payment of interest

Warrants that are listed on a non-ISG member exchange or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement, together with all other exchange-listed securities and Exchange-Traded Derivatives held by the Fund that are listed on a non-ISG member exchange or exchange with which the Exchange does not have a comprehensive surveillance sharing agreement, are limited to 10% of the Fund’s total assets. Equity-Related Warrants together with all other Warrants traded in the OTC market are limited to 5% of the Fund’s total assets. See *infra* “Investment Restrictions.”

³⁰ Brady Bonds are debt securities issued under the framework of the Brady Plan as a means for debtor nations to restructure their outstanding external indebtedness.

³¹ A supranational entity is a bank, commission or company established or financially supported by the national government of one or more countries to promote reconstruction or development.

begins and are issued at a significant discount from face value; (viii) U.S. or foreign structured notes and indexed securities, including securities that have demand, tender or put features, or interest rate reset features; (ix) U.S. or foreign inflation-indexed or inflation-protected securities, which are fixed income securities that are structured to provide protection against inflation and whose principal value or coupon is periodically adjusted according to the rate of inflation and which include, among others, treasury inflation protected securities; and (x) fixed income securities issued by securitization vehicles (“Securitized Products”).³² Securitized Products include: (A) U.S. or foreign mortgage-backed securities (“MBS”), which are securities that represent direct or indirect participations in, or are collateralized by and payable from, mortgage loans secured by real property and which may be issued or guaranteed by government-sponsored entities (“GSEs”) ³³ such as Fannie Mae (formally known as the Federal National Mortgage Association) or Freddie Mac (formally known as the Federal Home Loan Mortgage Corporation) or issued or guaranteed by agencies of the U.S.

³² As defined in Rule 6710(m) of the Financial Industry Regulatory Authority, Inc. (“FINRA”), the term Securitized Product means a security collateralized by any type of financial asset, such as a loan, a lease, a mortgage, or a secured or unsecured receivable, and includes but is not limited to an asset-backed security as defined in Section 3(a)(79)(A) of the Act, a synthetic asset-backed security, any residual tranche or interest of any security specified above, which tranche or interest is a fixed income security for purposes of FINRA Rule 6700 and paragraph (a) of FINRA Rule 6710. Consistent with the requirements applicable to other fixed income securities listed pursuant to this proposed rule change, Securitized Products are subject to limits set forth in Nasdaq Rule 5735(b)(1)(B)(i), (ii), (iii), (iv) and (v), except that, with respect to the Fund’s investments in ABS/Private MBS (as defined below), the Fund will not comply with the 90% requirement in Nasdaq Rule 5735(b)(1)(B)(iv) and CDOs (as defined below) will not be subject to the limits set forth in Nasdaq Rule 5735(b)(1)(B)(v) but will be required to comply with the tests in Nasdaq Rule 5735(b)(1)(B)(i)–(iv), including, without limitation, the 90% requirement in Nasdaq Rule 5735(b)(1)(B)(iv). Investments in CDOs will separately be subject to a limit of 10% of total assets of the Fund. In addition, the Fund’s total investments in Securitized Products (including CDOs) will be subject to the restrictions applicable to all fixed income securities and Debt holdings of the Fund, including that: no more than 30% of the Debt and fixed income securities held by the Fund will be below investment grade (as defined *infra* in “Investment Restrictions”), and no more than 25% of the total assets of the Fund will be invested in Debt or fixed income or equity securities of issuers in any one industry (excluding securities of sovereign issuers). See *infra* “Investment Restrictions.”

³³ A “GSE” is a type of financial services corporation created by the United States Congress. GSEs include Fannie Mae and Freddie Mac but not Sallie Mae, which is no longer a government entity.

government, such as the Government National Mortgage Association (“Ginnie Mae”);³⁴ (B) U.S. or foreign asset-backed securities (“ABS”)³⁵ and (C) U.S. or foreign collateralized debt obligations (“CDOs”).³⁶

The securities in which the Fund invests may pay fixed, variable or floating rates of interest or, in the case of instruments such as zero coupon bonds, do not pay current interest but are issued at a discount from their face values. Securitized Products in which the Fund will invest make periodic payments of interest and/or principal on

³⁴ MBS include collateralized mortgage obligations (“CMOs”), which are debt obligations collateralized by mortgage loans or mortgage pass-through securities. Typically, CMOs are collateralized by Ginnie Mae, Fannie Mae or Freddie Mac certificates, but they may also be collateralized by whole loans or pass-through securities issued by private issuers (*i.e.*, issuers other than U.S. government agencies or GSEs) (referred to as “Private MBS”). Payments of principal and of interest on the mortgage-related instruments collateralizing the MBS, and any reinvestment income thereon, provide the funds to pay debt service on the CMOs. In a CMO, a series of bonds or certificates is issued in multiple classes. Each class of CMOs, often referred to as a “tranche” of securities, is issued at a specified fixed or floating coupon rate and has a stated maturity or final distribution date.

³⁵ As defined by FINRA Rule 6710(cc), ABS are Securitized Products in connection with which the securities issued, which may be issued by either a U.S. or a foreign entity, are collateralized by any type of financial asset, such as a consumer or student loan, a lease, or a secured or unsecured receivable. ABS exclude (per the FINRA definition, which is applicable for purposes of reporting and as used herein): (i) a Securitized Product that is backed by residential or commercial mortgage loans, mortgage-backed securities, or other financial assets derivative of mortgage-backed securities; (ii) a small business administration backed ABS traded “To Be Announced” or in a specified pool transaction as defined in FINRA Rule 6710(x); and (iii) CDOs. Consistent with the requirements of Nasdaq Rule 5735(b)(1)(B)(v), the Fund will limit investments in ABS and Private MBS (together, “ABS/Private MBS”) to 20% of the weight of the fixed income portion of the Fund’s portfolio.

³⁶ For purposes of this proposed rule change, CDOs are excluded from the definition of ABS and, for purposes of this proposed rule change only, are comprised exclusively of collateralized loan obligations (“CLOs”) and collateralized bond obligations (“CBOs”). CLOs are securities issued by a trust or other special purpose entity that are collateralized by a pool of loans by U.S. banks and participations in loans by U.S. banks that are unsecured or secured by collateral other than real estate. CBOs are securities issued by a trust or other special purpose entity that are backed by a diversified pool of fixed income securities issued by U.S. or foreign governmental entities or fixed income securities issued by U.S. or corporate issuers. CDOs are distinguishable from ABS because they are collateralized by bank loans or by corporate or government fixed income securities and not by consumer and other loans made by non-bank lenders, including student loans. For purposes of this proposed rule change, CDOs will not be subject to the 20% limit set forth in Nasdaq Rule 5735(b)(1)(B)(v). However, the Exchange believes that the 10% limit on the Fund’s holdings in CDOs will help to ensure that the Fund maintains a diversified portfolio and will mitigate the risk of manipulation. *See infra* “Investment Restrictions.”

underlying pools of mortgages, in the case of MBS, loans, leases and receivables other than real estate, in the case of ABS, and government and corporate bonds or non-real estate related loans, in the case of CDOs. The Fund may also invest in stripped Securitized Products, which represent the right to receive either payments of principal or payments of interest on real estate receivables. Interests in CDOs and ABS will not be stripped so as to provide the right to receive only payments of principal or payments of interest.

Investments by the Fund in debt instruments that are not characterized as “securities” under applicable case law (“Debt”),³⁷ are comprised primarily of the following: (i) U.S. or foreign loans made by banks and participations in such loans, loans made by commercial non-bank lenders and participations in such loans, loans made by governmental entities and participations in such loans and/or other extensions of credit, such as guarantees made by any of the foregoing lenders; and (ii) U.S. or foreign loans on real estate secured by mortgages and participations in such loans. Debt may be partially or fully secured by collateral supporting the payment of interest and principal, or unsecured and/or subordinated to other instruments.³⁸ Debt may relate to

³⁷ Although bank loans are included as “fixed income securities” for purposes of the “generic” listing requirements of Nasdaq Rule 5735(b)(1), the types of bank loans in which the Fund invests are not treated as “securities” under applicable case law and, as a result, the Fund intends to treat bank loans as Debt and not as fixed income securities. *See, e.g., Banco Espanol de Credito et al. v. Security Pacific National Bank*, 973 F.2d 51(2d Cir. 1992), *cert. denied*, 509 U.S. 903 (1993). Accordingly, the Fund will not seek to comply with the parameters on investments in fixed income securities under Nasdaq Rule 5735(b)(1)(B) with respect to the Fund’s holdings in bank loans, but instead will comply with the alternative limitations applicable to Debt with respect to such holdings, as set forth herein. *See infra* “Investment Restrictions.”

³⁸ As discussed *infra* in “Investment Restrictions,” at least 75% of the Fund’s investments fixed income securities (including convertible fixed income and convertible preferred securities) and Debt (together constituting the fixed income weight of the portfolio) shall have a minimum principal amount outstanding of \$100 million or more. In addition, consistent with the Fund’s Registration Statement, the following diversification requirements will apply: during Normal Market Conditions, the Fund: (i) Will not invest more than 25% of its total assets in securities or Debt in any one foreign country, other than the United States, Canada, the United Kingdom, Japan, Australia and member countries of the European Union, or denominated in any one currency, other than the U.S. dollar, the Canadian dollar, the British pound, the yen, the Australian dollar, or the euro; and (ii) will have “economic exposure” to at least three countries. “Economic exposure” means that an issuer of a security or a borrower in respect to Debt: (A) Will have a class of securities whose principal securities market is in the country; (B) is

financings for highly-leveraged borrowers.

With respect to fixed income securities, the Fund may invest in restricted instruments which are subject to resale restrictions that limit purchasers to qualified institutional buyers, as defined in Rule 144A under the Securities Act of 1933, as amended (the “Securities Act”) or to non-U.S. persons, within the meaning of Regulation S under the Securities Act.

The Fund will use derivatives to (i) provide exposure to U.S. or foreign fixed income securities, Debt and other Principal Investments, (ii) risk manage the Fund’s holdings,³⁹ and/or (iii) enhance returns, such as through covered call strategies.⁴⁰ The Fund will not use derivatives for the purpose of seeking leveraged returns or performance that is the multiple or inverse multiple of a benchmark. Derivatives that the Fund may enter into include: (i) Over-the-counter deliverable and non-deliverable foreign exchange forward contracts; (ii) exchange-listed futures contracts on securities (including Treasury Securities⁴¹ and foreign government securities), Debt, commodities, securities-, commodities-, or combined-asset-class-related indices, interest rates, financial rates and currencies; (iii) exchange-listed or over-the-counter options or swaptions (*i.e.*, options to enter into a swap) on securities, Debt, commodities, securities-, commodities-, or combined-asset-class-related indices, interest rates, financial rates, and currencies; (iv) exchange-listed or over-the-counter swaps (including total return swaps) on securities, Debt, commodities, securities-, commodities-, or combined-asset-class-related indices, interest rates, financial rates, and currencies; and (v) credit default swaps on single names, baskets and indices (both as protection seller and as protection buyer). As a result of the

organized under the laws of, or has a principal office in, the country; (iii) derives 50% or more of its total revenue or profit from goods produced, sales made or services provided in the country; or (D) maintains 50% of more of its assets in that country. In addition, no more than 30% of the Debt and fixed income securities held by the Fund, will be below investment grade; and (iii) no more than 25% of the total assets of the Fund will be invested in Debt or fixed income or equity securities of issuers in any one industry (excluding securities of sovereign issuers).

³⁹ The risk management uses of derivatives will include managing (i) investment-related risks, (ii) risks due to fluctuations in securities prices, interest rates, or currency exchange rates, (iii) risks due to the credit-worthiness of an issuer, and (iv) the effective duration of the Fund’s portfolio.

⁴⁰ *See also infra* “The Fund’s Use of Derivatives.”

⁴¹ The term “Treasury Securities” has the meaning set forth in Nasdaq Rule 5735(b)(1)(B).

Fund's use of derivatives and to serve as collateral, the Fund may also hold significant amounts of Treasury Securities, cash and cash equivalents and, in the case of derivatives that are payable in a foreign currency, the foreign currency in which the derivatives are payable.

The Fund may, without limitation, enter into repurchase arrangements and borrowing and reverse repurchase arrangements, purchase and sale contracts,⁴² buybacks⁴³ and dollar rolls⁴⁴ and spot currency transactions. The Fund may also, subject to required margin and without limitation, purchase securities and other instruments under when-issued, delayed delivery, to be announced or forward commitment transactions, where the securities or instruments will not be delivered or paid for immediately.⁴⁵ To the extent required under applicable federal securities laws (including the 1940 Act), rules, and interpretations thereof, the Fund will "set aside" liquid assets or engage in other measures to "cover" open positions held in connection with the foregoing types of transactions, as well as derivative transactions.

Other Investments

Under Normal Market Conditions, the Fund will seek its investment objective by investing at least 80% of its assets in a portfolio of the Principal Investments. The Fund may invest its remaining assets exclusively in: (i) U.S. or foreign

⁴² A purchase and sale contract is a legally-binding agreement between an issuer of fixed income securities and an investor establishing the terms under which the investor will provide debt financing to the issuer. Such agreements include terms and conditions such as terms of the bonds, call rights, negative covenants and notice requirements.

⁴³ A buyback refers to a TBA transaction that incorporates a special feature for addressing a failure by the seller to deliver the mortgages promised under the contract. A buyback feature typically provides that, in the event a TBA seller fails to deliver the MBS that is the subject of the transaction to the TBA buyer on the scheduled settlement date, the TBA buyer will be entitled to close-out its payment obligations by either (i) selling the deliverable MBS back to the seller at a price established under the buyback or (ii) accepting assignment from the seller of its right to receive the specified MBS from the third-party entity that failed to deliver the MBS to the TBA seller.

⁴⁴ A dollar roll transaction is a simultaneous sale and purchase of an Agency Pass-Through Mortgage-Backed Security (as defined in FINRA Rule 6710(v), which is the only reference security for such transaction) for different settlement dates, where the initial seller agrees to take delivery, upon settlement of the re-purchase transaction, of the same or substantially similar securities. See FINRA Rule 6710(z).

⁴⁵ FINRA Rule 4210 is scheduled to begin requiring broker-dealers to impose margin requirements on investors in TBAs and certain other delayed delivery transactions beginning March 25, 2019.

exchange-listed⁴⁶ or over-the counter convertible fixed income and convertible preferred securities;⁴⁷ and (ii) OTC Derivatives and Exchange-Traded Derivatives for which the underlying reference asset is not a Principal Investment.⁴⁸

The Fund's Use of Derivatives

The types of derivatives in which the Fund may invest and the reference assets for such derivatives are described in greater detail in "Principal Investments" and "Other Investments" above. Exchange-Traded Derivatives will primarily be traded on exchanges that are ISG members or exchanges with which the Exchange has a comprehensive surveillance sharing agreement. The Fund may, however, invest up to 10% of the assets of the Fund in Exchange-Traded Derivatives and exchange-listed securities whose principal market is not a member of ISG or a market with which the Exchange has a comprehensive surveillance sharing agreement. For purposes of this 10% limit, the weight of such Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives.

The Fund will limit the weight of its investments in OTC Derivatives to 10% of the assets of the Fund, with the exception of Interest Rate Derivatives⁴⁹

⁴⁶ No more than 10% of the Fund's total assets will be invested in exchange-listed securities or Exchange-Traded Derivatives that are listed on an exchange that is not an ISG-member or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement. See *infra* "Investment Restrictions."

⁴⁷ The Fund's investment in U.S. or foreign fixed income or preferred securities would include contingent convertible securities, which are also referred to as "CoCos." CoCos are fixed income instruments that are convertible into equity if a pre-specified trigger event occurs. The type of event that causes a CoCo to be convertible occurs when capital of the issuer falls below a designated threshold. The Fund will limit investments in convertible fixed income and convertible preferred securities to 20% of the Fund's total assets under Normal Market Conditions.

⁴⁸ Investments in OTC Derivatives and Exchange-Traded Derivatives will also be subject to the limitations described in the "The Fund's Use of Derivatives" section below. As is the case with respect to the Fund's investments in OTC Derivatives and Exchange-Traded Derivatives for which the underlying reference asset is a Principal Investment, the Fund will invest in OTC Derivatives and Exchange-Traded Derivatives whose underlying reference asset is not a Principal Investment in order to (i) provide exposure to non-Principal Investments instruments; (ii) to risk manage the Fund's holdings; and/or (iii) to enhance returns.

⁴⁹ "Interest Rate Derivatives" are comprised of interest rate swaps, swaptions (*i.e.*, options on interest rate swaps), rate options and other similar derivatives, and may be Exchange-Traded Derivatives or OTC Derivatives. As reflected in statistics compiled by the Bank for International Settlements, as of June 30, 2017 there were

and Currency Derivatives⁵⁰ (together, "Interest Rate and Currency Derivatives") entered into with broker-dealers, banks and other financial intermediaries. Investments in Interest Rate and Currency Derivatives (whether the instruments are Exchange-Traded Derivatives or OTC Derivatives) will not be subject to a limit. The Exchange believes that this exception, which is generally consistent with the requirement in a previous filing for the listing of an ETF approved by the Commission,⁵¹ is appropriate in light of the fact that Interest Rate and Currency Derivatives are among the most liquid investment instruments (including not only derivatives but also securities) in the market⁵² (and are even more liquid

approximately \$416 trillion (notional amount) of total interest rate contracts outstanding in the over-the-counter markets alone. As reflected by the statistics, the market is wide, deep and liquid. See <https://www.bis.org/statistics/d7.pdf> (accessed November 2017). Interest Rate Derivatives may trade on trading platforms that are not ISG members or that are not subject to a comprehensive surveillance sharing agreement with the Exchange. Holdings in Exchange-Traded Derivatives (together with exchange-listed securities) that are listed on an exchange that is not an ISG member or on a market with which the Exchange does not have a comprehensive surveillance sharing agreement are limited to 10% of the Fund's assets.

⁵⁰ "Currency Derivatives" are comprised of deliverable forwards, which are agreements between the contracting parties to exchange a specified amount of currency at a specified future time at a specified rate, non-deliverable forwards, which are agreements to pay the difference between the exchange rates specified for two currencies at a future date, swaps and options on currencies, and similar currency or foreign exchange derivatives. As reflected in statistics compiled by the Bank for International Settlements, as of June 30, 2017 there were approximately \$77 trillion (notional amount) of Currency Derivatives outstanding in the over-the-counter markets alone. As reflected by the statistics, the market is wide, deep and liquid. See <https://www.bis.org/statistics/d6.pdf> (accessed November 2017). Currency Derivatives may trade on trading platforms that are not ISG members or that are not subject to a comprehensive surveillance sharing agreement with the Exchange. Holdings in Exchange-Traded Derivatives (together with exchange-listed securities) that are listed on an exchange that is not an ISG member or on a market with which the Exchange does not have a comprehensive surveillance sharing agreement are limited to 10% of the Fund's assets.

⁵¹ See Securities Exchange Act Release No. 80657 (May 11, 2017), 82 FR 22702 (May 17, 2017) (SR-NYSEArca-2017-09) (approving up to 50% of the fund's assets (calculated on the basis of aggregate gross notional value) to be invested in over-the-counter derivatives that are used to reduce currency, interest rate, or credit risk arising from the fund's investments, including forwards, over-the-counter options, and over-the-counter swaps).

⁵² Trading in foreign exchange markets averaged \$5.1 trillion per day in April 2016, and 67% of this trading activity was in derivatives contracts such as currency or foreign exchange forwards, options and swaps (with the other 33% consisting of spot transactions). See Bank for International Settlements, *Triennial Central Bank Survey, Foreign Exchange Turnover in April 2016*, available at <http://www.bis.org/publ/rpfx16fx.pdf> (accessed November 2017). Trading in OTC interest rate

than most non-government or government-guaranteed securities). Based on the data compiled by the Sub-Adviser in respect to its liquidity policy, these derivatives are among the most liquid investments traded. In addition, most Interest Rate Derivatives traded by the Fund are centrally cleared by regulated clearing firms, and Interest Rate and Currency Derivatives are subject to trade reporting,⁵³ and other robust regulation.⁵⁴ Given the size of the trading market and the regulatory oversight of the markets, the Exchange believes that Interest Rate and Currency Derivatives are not readily subject to manipulation. The Exchange also believes that allowing the Fund to risk manage its portfolio through the use of Interest Rate and Currency Derivatives without limit is necessary to allow the Fund to achieve its investment objective and protect investors.

For purposes of the 10% limit applicable generally to OTC Derivatives (other than Interest Rate and Currency Derivatives), the weight of such OTC Derivatives will be calculated based on the mark-to-market value of such OTC

derivatives averaged \$2.7 trillion per day in April 2016. See Bank for International Settlements, *Triennial Central Bank Survey, OTC Interest Rate Derivatives Turnover in April 2016*, available at <http://www.bis.org/publ/rpfx16ir.pdf> (accessed November 2017).

⁵³ Transactions in Interest Rate and Currency Derivatives are required to be reported to a swap data repository, and transactions in Interest Rate Derivatives and certain Currency Derivatives (*i.e.*, Currency Derivatives that are not excluded from the definition of a “swap”, as described below) are also publicly reported pursuant to rules issued by the Commodity Futures Trading Commission (“CFTC”). See 17 CFR parts 43, 45 and 46. Pursuant to Section 1(a)(47)(E) of the CEA and a related determination by the Department of the Treasury, physically-settled Currency Derivatives that meet the definition of “foreign exchange forwards” or “foreign exchange swaps” under Sections 1a(24)–(25) of the CEA that are entered into between eligible contract participants (as defined in the CEA) (“Excluded Currency Derivatives”) are excluded from the definition of a “swap” under the CEA. See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694 (Nov. 20, 2012). Transactions in such Excluded Currency Derivatives are required to be reported to a swap data repository, but they are not subject to the public reporting requirements.

⁵⁴ Interest Rate Derivatives and Currency Derivatives other than Excluded Currency Derivatives are comprehensively regulated as swaps under the CEA and regulations issued thereunder by the CFTC and other federal financial regulators. See, *e.g.*, 17 CFR part 23 (capital and margin requirements for swap dealers, business conduct standards for swap dealers, and swap documentation requirements); 17 CFR part 50 (clearing requirements for swaps). While Excluded Currency Derivatives are not subject to all swap regulations, they are subject to the “business conduct standards” adopted by the CFTC pursuant to the CEA. See Section 1(a)(47)(E) of the CEA; Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694 (Nov. 20, 2012).

Derivatives.⁵⁵ The mark-to-market methodology is consistent with the methodology proposed by the SEC in proposed Rule 18f–4 for the purposes of asset coverage requirements⁵⁶ and in keeping with disclosures regarding compliance with Section 18 of the 1940 Act made by other registered investment companies and reviewed by the SEC staff for a number of years.⁵⁷ In that regard, the SEC expressly noted in the Derivatives Rule Proposing Release that reliance on a mark-to-market valuation of a derivatives position for purposes of calculating the required coverage amount “would generally correspond to the amount of the fund’s liability with respect to the derivatives transaction” and, therefore, be consistent with the appropriate valuation of the derivatives transaction.⁵⁸ The mark-to-market value is also the measure on which collateral posting is based under the Master Agreement published by the International Swaps and Derivatives Association, Inc. (“ISDA”), which is the predominant agreement used to trade derivatives.⁵⁹ This value measures gain and loss to the Fund of the Fund’s derivatives positions on a daily basis, as well as on a net basis across all transactions covered by a master netting agreement and, as a result, accurately reflects the actual economic exposure of the Fund to the counterparty on each derivative (as compared to notional amount, which may overstate or understate economic risk).

The Fund may choose not to make use of derivatives.

⁵⁵ The mark-to-market value reflects the Fund’s actual delivery or payment obligation under the derivative. This measure differs from that referenced in Nasdaq Rule 5735(b)(1)(E), which bases its 20% limit of assets in the portfolio applicable for funds issuing Managed Fund Shares on the aggregate gross notional value of the over-the-counter derivatives rather than on the mark-to-market value.

⁵⁶ See Derivatives Rule Proposing Release at 157–158; see also *infra* note 113.

⁵⁷ See Derivatives Rule Proposing Release at n.58, citing Comment Letter on SEC Concept Release (November 11, 2011) (File No. S7–33–11), Davis Polk & Wardwell LLP, available at <http://www.sec.gov/comments/s7-33-11/s73311-49.pdf> (“[F]und registration statements indicate that, in recent years, the Staff has not objected to the adoption by funds of policies that require segregation of the mark-to-market value, rather than the notional amount . . . [for asset segregation purposes].”).

⁵⁸ See Derivatives Rule Proposing Release at 157–158.

⁵⁹ The Credit Support Annex to the ISDA Master Agreement bases the collateral amount owed by a party to a derivatives contract, which is defined as a party’s “exposure,” by reference to the replacement value of the party’s net positions. Replacement value, which has the same meaning as “mark-to-market” value, is the amount owed by a party at a point in time determined based on the net termination payment due under the outstanding transaction.

Generally, derivatives are financial contracts whose value depends upon, or is derived from, the value of an underlying asset, reference rate or index, and may relate to stocks, bonds, interest rates, currencies or currency exchange rates, commodities, and related indexes. As described above, the Fund will use derivatives to (i) provide exposure to the Principal Investments, (ii) risk manage the Fund’s holdings,⁶⁰ and/or (iii) enhance returns, such as through covered call strategies. The Fund will not use derivatives for the purpose of seeking leveraged returns or performance that is the multiple or inverse multiple of a benchmark. The Fund will enter into derivatives only with counterparties that the Fund reasonably believes are financially and operationally able to perform the contract or instrument, and the Fund will collect collateral from the counterparty in accordance with credit considerations and margining requirements under applicable law.⁶¹

Investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund’s investment objective and policies. To limit the potential risk (including leveraging risk) associated with such transactions, the Fund will segregate or “earmark” assets determined to be liquid by the Manager and/or the Sub-Adviser in accordance with procedures established by the Board and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into offsetting positions) to cover its obligations under derivative instruments. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that transactions of the Fund, including the Fund’s use of derivatives, may give rise to additional leverage,

⁶⁰ The risk management uses of derivatives will include managing (i) investment-related risks, (ii) risks due to fluctuations in securities prices, interest rates, or currency exchanges rates, (iii) risks due to the credit-worthiness of an issuer, and (iv) the effective duration of the Fund’s portfolio.

⁶¹ The Fund will seek, where practicable, to trade with counterparties whose financial status is such that the risk of default is reduced. The Sub-Adviser will monitor the financial standing of counterparties on an ongoing basis. This monitoring may include reliance on information provided by credit agencies or credit analysts employed by the Sub-Adviser. The analysis may include earnings updates, the counterparty’s reputation, past experience with the dealer, market levels for the counterparty’s debt and equity, credit default swap levels for the counterparty’s debt, the liquidity provided by the counterparty and its share of market participation.

causing the Fund to be more volatile than it would have if it had not been leveraged. Because the markets for securities or Debt, or the securities or Debt themselves, may be unavailable, cost prohibitive or tax-inefficient as compared to derivative instruments, suitable derivative transactions may be an efficient alternative for the Fund to obtain the desired asset exposure.

The Manager and the Sub-Adviser believe that derivatives can be an economically attractive substitute for an underlying physical security or Debt that the Fund would otherwise purchase. For example, the Fund could purchase futures contracts on Treasury Securities instead of investing directly in Treasury Securities or could sell credit default protection on a corporate bond instead of buying a physical bond. Economic benefits include potentially lower transactions costs, attractive relative valuation of a derivative versus a physical bond (e.g., differences in yields) or economic exposure without incurring transfer or similar taxes.

The Manager and the Sub-Adviser further believe that derivatives can be used as a more liquid means of adjusting portfolio duration, as well as targeting specific areas of yield curve exposure, with potentially lower transaction costs than the underlying securities or Debt (e.g., interest rate swaps may have lower transaction costs than the physical bonds). Similarly, money market futures can be used to gain exposure to short-term interest rates in order to express views on anticipated changes in central bank policy rates. In addition, derivatives can be used to protect client assets through selectively hedging downside (or “tail risks”) in the Fund.

The Fund also can use derivatives to increase or decrease credit exposure. Index credit default swaps can be used to gain exposure to a basket of credit risk by “selling protection” against default or other credit events, or to hedge broad market credit risk by “buying protection.” Single name credit default swaps can be used to allow the Fund to increase or decrease exposure to specific issuers, saving investor capital through lower trading costs. The Fund can use total return swap contracts to obtain the total return of a reference asset or index in exchange for paying financing costs. A total return swap may be more efficient than buying underlying securities or Debt, potentially lowering transaction costs.

The Fund expects to manage foreign currency exchange rate risk by entering into Currency Derivatives.

The Sub-Adviser may use options strategies to meet the Fund’s investment

objectives. Option purchases and sales can also be used to hedge specific exposures in the portfolio and can provide access to return streams available to long-term investors such as the persistent difference between implied and realized volatility. Options strategies can generate income or improve execution prices (e.g., covered calls).

Investment Restrictions

At least 75% of the Fund’s investments in Debt and fixed income securities shall have a minimum principal amount outstanding of \$100 million or more.

The Fund may invest up to 15% of its assets in Non-Convertible Preferred Securities, Equity-Related Warrants and Work Out Securities. The Fund will not invest in equity securities other than Principal Investment Equities.⁶² Principal Investment Equities consist of (i) Non-Convertible Preferred Securities, Equity-Related Warrants and Work Out Securities, which are subject to the 15% limit noted above and (ii) shares of ETFs that provide exposure to fixed income securities, Debt or other Principal Investments, which are subject to no limits. The Fund will not invest more than 5% of its total assets in Fixed-Income Related Warrants and Equity-Related Warrants traded OTC.

While the Fund will invest principally in fixed income securities and Debt that are, at the time of purchase, investment grade, the Fund may invest up to 30% of its assets in below investment grade fixed income securities and Debt. For these purposes, “investment grade” is defined as investments with a rating at the time of purchase in one of the four highest rating categories of at least one

nationally recognized statistical ratings organization (“NRSRO”) (e.g., BBB- or higher by S&P Global Ratings (“S&P”), and/or Fitch Ratings (“Fitch”), or Baa3 or higher by Moody’s Investors Service, Inc. (“Moody’s”).⁶³ Unrated fixed income securities or Debt may be considered investment grade if, at the time of purchase, and under Normal Market Conditions, the applicable Sub-Adviser determines that such securities are of comparable quality based on a fundamental credit analysis of the unrated security or Debt instrument and comparable NRSRO-rated securities.

The Fund may invest in fixed income or equity securities and Debt issued by both U.S. and non-U.S. issuers (including issuers in emerging markets). Consistent with the Fund’s Registration Statement, the following diversification requirements will apply: During Normal Market Conditions, the Fund: (i) Will not invest more than 25% of its total assets in securities or Debt in any one foreign country, other than the United States, Canada, the United Kingdom, Japan, Australia and member countries of the European Union, or denominated in any one currency, other than the U.S. dollar, the Canadian dollar, the British pound, the yen, the Australian dollar, or the euro; and (ii) will have “economic exposure” to at least three countries. “Economic exposure” means that an issuer of a security or a borrower in respect to Debt: (A) Will have a class of securities whose principal securities market is in the country; (B) is organized under the laws of, or has a principal office in, the country; (C) derives 50% or more of its total revenue or profit from goods produced, sales made or services provided in the country; or (D) maintains 50% of more of its assets in that country.

The Fund will not invest more than 20% of the fixed income portion of the Fund’s portfolio⁶⁴ in ABS/Private MBS or more than 10% of the Fund’s total assets in CDOs.⁶⁵ The Fund will also not

⁶³ For the avoidance of doubt, if a security or Debt is rated by multiple NRSROs and receives different ratings, the Fund will treat the security or Debt as being rated in the highest rating category received from any one NRSRO. If a security or Debt is not rated, the Fund may determine its rating by reference to other securities issued by the issuer or comparable NRSRO-rated securities.

⁶⁴ The Exchange notes that the terms “fixed income weight of the portfolio” and “weight of the fixed income portion of the portfolio” are used synonymously in Nasdaq Rule 5735. For purposes of this proposed rule change, these terms include all fixed income securities and Debt held by the Fund as well as derivatives held by the Fund that provide exposure to fixed income securities or Debt.

⁶⁵ As discussed above, CDOs would be excluded from the 20% limit on ABS/Private MBS but would be subject to a separate limit of 10%, measured with respect to the total assets of the Fund. See *supra*

⁶² The convertible fixed income securities and convertible preferred securities will generally be held and disposed of prior to conversion, and in that respect will be treated as fixed income securities rather than equity. Consistent with treatment as fixed income securities, convertible fixed income securities and convertible preferred securities will comply with the tests set forth in Nasdaq Rule 5735(b)(1)(B) and be limited to 20% of the total assets of the Fund. In the unlikely event that any of the convertible fixed income securities or convertible preferred securities held by the Fund were to be converted, then the Fund would comply with the tests set forth in Nasdaq Rule 5735(b)(1)(A) in respect to equity stock into which such instruments are converted or Nasdaq Rule 5735(b)(1)(B) in respect to fixed income securities into which such instruments are converted. In addition, no more than 10% of such convertible fixed income and convertible preferred securities or Exchange Traded Derivatives on such securities, together with all other listed securities and Exchange Traded Derivatives in which the Fund will invest, will be traded on an exchange that is not an ISG member or an exchange with which the Exchange has comprehensive surveillance sharing agreement.

invest more than 20% of its total assets in Debt that is unsecured and subordinated.

The Fund may not concentrate its investments (*i.e.*, invest more than 25% of the value of its total assets) in Debt of borrowers in any one industry or in fixed income or equity securities of issuers in any one industry (excluding securities of sovereign issuers) as provided in the Registration Statement.⁶⁶ The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment),⁶⁷ including Rule 144A securities deemed illiquid by the Manager or the Sub-Adviser.⁶⁸ The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities or other illiquid assets. Illiquid securities and other illiquid assets include those subject to contractual or other restrictions on resale and other instruments or assets that lack readily available markets as determined in accordance with Commission staff guidance.⁶⁹

note 36. The Exchange believes that the 10% limit on the Fund's holdings in CDOs will help to ensure that the Fund maintains a diversified portfolio and will mitigate the risk of manipulation.

⁶⁶ See Form N-1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.*, Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975). For these purposes and as described above, Debt is comprised of loans that do not constitute securities (consistent with applicable case law) whereas fixed income securities would include loans and other fixed income instruments that are characterized as securities under applicable case law. *See supra* note 37.

⁶⁷ See Rule 22e-4(b)(1)(iv). "No fund or In-Kind ETF may acquire any illiquid investment if, immediately after the acquisition, the fund or In-Kind ETF would have invested more than 15% of its *net assets* in illiquid investments that are assets." (emphasis added)

⁶⁸ In reaching liquidity decisions, the Manager or Sub-Adviser (as applicable) may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

⁶⁹ Long-standing Commission guidelines have required investment companies to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), FN 34; *see also* Investment

As noted in "The Fund's Use of Derivatives," the Fund's investments in derivatives will be consistent with the Fund's investment objective and will not be used for the purpose of seeking leveraged returns or performance that is the multiple or inverse multiple of a benchmark (although derivatives have embedded leverage). Although the Fund will be permitted to borrow as permitted under the 1940 Act, it will not be operated as a "leveraged ETF," (*i.e.*, it will not be operated in a manner designed to seek a multiple or inverse multiple of the performance of an underlying reference index). The Fund may engage in frequent and active trading of portfolio securities, Debt, and derivatives to achieve its investment objective.

Under Normal Market Conditions, the Fund will satisfy the following requirements, on a continuous basis: (i) Component fixed income securities and Debt that in the aggregate account for at least 75% of the fixed income weight of the Fund's portfolio each shall have a minimum original principal amount outstanding of \$100 million or more; (ii) no fixed income security held in the portfolio (excluding Treasury Securities and GSE-sponsored securities) will represent more than 30% of the fixed income weight of the Fund's portfolio, and the five most heavily weighted portfolio securities (excluding Treasury Securities and GSE-sponsored securities) will not in the aggregate account for more than 65% of the fixed income weight of the Fund's portfolio; and (iii) the Fund's portfolio of fixed income securities (excluding exempted securities) will include a minimum of 13 non-affiliated issuers.⁷⁰ Under

Company Act Release Nos. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); and 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N-1A). The Commission also recently adopted Rule 22e-4 under the 1940 Act, which requires that each registered open-end management investment company, including ETFs but not including money market mutual funds, to establish a liquidity risk management program that includes limitations on illiquid investments. *See* Investment Company Act Release No. 32315 (October 13, 2016), 81 FR 82142 (November 18, 2016). Under Rule 22e-4, a fund's portfolio security is illiquid if it cannot be sold or disposed of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment. *See* 17 CFR 270.22e-4(a)(8).

⁷⁰ These requirements are consistent with the "generic" listing requirements under Nasdaq Rule 5735(b)(1)(B)(i)-(iii), which require: (i) For fixed income securities, that components that in the aggregate account for at least 75% of the fixed income weight of the portfolio each have a minimum principal amount outstanding of \$100 million or more (*see* Nasdaq Rule 5735(b)(1)(B)(i)); (ii) for component fixed-income securities (excluding Treasury Securities and GSE-sponsored

Normal Market Conditions, the Fund will also satisfy the following requirements, on a continuous basis measured at the time of purchase: (x) At least 75% of the Fund's investments in fixed income securities issued by emerging market issuers shall have a minimum original principal amount outstanding of \$200 million or more; and (y) at least 75% of the Fund's investments in Debt shall be in senior loans with an initial deal size of \$100 million or greater.⁷¹

Those exchange-listed securities and Exchange-Traded Derivatives held by the Fund that are listed and traded on a non-ISG member exchange or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement are limited to 10% of the Fund's assets.

In addition, the Fund will impose the limits described in the following section, which describes differences between the "generic" listing requirements of Nasdaq Rule 5735(b)(1) and those applicable to the Fund.

securities) that no component represent more than 30% of the fixed income weight of the portfolio (*see* Nasdaq Rule 5735(b)(1)(B)(ii)); (iii) that the five most heavily weighted component fixed income securities in the portfolio (excluding Treasury Securities and GSE-sponsored securities) not in the aggregate account for more than 65% of the fixed income weight of the portfolio (*see* Nasdaq Rule 5735(b)(1)(B)(ii)); and (iv) that an underlying portfolio (excluding exempted securities) that includes fixed income securities include a minimum of 13 non-affiliated issuers (*see* Nasdaq Rule 5735(b)(1)(B)(iii)). Nasdaq Rule 5735(b)(1)(B)(iv) includes the following requirement: component securities that in aggregate account for at least 90% of the fixed income weight of the portfolio must be either: (a) From issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in Section 3(a)(12) of the Act; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country. Nasdaq Rule 5735(b)(1)(B)(v) requires: non-agency, non-GSE and privately-issued mortgage-related and other asset-backed securities components of a portfolio shall not account, in the aggregate, for more than 20% of the weight of the fixed income portion of the portfolio.

⁷¹ The Exchange notes that Nasdaq Rule 5735(b)(1)(F) provides that, to the extent that derivatives are used to gain exposure to individual fixed income securities or indexes of fixed income securities, the aggregate gross notional value of such exposure shall meet the criteria set forth in Nasdaq Rule 5735(b)(1)(B). The Exchange proposes, however, as further described below, that for the purposes of the requirements in this paragraph and any requirements under Nasdaq Rule 5735(b)(1), the Fund will use the mark-to-market value of its derivatives rather than gross notional value.

Application of Generic Listing Requirements

The Exchange is submitting this proposed rule change because the Fund will not meet all of the “generic” listing requirements of Nasdaq Rule 5735(b)(1). The Fund will meet all such requirements except the requirements described below,⁷² and the Exchange proposes that the Fund will comply with the alternative limits described below.

(i) The Fund will not comply with the requirements in Nasdaq Rule 5735(b)(1) regarding the use of aggregate gross notional value of derivatives when calculating the weight of such derivatives or the exposure that such derivatives provide to underlying reference assets, including the requirements in Rules 5735(b)(1)(D)(i),⁷³ 5735(b)(1)(D)(ii),⁷⁴ 5735(b)(1)(E)⁷⁵ and 5735(b)(1)(F).⁷⁶ Instead, the Exchange

⁷² The Exchange notes that, while the Fund treats commercial paper having maturities of 360 days or less as cash equivalents for the purposes of its 80% Principal Investments measure, the Fund will comply with the applicable requirements of Nasdaq Rule 5735(b)(1) with respect to all commercial paper held by the Fund. Further, in accordance with Nasdaq Rule 5735(b)(1)(B), to the extent that the Fund holds securities that are convertible into fixed income securities, the fixed income securities into which any such securities are converted shall meet the criteria of Nasdaq Rule 5735(b)(1)(B) after converting.

⁷³ Nasdaq Rule 5735(b)(1)(D)(i) provides that, at least 90% of the weight of a portfolio's holdings invested in futures, exchange-traded options, and listed swaps shall, on both an initial and continuing basis, consist of futures, options and swaps for which the Exchange may obtain information via the ISG, from other members or affiliates of the ISG, or for which the principal market is a market with which the Exchange has a comprehensive surveillance sharing agreement; for the purposes of calculating this limitation, a portfolio's investment in such listed derivatives will be calculated as the aggregate gross notional value of the listed derivatives.

⁷⁴ Nasdaq Rule 5735(b)(1)(D)(ii) provides that, the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).

⁷⁵ Nasdaq Rule 5735(b)(1)(E) provides that, on both an initial and continuing basis, no more than 20% of the assets in the portfolio may be invested in over-the-counter derivatives, including forwards, options, and swaps on commodities, currencies and financial instruments (e.g., stocks, fixed income, interest rates, and volatility) or a basket or index of any of the foregoing; for purposes of calculating this limitation, the Fund's investment in OTC Derivatives will be calculated as the aggregate gross notional value of the OTC Derivatives.

⁷⁶ Nasdaq Rule 5735(b)(1)(F) provides that, to the extent that listed or over-the-counter derivatives are used to gain exposure to individual equities and/or fixed income securities, or to indexes of equities and/or indexes of fixed income securities, the aggregate gross notional value of such exposure shall meet the criteria set forth in Nasdaq Rules 5735(b)(1)(A) and 5735(b)(1)(B), respectively.

proposes that, except as otherwise provided herein, for the purposes of any applicable requirements under Nasdaq Rule 5735(b)(1), and any alternative requirements proposed by the Exchange, the Fund will use the mark-to-market value of its derivatives in calculating the weight of such derivatives or the exposure that such derivatives provide to their reference assets.⁷⁷ The Exchange believes that this alternative requirement is appropriate because the mark-to-market value is a more accurate measurement of the actual exposure incurred by the Fund in connection with a derivatives position.⁷⁸

(ii) The Fund will not comply with the requirement that securities comprising at least 90% of the fixed income weight of the Fund's portfolio meet one of the criteria in Nasdaq Rule 5735(b)(1)(B)(iv) in respect to its investments in ABS/Private MBS.⁷⁹ Instead, ABS/Private MBS will be limited to 20% of the weight of the fixed income portion of the Fund's portfolio.⁸⁰ Other than ABS/Private MBS, which will not meet the criteria in Nasdaq Rule 5735(b)(1)(B)(iv) but will be subject to the 20% limit on aggregate holdings in ABS/Private MBS, all fixed income securities held by the Fund (which, for purposes of this proposed rule change, include convertible fixed income and convertible preferred securities) will satisfy this 90% requirement. As a result, other than ABS/Private MBS, which will not satisfy the 90% requirement, and CDOs, which will be excluded from the requirement in Nasdaq Rule 5735(b)(1)(B)(v) and, instead, be limited to 10% of the total assets of the Fund, all fixed income securities held by the Fund will comply with all of the

⁷⁷ Further, as described further below, the Exchange is proposing that the Fund will comply with alternative requirements rather than Rules 5735(b)(1)(D)(i), 5735(b)(1)(D)(ii), and 5735(b)(1)(E).

⁷⁸ See *infra* note 113.

⁷⁹ Nasdaq Rule 5735(b)(1)(B)(iv) provides that, component securities that in the aggregate account for at least 90% of the fixed income weight of the portfolio must be either: (a) From issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in Section 3(a)(12) of the Act; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

⁸⁰ ABS/Private MBS are generally issued by special purpose vehicles, so the criteria in Nasdaq Rule 5735(b)(1)(B)(iv) regarding an issuer's market capitalization and the remaining principal amount of an issuer's securities are typically unavailable with respect to ABS/Private MBS, even though such ABS/Private MBS may own significant assets.

requirements of Nasdaq Rule 5735(b)(1)(B)(i)–(v). The Exchange believes that this exception is appropriate for the reasons stated below in this proposed rule change.⁸¹

(iii) The Exchange has classified bank loans as Debt for purposes of this proposed rule change and not as “fixed income securities” as they are classified in Nasdaq Rule 5735(b)(1)(B). As a result, the Fund's investments in bank loans will comply with the limitations or restrictions applicable to the Fund's investments in Debt as set forth herein with respect to such holdings and not with the restrictions for fixed income securities set forth in Nasdaq Rule 5735(b)(1)(B)(i)–(v).⁸² The Exchange believes that this exception is appropriate for the reasons stated below in this proposed rule change.⁸³

(iv) The Fund will not comply with the equity requirements in Nasdaq Rules 5735(b)(1)(A)(i)⁸⁴ and

⁸¹ See *infra* “Statutory Basis.”

⁸² For a listing of such restrictions, see *supra* “Investment Restrictions.”

⁸³ See *infra* “Statutory Basis.”

⁸⁴ Nasdaq Rule 5735(b)(1)(A)(i) provides that, the components stocks of the equity portion of a portfolio that are U.S. Component Stocks (as such term is defined in Nasdaq Rule 5705) shall meet the following criteria initially and on a continuing basis: (a) Component stocks (excluding Exchange Traded Derivative Securities and Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively) that in the aggregate account for at least 90% of the equity weight of the portfolio (excluding such Exchange Traded Derivative Securities and Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively) each shall have a minimum market value of at least \$75 million; (b) Component stocks (excluding Exchange Traded Derivative Securities and Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively) that in the aggregate account for at least 70% of the equity weight of the portfolio (excluding such Exchange Traded Derivative Securities and Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively) each shall have a minimum monthly trading volume of 250,000 shares, or minimum notional volume traded per month of \$25,000,000, averaged over the last six months; (c) The most heavily weighted component stock (excluding Exchange Traded Derivative Securities and Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively) shall not exceed 30% of the equity weight of the portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Exchange Traded Derivative Securities and Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively) shall not exceed 65% of the equity weight of the portfolio; (d) Where the equity portion of the portfolio does not include Non-U.S. Component Stocks, the equity portion of the portfolio shall include a minimum of 13 component stocks; provided, however, that there shall be no minimum number of component stocks if (i) one or more series of Exchange Traded Derivative Securities or Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively, constitute, at least in part, components underlying a series of Managed Fund Shares (as defined in Nasdaq Rule 5735), or (ii) one or more series of Exchange Traded Derivative

5735(b)(1)(A)(ii)⁸⁵ with respect to the Fund's investment in Non-Convertible Preferred Securities, Work Out Securities, and Equity-Related Warrants traded OTC [sic].⁸⁶ Instead, the Exchange proposes that the weight of Non-Convertible Preferred Securities, Work Out Securities and Equity-Related Warrants in the Fund's portfolio shall together not exceed 15% of the Fund's assets. In addition, the Fund will not invest more than 5% of its total assets in Fixed-Income Related Warrants and Equity-Related Warrants traded OTC. The Exchange believes that these alternative limitations are appropriate in light of the fact that the Non-Convertible Preferred Securities, Equity-Related Warrants and Work Out Securities are

Securities or Linked Securities, as such terms are defined in Nasdaq Rule 5735(c)(6) and 5710, respectively, account for 100% of the equity weight of the portfolio of a series of Managed Fund Shares; (e) except as otherwise provided, equity securities in the portfolio shall be U.S. Component Stocks listed on a national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act; and (f) American Depositary Receipts ("ADRs") in a portfolio may be exchange-traded or non-exchange-traded; however, no more than 10% of the equity weight of a portfolio shall consist of non-exchange-traded ADRs.

⁸⁵ Nasdaq Rule 5735(b)(1)(A)(ii) provides that, the component stocks of the equity portion of a portfolio that are Non-U.S. Component Stocks (as such term is defined in Nasdaq Rule 5705) shall meet the following criteria initially and on a continuing basis: (a) Non-U.S. Component Stocks (as such term is defined in Nasdaq Rule 5705) each shall have a minimum market value of at least \$100 million; (b) Non-U.S. Component Stocks (as such term is defined in Nasdaq Rule 5705) each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of \$25,000,000, averaged over the last six months; (c) The most heavily weighted Non-U.S. Component Stock (as such term is defined in Nasdaq Rule 5705) shall not exceed 25% of the equity weight of the portfolio, and, to the extent applicable, the five most heavily weighted Non-U.S. Component Stocks (as such term is defined in Nasdaq Rule 5705) shall not exceed 60% of the equity weight of the portfolio; (d) Where the equity portion of the portfolio includes Non-U.S. Component Stocks (as such term is defined in Nasdaq Rule 5705), the equity portion of the portfolio shall include a minimum of 20 component stocks; provided, however, that there shall be no minimum number of component stocks if (i) one or more series of Exchange Traded Derivative Securities or Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively, constitute, at least in part, components underlying a series of Managed Fund Shares, or (ii) one or more series of Exchange Traded Derivative Securities or Linked Securities, as such terms are defined in Nasdaq Rules 5735(c)(6) and 5710, respectively, account for 100% of the equity weight of the portfolio of a series of Managed Fund Shares; and (e) Each Non-U.S. Component Stock (as such term is defined in Nasdaq Rule 5705) shall be listed and traded on an exchange that has last-sale reporting.

⁸⁶ As noted above, convertible fixed income securities and convertible preferred securities are treated as fixed income securities for purposes of this proposed rule change and will be subject to a limit of 20% of the total assets of the Fund. See *supra* "Application of Generic Listing Requirements" section (ii).

providing debt-oriented exposures or are received in connection with the Fund's previous investment in Debt or fixed income securities, and all of the other equity securities held by the Fund will comply with the requirements of Nasdaq Rule 5735(b)(1)(A).⁸⁷ In addition, by limiting the Fund's investment in all warrants traded OTC, which in most cases are not subject to publicly-reported price feeds, the Fund believes it will ensure that the portfolio remains liquid and transparent.

(v) The Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(E) that no more than 20% of the assets in the Fund's portfolio may be invested in over-the-counter derivatives. Instead, the Exchange proposes that there shall be no limit on the Fund's investment in Interest Rate and Currency Derivatives, and the weight of all OTC Derivatives other than Interest Rate and Currency Derivatives shall not exceed 10% of the Fund's assets. For purposes of this 10% limit on OTC Derivatives, the weight of such OTC Derivatives will be calculated based on the mark-to-market value of such OTC Derivatives. The Exchange believes that this exception for Interest Rate and Currency Derivatives is appropriate for the reasons stated below in this proposed rule change.⁸⁸

(vi) The Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(D)(i) that at least 90% of the weight of the Fund's holdings in futures, exchange-traded options, and listed swaps shall, on both an initial and continuing basis, consist of futures, options and swaps for which the Exchange may obtain information via the ISG from other members or affiliates of the ISG, or for which the principal market is a market with which the Exchange has a comprehensive surveillance sharing agreement. Instead, the Exchange proposes that no more than 10% of the assets of the Fund will be invested in Exchange-Traded

⁸⁷ Other equities consist of ETFs (including money market ETFs) that provide exposure to fixed income securities, Debt and other Principal Investments. The weight of such ETFs in the Fund's portfolio shall not be limited. As noted above, Fixed-Income Related Warrants are treated as fixed income securities for purposes of this proposed rule change and will be subject to and comply with the generic listing requirements for fixed-income securities, rather than the generic listing requirements for equity securities. Equity-Related Warrants will not comply with the generic listing requirements for equity securities but will be subject to limits if traded OTC or on a non-ISG member exchange or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement. See *supra* notes 25, 28, 29 and 46.

⁸⁸ See *infra* notes 120–123 and accompanying text.

Derivatives and exchange-listed securities whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. For purposes of this 10% limit, the weight of such Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives. The Exchange believes that this exception is appropriate for the reasons stated below in this proposed rule change.⁸⁹

(vii) The Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(D)(ii) that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the Fund's portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the Fund's portfolio (including gross notional exposures). Instead, the Exchange proposes that the Fund will comply with the concentration requirements in Nasdaq Rule 5735(b)(1)(D)(ii) except with respect to the Fund's investment in futures and options (including options on futures) referencing eurodollars and sovereign debt issued by the United States (*i.e.*, Treasury Securities) and other "Group of Seven" countries⁹⁰ where such futures and options contracts are listed on an exchange that is an ISG member or an exchange with which the Exchange has a comprehensive surveillance sharing agreement ("Eurodollar and G–7 Sovereign Futures and Options"). The Fund may maintain significant positions in Eurodollar and G–7 Sovereign Futures and Options, and such investments will not be subject to the concentration limits provided in Nasdaq Rule 5735(b)(1)(D)(ii). For purposes of these requirements, the weight of the applicable Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives. The Exchange believes that this exception is appropriate for the reasons stated below in this proposed rule change.⁹¹

The Exchange believes that, notwithstanding that the Fund would not meet a limited number of "generic" listing requirements of Nasdaq Rule 5735(b)(1) in order to be able to satisfy its investment objective, the Exchange

⁸⁹ See *infra* "Statutory Basis."

⁹⁰ The "Group of Seven" or G–7 countries consist of the United States, Canada, France, Germany, Italy, Japan and the United Kingdom.

⁹¹ See *infra* note 124 and accompanying text.

will be able to appropriately monitor and surveil trading in the underlying investments, including those that do not meet the “generic” listing requirements. The Exchange also notes that the parameters around the Fund’s portfolio holdings are generally consistent with the parameters approved by the Commission prior to adoption of “generic” listing requirements for actively-managed ETFs.⁹² In addition, the Fund will be well diversified. For these reasons, the Exchange believes that it is appropriate and in the public interest to approve listing and trading of Shares of the Fund on the Exchange.

As further described in “Statutory Basis,” deviations from the generic requirements are necessary for the Fund to achieve its investment objective and efficiently manage the risks associated with its investments, and any possible risks have been fully mitigated and addressed through the alternative limits proposed by the Exchange. In addition, many of the changes requested are generally consistent with previous filings approved by the Commission.⁹³

⁹² See, e.g., Securities Exchange Act Release Nos. 76719 (December 21, 2015), 80 FR 80859 (December 28, 2015) (SR-NYSEArca-2015-73) (granting approval for the listing of shares of the Guggenheim Total Return Bond ETF); 66321 (February 3, 2012), 77 FR 6850 (February 9, 2012) (SR-NYSEArca-2011-95) (granting approval for the listing of shares of the PIMCO Total Return Exchange Traded Fund (now known as the PIMCO Active Bond Exchange-Traded Fund)); and 72666 (July 24, 2014), 79 FR 44224 (July 30, 2014) (SR-NYSEArca-2013-122) (granting approval to the use of derivatives by the PIMCO Total Return Exchange Traded Fund). The investments of the Guggenheim Total Return Bond ETF include a wide variety of U.S. and foreign fixed income instruments (including Private ABS/MBS), preferred securities, cash equivalents, other ETFs and listed and over-the-counter derivatives and are managed in a manner that appears to be generally consistent with that proposed for the Fund. Consistent with the requests made in this proposed rule change, the Commission’s approval of the listing of shares of the Guggenheim Total Return Bond ETF did not include many of the conditions imposed by the generic listing standards under Nasdaq Rule 5735; the Commission’s approval did not impose limits regarding the total notional size of the ETF’s investment in over-the-counter derivatives, did not impose concentration limits on the ETF’s investment in listed derivatives and did not require compliance with the same criteria as the fixed income criteria in Nasdaq Rule 5735(b)(1)(B). The order approving investments in derivatives by the PIMCO Total Return Exchange Traded Fund described investments in both over-the-counter and listed derivatives, but did not impose limits regarding the total notional size of the ETF’s investments in over-the-counter derivatives, did not impose concentration limits on the ETF’s investments in listed derivatives, and did not impose limitations on investments in listed derivatives whose principal market is not a member of ISG or is a market with which its listing exchange does not have a comprehensive surveillance sharing agreement.

⁹³ See, e.g., Securities Exchange Act Release Nos. 80657 (May 11, 2017), 82 FR 22702 (May 17, 2017) (SR-NYSEArca-2017-09) (approving up to 50% of the fund’s assets (calculated on the basis of

Net Asset Value

The Fund’s administrator will calculate the Fund’s net asset value (“NAV”) per Share as of the close of regular trading (normally 4:00 p.m., Eastern time (“E.T.”)) on each day the New York Stock Exchange is open for business. NAV per Share will be calculated for the Fund by taking the value of the Fund’s total assets, including interest or dividends accrued but not yet collected, less all liabilities, and dividing such amount by the total number of Shares outstanding. The result, rounded to the nearest cent, will be the NAV per Share (although creations and redemptions will be processed using a price denominated to the fifth decimal point, meaning that rounding to the nearest cent may result in different prices in certain circumstances).

Impact on Arbitrage Mechanism

The Manager and the Sub-Adviser believe there will be minimal, if any, impact on the arbitrage mechanism for the Fund as a result of its use of derivatives. The Manager and the Sub-Adviser understand that market makers and other market participants should be able to value derivatives held by the Fund as long as the Fund’s positions are disclosed. The Manager and the Sub-

aggregate gross notional value) to be invested in over-the-counter derivatives that are used to reduce currency, interest rate, or credit risk arising from the fund’s investments, including forwards, over-the-counter options, and over-the-counter swaps); 78592 (August 16, 2016), 81 FR 56729 (August 22, 2016) (SR-NASDAQ-2016-061) (approving investment of up to 20% of the fund’s assets in, among other things, non-exchange-traded equity securities acquired in conjunction with the fund’s event-driven strategy, including securities acquired by the fund as a result of certain corporate events including reorganizations); 76719 (December 21, 2015), 80 FR 80859 (December 28, 2015) (SR-NYSEArca-2015-73) (permitting (i) investments in over-the-counter and listed derivatives without imposing limits on the total notional size of the ETF’s investments in over-the-counter derivatives and without imposing concentration limits on the ETF’s investments in listed derivatives and (ii) permitting investments in a wide variety of fixed income instruments without compliance with the same criteria as the fixed income criteria in Nasdaq Rule 5735(b)(1)(B)); and 72666 (July 24, 2014), 79 FR 44224 (July 30, 2014) (SR-NYSEArca-2013-122) (permitting investments in both over-the-counter and listed derivatives, but without imposing limits regarding the total notional size of the ETF’s investments in over-the-counter derivatives, without imposing concentration limits on the ETF’s investments in listed derivatives, and without imposing limitations on investments in listed derivatives whose principal market is not a member of ISG or is a market with which its listing exchange does not have a comprehensive surveillance sharing agreement); and 69061 (March 7, 2013), 78 FR 15990 (March 13, 2013) (SR-NYSEArca 2013-01) (approving investments in non-agency commercial MBS and non-agency residential MBS without a fixed limit but consistent with the fund’s objective of investing up to 80% of its assets in investment grade fixed-income securities).

Adviser believe that the price at which Shares trade will continue to be disciplined by arbitrage opportunities created by the ability for authorized participants (“APs”) to purchase or redeem creation Shares at their NAV, which should ensure that Shares will not trade at a material discount or premium in relation to their NAV.

The Manager and the Sub-Adviser do not believe that there will be any significant impact on the settlement or operational aspects of the Fund’s arbitrage mechanism due to the use of derivatives. Because derivatives generally are not eligible for in-kind transfer, they will typically be substituted with a “cash in lieu” amount when the Fund processes purchases or redemptions of creation units in-kind.

Creation and Redemption of Shares

The Fund will issue Shares of the Fund at NAV only to APs and only in aggregations of at least 50,000 shares (each aggregation is called a “Creation Unit”) or multiples thereof, on a continuous basis through the Distributor, without a sales load, at the NAV next determined after receipt, on any Business Day, of an order in proper form. A “Business Day” is defined as any day that the Trust is open for business, including as required by Section 22(e) of the 1940 Act.

Although the Fund reserves the right to issue Creation Units on a partial or fully “in kind” basis, the Fund expects that it will primarily issue Creation Units solely for cash. As a result, APs seeking to purchase Creation Units will generally be required to transfer to the Fund cash in an amount equal to the value of the Creation Unit(s) purchased and the applicable transaction fee. To the extent that the Fund elects to issue Creation Units on an “in-kind” basis, the applicable AP will be required to deposit with the Fund a designated portfolio of securities and/or instruments (the “Deposit Securities”) that will conform *pro rata* to the holdings of the Fund (except in the circumstances described in the Fund’s Statement of Additional Information (the “SAI”)) and/or an amount of cash. If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Deposit Securities or Redemption Securities (defined below) exchanged for the Creation Unit, the party conveying the instruments with the lower value will pay to the other an amount in cash equal to that difference (the “Cash Component”). Together, the Deposit Securities and the Cash Component will constitute the “Fund Deposit,” which

will represent the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The Fund also expects to effect redemptions of Creation Units primarily on a cash basis, although it reserves the right to effect redemption on a partial or wholly “in-kind” basis. In connection with a cash redemption, the AP will be required to transfer to the Fund, Creation Units and cash equal to the transaction fee. To the extent that the Fund elects to utilize an “in-kind” redemption, it will deliver to the redeeming AP, in exchange for a Creation Unit, securities and/or instruments that will conform *pro rata* to the holdings of the Fund (“Redemption Securities”) plus the Cash Component.

To be eligible to place orders with respect to creations and redemptions of Creation Units, an entity must have executed an agreement with the Distributor, subject to acceptance by the transfer agent, with respect to creations and redemptions of Creation Units. Each such entity (an AP) must be (i) a broker-dealer or other participant in the clearing process through the continuous net settlement system of the National Securities Clearing Corporation (“NSCC”) or (ii) a Depository Trust Company participant.

When the Fund permits Creation Units to be issued principally or partially in-kind, the Fund will cause to be published, through the NSCC, on each Business Day, at or before 9:00 a.m. E.T., the identity and the required principal amount or number of each Deposit Security and the amount of the Cash Component (if any) to be included in the current Fund Deposit (based on information at the end of the previous Business Day).

All orders to create Creation Units must be received by the Distributor within a one-hour window from 9:00 a.m. E.T. to 10:00 a.m. E.T. on a given Business Day in order to receive the NAV determined on the Business Day on which the order was placed.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form on a Business Day and only through an AP. The Fund will not redeem Shares in amounts less than a Creation Unit unless the Fund is being liquidated.

When the Fund permits Creation Units to be redeemed principally or partially in-kind, the Fund will cause to be published, through the NSCC, at or before 9:00 a.m. E.T. on each Business Day, the identity of the Redemption Securities and/or an amount of cash that will be applicable to redemption

requests received in proper form on that day. The Redemption Securities will be identical to the Deposit Securities.

In order to redeem Creation Units of the Fund, an AP must submit an order to redeem for one or more Creation Units. All such orders must be received by the Distributor within a one-hour window from 9:00 a.m. E.T. to 10:00 a.m. E.T. on a given Business Day in order to receive the NAV determined on the Business Day on which the order was placed.

Availability of Information

The Fund’s website (www.leggmason.com), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The website will include the Shares’ ticker, CUSIP and exchange information, along with additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior Business Day’s NAV per share and the market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV per share (the “Bid/Ask Price”),⁹⁴ and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV per share; and (2) a table showing the number of days of such premium or discount for the most recently completed calendar year, and the most recently completed calendar quarters since that year (or the life of Fund, if shorter).

On each Business Day, before commencement of trading in Shares in the Regular Market Session⁹⁵ on the Exchange, the Fund will disclose on its website the identities and quantities of the portfolio of securities and other assets (the “Disclosed Portfolio” as defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund’s calculation of NAV at the end of the Business Day.⁹⁶ The Fund’s disclosure of derivative positions in the

⁹⁴ The Bid/Ask Price of the Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund’s NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

⁹⁵ See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m., E.T.; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m., E.T.; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m., E.T.).

⁹⁶ Under accounting procedures to be followed by the Fund, trades made on the prior Business Day (“T”) will be booked and reflected in NAV on the current Business Day (“T+1”). Accordingly, the Fund will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

Disclosed Portfolio will include sufficient information for market participants to use to value these positions intraday. On a daily basis, the Fund will disclose on the Fund’s website the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding), the identity of the security or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and percentage weighting of the holding in the Fund’s portfolio.⁹⁷ The website information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in Rule 5735(c)(3) as the “Intraday Indicative Value,” that reflects an estimated intraday value of the Fund’s Disclosed Portfolio, will be disseminated. Moreover, the Intraday Indicative Value, available on the Nasdaq Information LLC proprietary index data service,⁹⁸ will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendor and broadly displayed at least every 15 seconds during the Regular Market Session. The Intraday Indicative Value will be based on quotes and closing prices provided by a dealer who makes a market in those instruments. Premiums and discounts between the Intraday Indicative Value and the market price may occur. This should not be viewed as a “real time” update of the NAV per Share of the Fund, which is calculated only once a day.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the Business Day.

Information regarding the previous day’s closing price and trading volume information for the Shares will be

⁹⁷ See Nasdaq Rule 5735(c)(2).

⁹⁸ Currently, the Nasdaq Global Index Data Service (“GIDS”) is the Nasdaq global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. GIDS provides investment professionals with the daily information needed to track or trade Nasdaq indexes, listed ETFs, or third-party partner indexes and ETFs.

published daily in the financial section of newspapers. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the Business Day on brokers' computer screens and other electronic services. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association ("CTA") plans for the Shares and for the following U.S. securities, to the extent that they are exchange-listed securities: Work Out Securities, Non-Convertible Preferred Securities, warrants, convertible fixed income and convertible preferred securities and ETFs. Price information for U.S. exchange-listed options will be available via the Options Price Reporting Authority and for other U.S. Exchange-Traded Derivatives will be available from the applicable listing exchange and from major market data vendors. Price information for TRACE-Eligible Securities⁹⁹ sold in transactions under Rule 144A under the Securities Act will generally be available through FINRA's Trade Reporting and Compliance Engine ("TRACE") and information regarding transactions in non-TRACE-Eligible Securities or transactions not otherwise subject to TRACE reporting is generally available from major market data vendors and broker-dealers. For most of the U.S. dollar denominated corporate bonds, GSE-sponsored securities, Securitized Products and other U.S. dollar denominated fixed income securities in which the Fund invests, price information will be available from TRACE and EMMA (as defined below).¹⁰⁰ For those instruments for which FINRA does not disseminate price information from TRACE, such as CDOs and fixed income securities

⁹⁹ For the definition of "TRACE-Eligible Security," see FINRA Rule 6710(a).

¹⁰⁰ FINRA generally disseminates information on all transactions in TRACE-Eligible Securities, including those effected pursuant to Rule 144A of the Securities Act, immediately upon receipt of the transaction reports. Exceptions to this dissemination schedule are: (i) In respect to CMOs transacted pursuant to Rule 144A under the Securities Act, where the transaction value is \$1 million or more and there have been five or more transactions of \$1 million or more in the period reported by at least two different market participant identifiers (where FINRA will disseminate information weekly and monthly); (ii) certain transactions with affiliates, certain transfers in connection with mergers and not in furtherance of a trading strategy; and certain primary offerings; (iii) transactions in CDOs, collateralized mortgage backed securities and CMOs, if the transaction value is \$1 million or more and does not qualify for periodic dissemination; and (iv) Treasury Securities. See FINRA Rule 6750.

denominated in foreign currencies, pricing information will generally be available from major market data vendors and broker-dealers. Money Market Funds are typically priced once each Business Day and their prices will be available through the applicable fund's website or from major market data vendors.

For other exchange-listed securities (to be comprised primarily of ETFs, warrants and structured notes and which may include exchange-listed securities of both U.S. and non-U.S. issuers), equities traded in the over-the-counter market (including Work Out Securities, and Non-Convertible Preferred Securities), Exchange-Traded Derivatives (including U.S. or foreign), OTC Derivatives, Debt and fixed income securities (including convertible fixed income and convertible preferred securities), and the small number of Securitized Products that are not reported to TRACE,¹⁰¹ intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable). Price information for such securities and instruments will also be available from feeds from major market data vendors, published or other public sources, or online information services. Price information is generally not available for OTC warrants, and these instruments will be subject to the Fund's fair valuation procedures unless the Fund is able to secure price information from market data vendors or broker dealers. As noted above, TRACE will be a source of price information for most of the U.S. dollar denominated corporate bonds, GSE-sponsored securities, Securitized Products and other U.S. dollar denominated fixed income securities in which the Fund invests. Intraday and other price information related to foreign government securities, Money Market Funds, and other cash equivalents that are traded over-the-counter and other Non-TRACE Eligible Securities as well as prices for Treasury Securities, CDOs, commercial mortgage-backed securities, or CMOs purchased through transactions that do not qualify for periodic dissemination by FINRA¹⁰² will be available through major market data vendors, such as Bloomberg, Markit, IDC and Thomson Reuters, which can be accessed by APs and other

¹⁰¹ Non-TRACE Eligible Securities, which are Securitized Products, in which the Fund may invest will primarily consist of fixed income securities issued by foreign entities and denominated in foreign currencies. For such securities that are not TRACE-eligible, pricing information will generally be available from major market data vendors and broker-dealers.

¹⁰² See *supra* note 100.

investors. Electronic Municipal Market Access ("EMMA") will be a source of price information for municipal bonds. Pricing for repurchase transactions and reverse repurchase agreements entered into by the Fund are not publicly reported. Prices are determined by negotiation at the time of entry with counterparty brokers, dealers and banks.

Additional information regarding the Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, Fund holdings' disclosure policies, distributions and taxes will be included in the Registration Statement. Investors will also be able to obtain the SAI, the Fund's annual and semi-annual reports (together, "Shareholder Reports"), and its Form N-CSR and Form N-SAR, filed twice a year, except the SAI, which is filed at least annually. The Fund's SAI and Shareholder Reports will be available free upon request from the Fund, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission's website at www.sec.gov.

Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and continued listing, the Fund must be in compliance with Rule 10A-3¹⁰³ under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading 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 trading is not occurring in the securities and/or the other assets constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or

¹⁰³ See 17 CFR 240.10A-3.

circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. Nasdaq will allow trading in the Shares from 4:00 a.m. until 8:00 p.m., E.T. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in Nasdaq Rule 5735(b)(3), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is \$0.01.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.¹⁰⁴ 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 applicable federal securities laws.

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.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including exchange-listed equities and Exchange-Traded Derivatives) with other markets and other entities that are members of ISG¹⁰⁵ and with which the Exchange has comprehensive surveillance sharing

agreements,¹⁰⁶ and FINRA and the Exchange both may obtain information regarding trading in the Shares, the exchange-listed securities, derivatives and other instruments held by the Fund from markets and other entities that are members of ISG, which include securities and futures exchanges and swap execution facilities, or with which the Exchange has in place a comprehensive surveillance sharing agreement.¹⁰⁷ Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for most of the fixed income securities held by the Fund through reporting on FINRA's TRACE and, with respect to municipal securities, EMMA.

The majority of the Fund's investments in exchange-listed, equity securities (*i.e.*, Non-Convertible-Preferred Securities, Equity-Related Warrants and ETFs) will constitute securities that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange. Up to 10% of the Fund's assets may be held in exchange-listed securities and Exchange-Traded Derivatives that are listed and traded on markets that are not members of ISG or a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value and the Disclosed

Portfolio is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. Members purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares of the Fund and the applicable NAV calculation time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's website.

Continued Listing Representations

All statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of the reference asset or intraday indicative values, or (d) the applicability of Exchange listing rules shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

¹⁰⁴ FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

¹⁰⁵ Exchange-listed securities and Exchange-Traded Derivatives held by the Fund that are listed and traded on a non-ISG member exchange or on an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement together are limited to 10% of the assets of the Fund.

¹⁰⁶ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

¹⁰⁷ As noted above, no more than 10% of the assets of the Fund may be invested in Exchange-Traded Derivatives and exchange-listed securities whose principal market is not a member of ISG or a market with which the Exchange has a comprehensive surveillance sharing agreement.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) of the Act 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 facilitating transactions in securities, and 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 Nasdaq Rule 5735. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both the Exchange and FINRA, on behalf of the Exchange, which are designed to deter and detect violations of Exchange rules and applicable federal securities laws and are adequate to properly monitor trading in the Shares in all trading sessions.

Paragraph (g) of Rule 5735 provides that if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company’s portfolio. In addition, paragraph (g) further requires that personnel who make decisions on the investment company’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the investment company’s portfolio.

Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i); however, paragraph (g) in connection with the establishment and maintenance of a “fire wall” between the investment adviser and the broker-dealer reflects the applicable investment company’s portfolio, not an underlying benchmark index, as is the case with index-based funds. Neither the Manager nor the Sub-Adviser is a broker-dealer, but each is affiliated with the Distributor, a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.

In addition, personnel who make decisions on the Fund’s portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund’s portfolio. In the event (a) the Manager or the Sub-Adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new investment adviser or any new sub-adviser to the Fund is a registered broker-dealer or becomes affiliated with another broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the Fund’s portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The Fund’s investments, including derivatives, will be consistent with the Fund’s investment objectives, applicable legal requirements¹⁰⁸ and will not be used for the purpose of seeking leveraged returns or performance that is the multiple or inverse multiple of a benchmark (although derivatives may have embedded leverage). Although the Fund will be permitted to borrow as permitted under the 1940 Act, it will not be operated as a “leveraged ETF,” *i.e.*, it will not be operated in a manner designed to seek leveraged returns or a multiple or inverse multiple of the performance of an underlying reference index.¹⁰⁹ The Fund may engage in frequent and active trading of portfolio investments to achieve its investment objective.

The Exchange believes that, notwithstanding that the Fund would not meet all of the “generic” listing requirements of Nasdaq Rule 5735(b)(1), the Fund will not be subject to manipulation, the investments of the Fund will be able to be monitored and surveilled by the Exchange and risks will be mitigated by alternative limits imposed by the Exchange and by the voluntary limits imposed by the Fund (*see supra* “Investment Restrictions”). As a result, it is in the public interest to approve listing and trading of Shares of the Fund on the Exchange pursuant to the requirements set forth herein. Deviations from the generic

¹⁰⁸ As noted above, the Fund will limit its investments in illiquid securities or other illiquid assets to an aggregate amount of 15% of its net assets (calculated at the time of investment), as required by the Commission.

¹⁰⁹ As noted above, the Fund will not invest in leveraged, inverse or inverse leveraged ETFs.

requirements are necessary for the Fund to achieve its investment objective in a cost-effective manner that maximizes investors’ returns and to manage the risks associated with its investments, and the Exchange proposes that the Fund will be required to comply with alternative requirements that are customized to address the objectives of Section 6(b)(5) of the Act, as described herein. Further, the strategy and investments of the Fund are substantially similar to those of other ETFs previously approved by the Commission, which have operated safely and without disrupting the market for several years.¹¹⁰

The Fund will not comply with the requirements in Nasdaq Rule 5735(b)(1) regarding the use of aggregate gross notional value of derivatives when calculating the weight of such derivatives or the exposure that such derivatives provide to underlying reference assets, including the requirements in Rules 5735(b)(1)(D)(i), 5735(b)(1)(D)(ii), 5735(b)(1)(E) and 5735(b)(1)(F).¹¹¹ Instead, the Exchange proposes that, except as otherwise provided herein, for the purposes of any applicable requirements under Nasdaq Rule 5735(b)(1), and any alternative requirements proposed by the Exchange, the Fund will use the mark-to-market value of its derivatives in calculating the weight of such derivatives or the exposure that such derivatives provide to their reference assets.¹¹² The Exchange believes that this alternative requirement is appropriate because the mark-to-market value is a more accurate measurement of the actual exposure incurred by the Fund in connection with a derivatives position.¹¹³

¹¹⁰ *See, e.g.*, Securities Exchange Act Release Nos. 66321 (February 3, 2012) 77 FR 6850 (February 9, 2012) (SR-NYSEArca-2011-95) (granting approval for the listing of shares of the PIMCO Total Return Exchange Traded Fund); 72666 (July 24, 2014) (granting approval to the use of derivatives by the PIMCO Total Return Exchange Traded Fund); and 76719 (December 21, 2015) (granting approval for the listing of shares of the Guggenheim Total Return Bond ETF).

¹¹¹ *See supra* notes 73–76.

¹¹² *See supra* note 77.

¹¹³ As previously noted, the mark-to-market approach is consistent with the valuation methodology for derivatives for asset coverage purposes advocated by the Commission in proposed Rule 18f-4 under the 1940 Act. *See Derivatives Rule Proposing Release*. In a white paper published by staff of the Division of Economic and Risk Analysis of the SEC (“DERA”) in connection with the proposal of Rule 18f-4 under the 1940 Act, the staff of DERA noted that a derivative’s notional amount does not accurately reflect the risk of the derivative. *See Daniel Deli, Paul Hanouna, Christof Stahel, Yue Tang and William Yost, Use of Derivatives by Registered Investment Companies* (December 2015) at 10 (“On the other hand, there are drawbacks to using notional amounts. First, because of differences in expected volatilities of the

The Fund will not comply with the requirement that securities comprising at least 90% of the fixed income weight of the Fund's portfolio meet one of the criteria in Nasdaq Rule 5735(b)(1)(B)(iv) in respect to its investments in ABS/Private MBS.¹¹⁴ Instead, ABS/Private MBS will be limited to 20% of the weight of the fixed income portion of the Fund's portfolio.¹¹⁵ The Exchange proposes, in the alternative, to require the Fund to ensure that all of the investments in the fixed income portion of the Fund's portfolio, other than ABS/Private MBS, comply with the 90% requirement in Nasdaq Rule 5735(b)(1)(B)(iv).¹¹⁶ The Exchange believes that this alternative limitation is appropriate because Nasdaq Rule 5735(b)(1)(B)(iv) does not appear to be designed for structured finance vehicles such as ABS/Private MBS, and the overall weight of ABS/Private MBS held by the Fund will be limited to 20% of the fixed income portion of the Fund's portfolio, as described above. As discussed above, although ABS/Private MBS will be excluded for the purposes of compliance with Nasdaq Rule 5735(b)(1)(B)(iv), the Fund's portfolio is consistent with the statutory standard as a result of the diversification provided by the investments and the Sub-Adviser's selection process, which closely monitors investments to ensure maintenance of credit and liquidity standards and relies on the higher investment levels in these instruments during periods of U.S. economic strength.

As discussed above, the Exchange has determined to make an exception solely in respect of the Fund such that CDOs will not be deemed to be included in the definition of ABS for purposes of the limitation in Nasdaq Rule 5735(b)(1)(B)(v) and, as a result, will not be subject to the restriction on aggregate holdings of ABS/Private MBS contained in such Rule, which limits such

underlying assets, notional amounts of derivatives across different underlying asset generally do not represent the same unit of risk. For example, the level of risk associated with a \$100 million notional of a S&P500 index futures is not equivalent to the level of risk of a \$100 million notional of interest rate swaps, currency forwards or commodity futures.').

¹¹⁴ See *supra* note 79.

¹¹⁵ See *supra* note 80 and accompanying text.

¹¹⁶ For purposes of this requirement, the weight of the Fund's exposure to any fixed income securities referenced in derivatives shall be calculated based on the mark-to-market value of such derivatives. CDOs, in which the Fund invests, would comply with the 90% requirement in Nasdaq Rule 5735(b)(1)(B)(iv) but would be limited in amount to 10% of the Fund's total assets. The Exchange believes that the 10% limit on the Fund's holdings in CDOs will help to ensure that the Fund maintains a diversified portfolio and will mitigate the risk of manipulation.

holdings to no more than 20% of the weight of the fixed income portion of the Fund's portfolio. However, the Fund's holdings in CDOs will be limited such that they do not account, in the aggregate, for more than 10% of the total assets of the Fund. The Exchange believes that the 10% limit on the Fund's holdings in CDOs will help to ensure that the Fund maintains a diversified portfolio and will mitigate the risk of manipulation.

The Exchange has classified bank loans as Debt for purposes of this proposed rule change and not as "fixed income securities" as they are classified in Nasdaq Rule 5735(b)(1)(B). As a result, the Fund's investments in bank loans will comply with the limitations or restrictions applicable to the Fund's investments in Debt as set forth herein with respect to such holdings and not with the restrictions for fixed income securities set forth in Nasdaq Rule 5735(b)(1)(B)(i)-(v).¹¹⁷ The Exchange believes that this approach is appropriate given that the "generic" listing requirements in Nasdaq Rule 5735(b)(1)(B) generally appear to be tailored to fixed income instruments that are "securities", as defined in the Act, rather than loans and other debt instruments that are not characterized as "securities" under applicable case law.

The Fund will not meet the equity requirements in Nasdaq Rule 5735(b)(1)(A) with respect to Non-Convertible Preferred Securities, Work Out Securities and Equity-Related Warrants.¹¹⁸ Instead, the Exchange proposes that the weight of Non-Convertible Preferred Securities, Work Out Securities and Equity-Related Warrants in the Fund's portfolio shall together not exceed 15% of the Fund's assets. The Fund will also not invest more than 5% of its total assets in Fixed-Income Related Warrants and Equity-Related Warrants traded OTC. The Exchange believes that these alternative limitations are appropriate in light of the fact that the Non-Convertible Preferred Securities, Equity-Related Warrants and Work Out Securities are providing debt-oriented exposures or

¹¹⁷ For a listing of such restrictions, see *supra* "Investment Restrictions."

¹¹⁸ As noted above, convertible fixed income securities and convertible preferred securities are treated as fixed income securities for purposes of this proposed rule change and will be subject to a limit of 20% of the total assets of the Fund. See *supra* "Application of Generic Listing Requirements" section (ii) and note 81. Equity-Related Warrants may be traded either on an exchange or OTC, subject to limits if traded on a non-ISG exchange, an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement or OTC. See *supra* notes 25, 28, 29 and 46.

are received in connection with the Fund's previous investment in Debt or fixed income securities, and all of the other equity securities held by the Fund will comply with the requirements of Nasdaq Rule 5735(b)(1)(A).¹¹⁹ In addition, by limiting the Fund's investment in all warrants traded OTC, which in most cases are not subject to publicly-reported price feeds, the Fund believes it will ensure that the portfolio remains liquid and transparent.

The Fund will not meet the requirement in Nasdaq Rule 5735(b)(1)(E) that no more than 20% of the assets in the Fund's portfolio may be invested in over-the-counter derivatives. Instead, The Exchange proposes that there shall be no limit on the Fund's investment in Interest Rate and Currency Derivatives, and the weight of all OTC Derivatives other than Interest Rate and Currency Derivatives shall not exceed 10% of the Fund's assets. For purposes of this 10% limit on OTC Derivatives, the weight of such OTC Derivatives will be calculated based on the mark-to-market value of such OTC Derivatives. The Exchange believes that this exception for Interest Rate and Currency Derivatives, which is generally consistent with the requirement in a previous filing for the listing of an ETF approved by the Commission,¹²⁰ is appropriate in light of the fact that Interest Rate and Currency Derivatives are among the most liquid investment instruments (including not only derivatives but also securities) in the

¹¹⁹ Other equities consist of ETFs (including money market ETFs) that provide exposure to fixed income securities, Debt and other Principal Investments. The weight of such ETFs in the Fund's portfolio shall not be limited. As noted above, Fixed-Income Related Warrants are treated as fixed income securities for purposes of this proposed rule change and will be subject to and comply with the generic listing requirements for fixed-income securities, rather than the generic listing requirements for equity securities. Equity-Related Warrants will not comply with the generic listing requirements for equity securities, whether traded on an exchange or traded OTC. However, Equity-Related Warrants traded OTC will be limited, together with Fixed-Income Related Warrants traded OTC, to no more than 5% of the total assets of the Fund, and Equity-Related Warrants traded on an exchange, will be subject to the requirement that no more than 10% of the Fund's total assets will be invested in exchange-listed securities or Exchange-Traded Derivatives that are listed on an exchange that is not an ISG-member or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement. See *supra* notes 25, 28, 29 and 46.

¹²⁰ See Securities Exchange Act Release No. 80657 (May 11, 2017), 82 FR 22702 (May 17, 2017) (SR-NYSEArca-2017-09) (approving up to 50% of the fund's assets (calculated on the basis of aggregate gross notional value) to be invested in over-the-counter derivatives that are used to reduce currency, interest rate, or credit risk arising from the fund's investments, including forwards, over-the-counter options, and over-the-counter swaps).

market¹²¹ (and the instruments are even more liquid than most non-government or government-guaranteed securities). Based on the data compiled by the Sub-Adviser in respect to its liquidity policy, these derivatives are among the most liquid investment instruments traded. In addition, most Interest Rate Derivatives traded by the Fund are centrally cleared by regulated clearing firms, and Interest Rate and Currency Derivatives are subject to trade reporting,¹²² and other robust regulation.¹²³ Given the size of the trading market and the regulatory oversight of the markets, the Exchange believes that Interest Rate and Currency Derivatives are not readily subject to manipulation. The Exchange also believes that allowing the Fund to risk manage its portfolio through the use of Interest Rate and Currency Derivatives without limit is necessary to allow the Fund to achieve its investment objective and protect investors.

The Fund will not comply with the requirement in Nasdaq Rule

¹²¹ Trading in foreign exchange markets averaged \$5.1 trillion per day in April 2016, and 67% of this trading activity was in derivatives contracts such as currency or foreign exchange forwards, options and swaps (with the other 33% consisting of spot transactions). See Bank for International Settlements, *Triennial Central Bank Survey, Foreign Exchange Turnover in April 2016*, available at <http://www.bis.org/publ/rpfx16fx.pdf> (accessed November 2017). Trading in OTC interest rate derivatives averaged \$2.7 trillion per day in April 2016. See Bank for International Settlements, *Triennial Central Bank Survey, OTC Interest Rate Derivatives Turnover in April 2016*, available at <http://www.bis.org/publ/rpfx16ir.pdf> (accessed November 2017).

¹²² Transactions in Interest Rate and Currency Derivatives are required to be reported to a swap data repository, and transactions in Interest Rate Derivatives and certain Currency Derivatives (*i.e.*, Currency Derivatives that are not excluded from the definition of a “swap”, as described below) are also publicly reported pursuant to rules issued by the CFTC. See 17 CFR parts 43, 45 and 46. Pursuant to Section 1(a)(47)(E) of the CEA and a related determination by the Department of the Treasury, Excluded Currency Derivatives are excluded from the definition of a “swap” under the CEA. See *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act*, 77 FR 69694 (Nov. 20, 2012). However, as noted above, transactions in such Excluded Currency Derivatives are required to be reported to a swap data repository, but they are not subject to the public reporting requirements.

¹²³ Interest Rate Derivatives and Currency Derivatives other than Excluded Currency Derivatives are comprehensively regulated as swaps under the CEA and regulations issued thereunder by the CFTC and other federal financial regulators. See, *e.g.*, 17 CFR part 23 (capital and margin requirements for swap dealers, business conduct standards for swap dealers, and swap documentation requirements); 17 CFR part 50 (clearing requirements for swaps). While Excluded Currency Derivatives are not subject to all swap regulations, they are subject to the “business conduct standards” adopted by the CFTC pursuant to the CEA. See Section 1(a)(47)(E) of the CEA; *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act*, 77 FR 69694 (Nov. 20, 2012).

5735(b)(1)(D)(i) that at least 90% of the weight of the Fund’s holdings in futures, exchange-traded options, and listed swaps shall, on both an initial and continuing basis, consist of futures, options, and swaps for which the Exchange may obtain information via the ISG from other members or affiliates of the ISG, or for which the principal market is a market with which the Exchange has a comprehensive surveillance sharing agreement. Instead, the Exchange proposes that no more than 10% of the assets of the Fund will be invested in Exchange-Traded Derivatives and exchange-listed securities whose principal market is not a member of ISG or is not a market with which the Exchange has a comprehensive surveillance sharing agreement. For purposes of this 10% limit, the weight of such Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives. The Exchange believes that this alternative limitation is appropriate because the overall limit on Exchange-Traded Derivatives and exchange-listed securities whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement will still be low relative to the overall size of the Fund.

The Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(D)(ii) that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the Fund’s portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the Fund’s portfolio (including gross notional exposures). Instead, the Exchange proposes that the Fund will comply with the concentration requirements in Nasdaq Rule 5735(b)(1)(D)(ii) except with respect to the Fund’s investment in Eurodollar and G–7 Sovereign Futures and Options. The Fund may maintain significant positions in Eurodollar and G–7 Sovereign Futures and Options, and such investments will not be subject to the concentration limits provided in Nasdaq Rule 5735(b)(1)(D)(ii). For purposes of these requirements, the weight of the applicable Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives. The Manager has indicated that obtaining exposure to these investments through futures contracts is often the most cost

efficient method to achieve such exposure. The Exchange notes that Eurodollar and G–7 Sovereign Futures and Options are highly liquid investments¹²⁴ and are not subject to

¹²⁴ See CME Group, *Interest Rate Futures Liquidity Metrics Reach New Highs* (October 6, 2017), available at <http://www.cmegroup.com/education/interest-rates-liquidity-metrics-reach-new-highs.html> (accessed November 2017) (providing statistics regarding liquidity and open interest in futures and options on eurodollars and Treasury Securities, including that during the first three quarters of 2017, eurodollar futures and options traded through CME Group had an average daily open interest of approximately 53 million contracts and futures and options on Treasury Securities had an average daily open interest of approximately 15 million contracts); The Montreal Exchange, *Statistics for Interest Rate Derivatives, Index Derivatives and Equity Derivatives* (September 2017), available at https://www.m-x.ca/f_stat_en/1709_stats_en.pdf (accessed November 2017) (providing statistics regarding liquidity and open interest in futures and options on Canadian sovereign debt, including that, as of September 2017, the open interest in futures and options on Canadian sovereign debt traded on The Montreal Exchange was approximately 560,000 contracts); Eurex Exchange, *Benchmark Fixed Income Derivatives*, available at https://www.eurexexchange.com/blob/115654/4c51e4b8bc77355475b3b6f46afc0ef1/data/factsheet_eurex_benchmark_fixed_income_derivatives.pdf (accessed November 2017) (providing statistics regarding liquidity and open interest in futures and options on German sovereign debt, including that, as of July 2015, the open interest in futures on German sovereign debt traded on Eurex was approximately 3,000,000 contracts and the open interest in options on German sovereign debt futures traded on Eurex was approximately 3,000,000 contracts); Eurex Exchange, *Eurex Exchange Euro-BTP Futures, Italian Government Bond Futures*, available at http://www.eurexexchange.com/blob/115624/6a1281939d15ddb9960af40da6f11dc/data/factsheet_eurex_euro_btp_futures_on_italian_government_bonds.pdf (accessed November 2017) (providing statistics regarding liquidity and open interest in futures on Italian sovereign debt, including that the open interest peaks in 2017 for futures on long-term and short-term Italian sovereign debt traded on Eurex was approximately 450,000 and 270,000 contracts, respectively); Eurex Exchange, *Euro-OAT Derivatives, French Government Bond Futures and Options*, available at http://www.eurexexchange.com/blob/115652/48198ec5777b3b0ac44d4c5a39ed0de/data/factsheet_eurex_euro_oat_futures_on_french_government_bonds.pdf (accessed November 2017) (providing statistics regarding liquidity and open interest in futures on French sovereign debt, including that, as of July 2017, the open interest in futures on long-term French sovereign debt traded on Eurex was approximately 600,000 contracts); Intercontinental Exchange, *Gilt Futures Overview*, available at https://www.theice.com/publicdocs/futures/Gilt_Futures_Overview.pdf (accessed November 2017) (providing statistics regarding liquidity and open interest in futures on British sovereign debt, including that, as of the third quarter of 2014, the open interest in futures on long-term British sovereign debt traded on the Intercontinental Exchange was approximately 400,000 contracts); Osaka Exchange, *Japanese Government Bond Futures & Options*, available at http://www.jpjx.co.jp/english/derivatives/products/jgb/jgb-futures/tvdivq0000003n94-att/JGB_FUT_OP_E.pdf (accessed November 2017) (providing statistics regarding liquidity and open interest in futures and options on Japanese sovereign debt, including that as of July 2016, the open interest in futures on 10-year Japanese sovereign debt traded

the same concentration risks as Exchange-Traded Derivatives referencing other assets because of such liquidity. Further, the Exchange notes that the significantly diminished risk of Treasury Securities is reflected in their exclusion from the concentration requirements applicable to fixed income securities in Nasdaq Rule 5735(b)(1)(B)(ii). The Exchange proposes that the Fund will comply with the concentration requirements in Nasdaq Rule 5735(b)(1)(D)(ii) except with respect to the Fund's investment in Eurodollar and G-7 Sovereign Futures and Options. The Exchange believes that this alternative limitation is appropriate to provide the Fund with sufficient flexibility and because of the highly liquid and transparent nature of Eurodollar and G-7 Sovereign Futures and Options. Further, as described above, the G-7 Sovereign Futures and Options in which the Fund invests will be listed on an exchange that is an ISG member or an exchange with which the Exchange has 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 the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily every Business Day that the Fund is traded, and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency.

Moreover, the Intraday Indicative Value, available on the Nasdaq Information LLC proprietary index data service, will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Regular Market Session. On each Business Day, before commencement of trading in the Shares in the Regular Market Session on the Exchange, the Fund will disclose on its website the Disclosed Portfolio of the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day. Information regarding the previous day's closing price and

on the Osaka Exchange was approximately 80,000 contracts). The Exchange also notes that the Commission has previously granted exemptions under the Act to facilitate the trading of futures on sovereign debt issued by each of the Group of Seven countries (among other countries) and that such exemptions were based in part on the Commission's assessment of the sufficiency of the credit ratings and liquidity of such sovereign debt. See 17 CFR 240.3a12-8; Securities Exchange Act Release No. 41453 (May 26, 1999), 64 FR 29550 (June 2, 1999).

trading volume information for the Shares will be published daily in the financial section of newspapers. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the Business Day on brokers' computer screens and other electronic services. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the CTA plans for the Shares and for the following U.S. securities, to the extent they are exchange-listed: Work Out Securities, Non-Convertible Preferred Securities, warrants, convertible fixed income and convertible preferred securities and ETFs. Price information for U.S. exchange-listed options will be available via the Options Price Reporting Authority and for other U.S. Exchange-Traded Derivatives will be available from the applicable listing exchange and from major market data vendors. Price information for restricted securities will be available from major market data vendors, broker-dealers and trading platforms, as well as for most fixed income securities sold in transactions under Rule 144A under the Securities Act, from TRACE and EMMA. Money Market Funds are typically priced once each Business Day and their prices will be available through the applicable fund's website or from major market data vendors.

For other exchange-listed securities (to be comprised primarily of ETFs, warrants and structured notes and which may include exchange-listed securities of both U.S. and non-U.S. issuers), equities traded in the over-the-counter market (including Work Out Securities and Non-Convertible Preferred Securities), Exchange-Traded Derivatives (including U.S. or foreign), OTC Derivatives, Debt and fixed income securities (including convertible fixed income and convertible preferred securities), and the small number of Securitized Products that are not reported to TRACE, intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable). Price information is generally not available for OTC warrants, and these instruments will be subject to the Fund's fair valuation procedures unless the Fund is able to secure price information from market data vendors or broker dealers. TRACE will be a source of price information for most of the U.S. dollar

denominated corporate bonds,¹²⁵ GSE-sponsored securities, Securitized Products and other U.S. dollar denominated fixed income securities in which the Fund invests.¹²⁶ Intraday and other price information related to foreign government securities, Money Market Funds, and other cash equivalents that are traded over-the-counter and other Non-TRACE Eligible Securities as well as prices for Treasury Securities, CDOs, commercial mortgage-backed securities, or CMOs purchased through transactions that do not qualify for periodic dissemination by FINRA¹²⁷ will be available through major market data vendors, such as Bloomberg, Markit, IDC and Thomson Reuters, which can be accessed by APs and other investors. EMMA will be a source of price information for municipal bonds. Pricing for repurchase transactions and reverse repurchase agreements entered into by the Fund are not publicly reported. Prices are determined by negotiation at the time of entry with counterparty brokers, dealers and banks.

The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Trading in the Shares of the Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121 or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and

¹²⁵ Broker-dealers that are FINRA member firms have an obligation to report transactions in specified debt securities to TRACE to the extent required under applicable FINRA rules. Generally, such debt securities will have at issuance a maturity that exceeds one calendar year. For fixed income securities that are not reported to TRACE, (i) intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable) and (ii) price information will be available from feeds from market data vendors, published or other public sources, or online information services, as described above.

¹²⁶ Broker-dealers that are FINRA member firms have an obligation to report transactions in TRACE-Eligible Securities to TRACE. For the definition of "TRACE-Eligible Security," see FINRA Rule 6710(a).

¹²⁷ See *supra* note 100.

quotation and last sale information for the Shares.

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 actively-managed ETF that will enhance competition among market participants, to the benefit of investors and the marketplace.

For the above reasons, the Exchange believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of 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 that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of actively-managed ETF that will enhance competition among market participants, to the benefit of investors and the marketplace.

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. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹²⁸ In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, is consistent with Section 6(b)(5) of the Act,¹²⁹ which requires, among other things, that the Exchange's rules be 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 a national market system, and, in general, to protect investors and the public interest.

As discussed above, the Fund will not comply with a number of the generic

¹²⁸ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹²⁹ 15 U.S.C. 78f(b)(5).

requirements in the initial and continued listing standards for Managed Fund Shares set forth in Nasdaq Rule 5735(b)(1). The Exchange states that it will be able to appropriately monitor and surveil trading in the underlying investments, including those that do not meet the generic listing requirements.¹³⁰ The Exchange also states that any risks that may arise due to the Fund not meeting certain of the generic listing requirements are mitigated and addressed through alternative limits on the Fund proposed by the Exchange.¹³¹ In addition, the Exchange states that the Fund will be well diversified.¹³²

With respect to its investments in derivatives, the Fund will not comply with the requirements in Nasdaq Rule 5735(b)(1) regarding the use of aggregate gross notional value of derivatives when calculating the weight of such derivatives or the exposure that such derivatives provide to underlying reference assets. Instead, the Exchange proposes that, for the purposes of any applicable requirements under Nasdaq Rule 5735(b)(1) and any alternative requirements proposed by the Exchange, the Fund will use the mark-to-market value of derivatives in calculating the weight of such derivatives or the exposure that such derivatives provide to their reference assets. The Exchange states its belief that mark-to-market value is a more accurate measurement of the actual exposure incurred by the Fund in connection with a derivatives position.¹³³ In addition, the Exchange states that the proposed mark-to-market methodology for valuing derivatives positions is consistent with other Commission proposals and policies and is the measure on which collateral posting is based under the ISDA Master Agreement.¹³⁴

With respect to its investments in ABS/Private MBS, the Fund will not meet the generic listing requirement that securities comprising at least 90% of the fixed income weight of the Fund's portfolio meet one of the criteria set forth in Nasdaq Rule 5735(b)(1)(B)(iv).¹³⁵ The Exchange represents that all fixed income securities held by the Fund other than ABS/Private MBS will comply with the 90% requirement under Nasdaq Rule 5735(b)(1)(B)(iv).¹³⁶ In addition, the

¹³⁰ See *supra* "Application of Generic Listing Requirements."

¹³¹ See *supra* "Statutory Basis."

¹³² See *supra* "Application of Generic Listing Requirements."

¹³³ See *supra* note 113 and accompanying text.

¹³⁴ See *supra* notes 56–59 and accompanying text.

¹³⁵ See *supra* note 79.

¹³⁶ See *supra* "Application of Generic Listing Requirements." As discussed above, the Exchange

Exchange notes that the Fund's investment portfolio will be diverse, and that the Sub-Adviser closely monitors investments to ensure maintenance of credit and liquidity standards.¹³⁷

The Exchange states that the Fund's investments in ABS/Private MBS will, in accordance with Nasdaq Rule 5735(b)(1)(B)(v), be limited to 20% of the weight of the fixed income portion of the Fund's portfolio, except with respect to CDOs. As discussed above, for purposes of this Fund, the Exchange will exclude CDOs from the definition of "ABS" and, as a result, CDOs will not be subject to the 20% limitation on aggregate ABS/Private MBS holdings pursuant to Rule 5735(b)(1)(B)(v). In the alternative, the Exchange represents that the Fund's investments in CDOs will be limited to 10% of the total assets of the Fund, which the Exchange explains will help to ensure that the Fund maintains a diversified portfolio and will mitigate the risk of manipulation.¹³⁸

For purposes of this Fund, the Exchange proposes to classify bank loans as Debt rather than "fixed income securities" (as they are classified in Nasdaq Rule 5735(b)(1)(B)). As a result, the Fund's investments in bank loans would comply with the proposed limitations applicable to investments in Debt set forth above¹³⁹ rather than with the restrictions for fixed income securities set forth in Nasdaq Rule 5735(b)(1)(B)(i)–(v).¹⁴⁰

The Fund will not comply with the listing requirements related to investments in equities set forth in Nasdaq Rule 5735(b)(1)(A)¹⁴¹ with respect to its investments in Non-Convertible Preferred Securities, Work Out Securities, and Equity-Related Warrants. Instead, the Exchange represents that: (i) The weight of Non-Convertible Preferred Securities, Work Out Securities, and Equity-Related Warrants in the Fund's portfolio in the aggregate will not exceed 15% of the Fund's assets; (ii) the Fund will not invest more than 5% of its total assets in Fixed-Income Related Warrants and Equity-Related Warrants that are traded OTC; and (iii) all exchange-listed securities (including Non-Convertible Preferred Securities, Work Out Securities and Equity-Related Warrants)

states that for purposes of this requirement, the weight of the Fund's exposure to any fixed income securities referenced in derivatives held by the Fund would be calculated based on the mark-to-market value of such derivatives.

¹³⁷ See *supra* "Statutory Basis."

¹³⁸ See *supra* "Statutory Basis."

¹³⁹ See *supra* "Investment Restrictions."

¹⁴⁰ See *supra* note 70.

¹⁴¹ See *supra* notes 84–85.

and Exchange-Traded Derivatives held by the Fund that are listed and traded on a non-ISG member exchange or an exchange with which the Exchange does not have a comprehensive surveillance sharing agreement (“CSSA”) will be limited to 10% of the Fund’s net assets.¹⁴² The Exchange believes these alternative limitations are appropriate because the Non-Convertible Preferred Securities, Work Out Securities, and Equity-Related Warrants will provide debt-oriented exposures or are received in connection with the Fund’s previous investments in Debt or fixed income securities.¹⁴³ In addition, the Exchange states that because in most cases OTC-traded warrants are not subject to publicly-reported price feeds, limiting these investments to 5% of the assets will help to ensure the Fund’s portfolio remains liquid and transparent.¹⁴⁴

The Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(E) that no more than 20% of the assets in the Fund’s portfolio may be invested in over-the-counter derivatives. Instead, the Exchange proposes that there would be no limit on the Fund’s investments in Interest Rate and Currency Derivatives, and that the aggregate weight of all OTC Derivatives other than Interest Rate and Currency Derivatives will not exceed 10% of the Fund’s assets.¹⁴⁵ The Exchange states that allowing the Fund to invest an unlimited amount of its assets in Interest Rate and Currency Derivatives is necessary to allow the Fund to risk manage its portfolio.¹⁴⁶ In addition, the Exchange states its belief that Interest Rate and Currency Derivatives are not readily subject to manipulation given the size, liquidity, and regulatory oversight of the trading market for such instruments.¹⁴⁷

The Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(D)(i) that at least 90% of the weight of the Fund’s holdings in futures, exchange-traded options, and listed swaps shall, on both an initial and continuing basis, consist of futures, options, and swaps for which the Exchange may obtain information via the ISG from other members or affiliates of the ISG, or for which the principal market is a market with which the Exchange has a CSSA. Instead, the

Exchange proposes that no more than 10% of the net assets of the Fund will be invested in Exchange-Traded Derivatives and exchange-listed securities whose principal market is not a member of ISG or is not a market with which the Exchange has a CSSA.¹⁴⁸ The Exchange believes that this alternative limit is appropriate because, relative to the overall size of the Fund, the Fund’s investment in non-ISG/CSSA derivatives and exchange-listed securities will be small.¹⁴⁹

Finally, the Exchange states that the Fund may maintain significant positions in Eurodollar and G–7 Sovereign Futures and Options, and that as a result, the Fund will not comply with the requirement in Nasdaq Rule 5735(b)(1)(D)(ii) that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets not exceed 65% of the weight of the Fund’s portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset not exceed 30% of the weight of the Fund’s portfolio (including gross notional exposures). The Exchange states that Eurodollar and G–7 Sovereign Futures and Options are highly liquid investments and are not subject to the same concentration risks as Exchange-Traded Derivatives referencing other assets because of such liquidity.¹⁵⁰ In addition, the Exchange represents that the G–7 Sovereign Futures and Options in which the Fund will invest will be listed on an exchange that is an ISG member or an exchange with which the Exchange has a CSSA.¹⁵¹ The Exchange represents that the Fund will comply with the concentration requirements in Nasdaq Rule 5735(b)(1)(D)(ii) except with respect to its investments in Eurodollar and G–7 Sovereign Futures and Options.¹⁵²

Other than as described above, the Fund will meet all the requirements of Nasdaq Rule 5735. For the reasons articulated by the Exchange above, the Commission believes that these proposed initial and continued listing requirements, including the alternative limitations on the Fund’s proposed

holdings described above, are designed to mitigate the potential for manipulation of the Shares.

The Commission finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,¹⁵³ which sets forth Congress’s finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges (“UTP”) and the CTA plans. Further, as required by Nasdaq Rule 5735(d)(2)(A), the Intraday Indicative Value, available on the Nasdaq Information LLC proprietary index data service,¹⁵⁴ will be widely disseminated by one or more major market data vendor at least every 15 seconds during the Exchange’s Regular Market Session. 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. In addition, the Fund’s website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

Quotation and last sale information for exchange-listed Work Out Securities, Non-Convertible Preferred Securities, warrants, convertible fixed income securities and convertible preferred securities, and ETFs will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the UTP and the CTA plans. Price information for U.S. exchange listed options will be available via the Options Price Reporting Authority and price information for other U.S. Exchange-Traded Derivatives will be available from the applicable listing exchange and from major market data vendors. Price information for TRACE-Eligible Securities sold in transactions under Rule 144A under the Securities Act will generally be available through TRACE and information regarding transactions in non-TRACE-Eligible Securities or transactions not otherwise subject to TRACE reporting will be available from

¹⁴² See *infra* notes 148–149 and accompanying text.

¹⁴³ See *supra* “Statutory Basis.”

¹⁴⁴ See *id.*

¹⁴⁵ As discussed above, for purposes of this 10% limit on OTC Derivatives, the weight of such OTC Derivatives would be calculated based on the mark-to-market value of such OTC Derivatives.

¹⁴⁶ See *supra* “Statutory Basis.”

¹⁴⁷ See *id.*

¹⁴⁸ As discussed above, for purposes of this 10% limit, the weight of such Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives.

¹⁴⁹ See *supra* “Statutory Basis.”

¹⁵⁰ See *supra* note 124 and accompanying text.

¹⁵¹ See *supra* “Statutory Basis.”

¹⁵² See *id.* As discussed above, for purposes of this requirement, the weight of the applicable Exchange-Traded Derivatives will be calculated based on the mark-to-market value of such Exchange-Traded Derivatives.

¹⁵³ 15 U.S.C. 78k–1(a)(1)(C)(iii).

¹⁵⁴ See *supra* note 98.

major market data vendors and broker-dealers. For most of the U.S. dollar denominated corporate bonds, GSE-sponsored securities, Securitized Products, and other U.S. dollar denominated fixed income securities in which the Fund invests, price information will be available from TRACE and EMMA.¹⁵⁵ For those instruments for which FINRA does not disseminate price information from TRACE, such as CDOs and fixed income securities denominated in foreign currencies, pricing information will be available from major market data vendors and broker-dealers. For other exchange-listed securities (to be comprised primarily of ETFs, warrants, and structured notes and which may include exchange-listed securities of both U.S. and non-U.S. issuers), equities traded in the OTC market (including Work Out Securities and Non-Convertible Preferred Securities), Exchange-Traded Derivatives (including U.S. or foreign), OTC Derivatives, Debt, fixed income securities (including convertible fixed income and convertible preferred securities), and Securitized Products that are not reported to TRACE, intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable). Price information for such securities and instruments will also be available from feeds from major market data vendors, published or other public sources, or online information services. Intraday and other price information related to foreign government securities, Money Market Funds, and other cash equivalents that are traded OTC, and other Non-TRACE Eligible Securities, as well as prices for Treasury Securities, CDOs, commercial mortgage-backed securities, or CMOs purchased through transactions that do not qualify for periodic dissemination by FINRA will be available through major market data vendors, such as Bloomberg, Markit, IDC, and Thomson Reuters, which can be accessed by APs and other investors. Price information for Money Market Funds will also be available through the applicable fund's website or from major market data vendors. Pricing information for repurchase transactions and reverse repurchase agreements entered into by the Fund is not publicly reported. Price information is generally not available for OTC warrants, and these instruments will be subject to the Fund's fair valuation procedures unless the Fund is able to secure price

information from market data vendors or broker-dealers.

The Commission also believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange states that it will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.¹⁵⁶ In addition, the Exchange represents that on each Business Day, before commencement of trading in the Shares in the Regular Market Session on the Exchange, the Fund will disclose on its website the Disclosed Portfolio of the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day, and that this website information will be available free of charge. Further, trading 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. Trading in the Shares also will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of a fund may be halted.

The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange states that neither the Manager nor the Sub-Adviser is a broker-dealer, but that each is affiliated with a broker-dealer and has implemented, and will maintain, a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Fund's portfolio. Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.¹⁵⁷

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange represents that:

(1) The Shares will be subject to Nasdaq Rule 5735, which sets forth the

initial and continued listing criteria applicable to Managed Fund Shares. Other than as described above, the Fund will meet all requirements of Nasdaq Rule 5735(b)(1). The Fund's investments will be subject to the limitations described in Section II.A above.

(2) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

(3) Trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, and 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 applicable federal securities laws.

(4) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund with other markets and other entities that are members of ISG and with which the Exchange has CSSAs, and FINRA and the Exchange both may obtain information regarding trading in the Shares, the exchange-listed securities, derivatives, and other instruments held by the Fund from markets and other entities that are members of ISG, which include securities and futures exchanges and swap execution facilities, or with which the Exchange has in place a CSSA. FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for most of the fixed income securities held by the Fund through reporting on TRACE and, with respect to municipal securities, EMMA.

(5) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or

¹⁵⁶ See Nasdaq Rule 5735(d)(1)(B).

¹⁵⁷ See Nasdaq Rule 5735(d)(2)(B)(ii). The term "Reporting Authority" is defined in Nasdaq Rule 5735(c)(4).

¹⁵⁵ See *supra* note 100. EMMA will be a source of price information for municipal bonds.

concurrently with the confirmation of a transaction; and (f) trading information.

(6) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(7) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.¹⁵⁸

(8) The Fund's investments, including derivatives, will be consistent with the Fund's investment objectives and applicable legal requirements, and will not be used to seek leveraged returns or performance that is the multiple or inverse multiple of a benchmark (although derivatives may have embedded leverage). Although the Fund will be permitted to borrow as permitted under the 1940 Act, it will not be operated in a manner designed to seek leveraged returns or a multiple or inverse multiple of the performance of an underlying reference index.

The Exchange represents that all statements and representations made in the filing regarding: (1) The description of the portfolio or reference assets; (2) limitations on portfolio holdings or reference assets; (3) dissemination and availability of the reference asset or Intraday Indicative Values; or (4) the applicability of Exchange listing rules constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

This approval order is based on all of the Exchange's statements and representations, including those set forth above and in Amendment Nos. 1, 2 and 3.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2 and 3 is consistent with Section 6(b)(5) of the Act¹⁵⁹ and Section 11A(a)(1)(C)(iii) of the Act¹⁶⁰ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments on Amendment No. 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 3 to the proposed rule change are 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-2018-080 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-NASDAQ-2018-080. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2018-080, and should be submitted on or before February 27, 2019.

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 1, 2 and 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 1, 2 and 3 prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the **Federal Register**. The Commission notes that Amendment No. 3 clarifies the proposed investments of the Fund, including any limitations on such investments. Amendment No. 3 also provides other clarifications and additional information to the proposed rule change.¹⁶¹ The changes and additional information in Amendment No. 3 assist the Commission in finding that the proposal is consistent with the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁶² to approve the proposed rule change, as modified by Amendment Nos. 1, 2 and 3 on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶³ that the proposed rule change (SR-NASDAQ-2018-080), as modified by Amendment Nos. 1, 2 and 3, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶⁴

Eduardo A. Aleman,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85019; File No. SR-NYSE-2018-52]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Amend Rule 7.31 Relating to Discretionary Orders, Auction-Only Orders, Discretionary Modifier, and Yielding Modifier and Related Amendments to Rules 7.16, 7.34, 7.36, and 7.37

January 31, 2019.

On November 29, 2018, New York Stock Exchange LLC ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant

¹⁶¹ See *supra* note 8.

¹⁶² 15 U.S.C. 78s(b)(2).

¹⁶³ *Id.*

¹⁶⁴ 17 CFR 200.30-3(a)(12).

¹⁵⁸ See 17 CFR 240.10A-3.

¹⁵⁹ 15 U.S.C. 78f(b)(5).

¹⁶⁰ 15 U.S.C. 78k-1(a)(1)(C)(iii).

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 its Rule 7.31 Relating to Discretionary Orders, Auction-Only Orders, Discretionary Modifier, and Yielding Modifier and to make related amendments to Rules 7.16, 7.34, 7.36, and 7.37. The proposed rule change was published for comment in the **Federal Register** on December 18, 2018.³ The Commission has not received any comments on the proposal.

Section 19(b)(2) of the Act⁴ 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 after publication of the notice for this proposed rule change is February 1, 2019. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates March 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-NYSE-2018-52).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-01180 Filed 2-5-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85015; File No. SR-CBOE-2019-003]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

January 31, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 29, 2019, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) 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 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

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its fees schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule, effective February 1, 2019 to amend its fee incentive program for Lead Market-Makers (“LMM”) in SPX during Global Trading Hours (“GTH”). By way of background, pursuant to Footnote 38 of the Fees Schedule, a GTH LMM in SPX will receive a rebate for that month in the amount of a pro-rata share of a compensation pool equal to \$30,000 times the number of LMMs in that class (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) if the LMM: (1) Provides continuous electronic quotes in at least the lesser of 99% of the non-adjusted series or 100% of the non-adjusted series minus one call-put pair in an GTH allocated class (excluding intraday add-on series on the day during which such series are added for trading) during GTH in a given month; (2) enters opening quotes within five minutes of the initiation of an opening rotation in any series that is not open due to the lack of a quote, provided that the LMM will not be required to enter opening quotes in more than the same percentage of series set forth in clause (1) for at least 90% of the trading days during GTH in a given month; and (3) satisfies the following time-weighted average quote widths and bid/ask sizes for each moneyness category: (A) Out of the money options (“OTM”), average quote width of \$0.75 or less and average bid/ask size of 15 contracts or greater; (B) at the money options (“ATM”), average quote width of \$3.00 or less and bid/ask size of 10 contracts or greater; and (C) in the money options (“ITM”), average quote width of \$10.00 or less and bid/ask size of 5 contracts or greater.³ GTH LMMs in SPX are not obligated to satisfy the heightened quoting standards described above or in Rule 8.15 during GTH. Rather, GTH LMMs in SPX are eligible to receive a rebate if they satisfy the heightened standards described in the Fees Schedule, which the Exchange believes will encourage SPX LMMs to provide liquidity during GTH.

The Exchange proposes to amend Footnote 38 to modify the quoting standard a GTH LMM in SPX will need to satisfy in order to receive a rebate for its SPX GTH activity. Particularly, the Exchange proposes to modify prong

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 84806 (Dec. 12, 2018), 83 FR 64913 (Dec. 18, 2018).

⁴ 15 U.S.C. 78s(b)(2).

⁵ *Id.*

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Cboe Options Fees Schedule, Footnote 38.

3(A) of the quoting standard with respect to the required average quote width for OTM options. As noted, above, a GTH LMM in SPX must, among other things, provide an average quote width of \$0.75 or less and average bid/ask size of 15 contracts or greater for OTM options. The Exchange proposes to modify the OTM options average quote width requirement. Specifically the Exchange proposes to require that a GTH LMM in SPX provide an average quote width for OTM options of \$0.90 or less instead of \$0.75 or less. The Exchange proposes to widen the average quote width required as the current market has made it more difficult for a GTH LMM in SPX to maintain the same quality of markets as compared to previous market conditions that were less volatile. The Exchange continues to believe that time-weighted averages are a good way to assess the overall quality of the market.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁵ requirements that the rules of an exchange be 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 mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes amending the third prong in Footnote 38 is reasonable as it does not change the financial benefit offered. Additionally, the Exchange believes the proposed amendment is reasonable, equitable and not unfairly discriminatory because it applies to any appointed GTH LMM in SPX uniformly and because if the third prong, as amended, is not met, a GTH

SPX LMM merely will not receive the offered financial benefit. The Exchange also believes the requirement under the amended third prong is commensurate with the financial benefit offered. Additionally, the Exchange notes that current market conditions have made the current OTM average quote widths requirement more difficult to attain and the Exchange believes the amended averaged width quote is more appropriate given current market conditions. The Exchange believes that its proposed rule change removes impediments to and perfects the mechanism of a free and open national market system as it continues to incentivize any GTH LMMs in SPX to provide liquidity in SPX during GTH and meet the prescribed quoting standard.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it applies uniformly to all SPX GTH LMMs. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because SPX options are proprietary products that will only be traded on Cboe Options. To the extent that the proposed changes make Cboe Options a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become Cboe Options market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

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 Act⁷ and paragraph (f) of Rule 19b-4⁸ 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 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-CBOE-2019-003 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-CBOE-2019-003. 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

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

⁶ *Id.*

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f).

comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2019-003 and should be submitted on or before February 27, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-01172 Filed 2-5-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85023; File No. SR-NYSEAMER-2018-58]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE American Options Fee Schedule

January 31, 2019.

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 21, 2018, NYSE American LLC (the “Exchange” or “NYSE American”) 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 the Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE American Options Fee Schedule (“Fee Schedule”). The Exchange proposes to implement the fee change effective January 1, 2019. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule, effective January 1, 2019, to provide an incentive for Market Makers to provide more competitive prices and deeper liquidity in the NYSE FANG+ Index (“NYSE FANG+”), which trades under the symbol FAANG. The Exchange also proposes to eliminate the FAANG Rebate that it currently offers Floor Brokers as it failed to achieve its intended goal of encouraging Floor Brokers to bring FAANG business to the Trading Floor.

The Exchange introduced fees and rebates for transactions in FAANG in June 2018.⁴ Currently, the Exchange charges \$0.35 per contract, per side for non-Customer and Professional Customer FAANG transactions, whether executed manually or electronically.⁵ However, the Exchange does not charge a fee for any FAANG transactions (i) on behalf of Customers or (ii) by Market Makers with an appointment in NYSE FANG+.⁶ Thus, Market Makers that do not have an appointment in NYSE FANG+ are currently subject to the same fee of \$0.35 per contract, per side for non-Customer and Professional Customer FAANG transactions. The Exchange proposes to remove the requirement that a Market Maker have an appointment in FAANG to be able to transact in FAANG for free. The Exchange believes that removing this limitation would encourage Market Makers to trade in FAANG.

Concurrent with this change, the Exchange proposes to introduce credits for Market Maker organizations—

specifically, NYSE American Options Market Makers, Specialists, e-Specialists or DOMMs—that execute at least 500 total monthly contract sides that open a position on the Exchange (the “MM FAANG Credit” or “Credit”).⁷ Only those FAANG transactions marked as “open” would be eligible to be counted towards the MM FAANG Credit. As proposed, firms that meet the minimum volume threshold would receive a MM FAANG Credit of \$5,000; provided, however, that if more than ten firms qualify for a MM FAANG Credit in a calendar month, the Credit for each qualifying firm would be a pro rata share of \$50,000. The Exchange believes the proposed MM FAANG Credit would further the Exchange’s goal of encouraging trading in this new index product. In particular, the Exchange seeks to spur Market Makers to provide increased liquidity in tighter markets, which would create greater trading opportunities for all market participants.

Finally, the Exchange proposes to eliminate the FAANG Rebate that it currently offers Floor Brokers as it failed to achieve its intended goal of encouraging Floor Brokers to bring FAANG business to the Trading Floor.⁸

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act, 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 the proposal to remove the restriction that Market Makers must have an appointment in FAANG to avoid transactions fees in this product is reasonable, equitable and not unfairly discriminatory because this proposal would encourage Market Makers to provide liquidity in FAANG, a product that was only introduced in June 2018. In addition, the proposed FAANG transaction fee change would

⁴ See Securities Exchange Act Release No. 83553 (June 28, 2018), 83 FR 31431 (July 5, 2018) (SR-NYSEAMER-2018-34).

⁵ See Fee Schedule, Section I.A., Options Transaction Fees and Credits, Rates for Options Transactions, note 7 (Options on NYSE FANG+ Index (“FAANG”) transactions), available here: https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.

⁶ See *id.* The term Market Maker, as used herein, includes NYSE American Options Market Makers, Specialists, e-Specialists and Directed Order Market Makers (or DOMMs).

⁷ See proposed Fee Schedule, Section I.A., Options Transaction Fees and Credits, Rates for Options Transactions, note 7 (Options on NYSE FANG+ Index (“FAANG”) transactions).

⁸ See Securities Exchange Act Release No. 83617 (July 10, 2018), 83 FR 32930, 32930 (July 16, 2018) (SR-NYSEAMER-2018-36) (adopting the FAANG Rebate for Floor Brokers to “encourage[e] Floor Brokers to bring business to the Trading Floor, which would in turn, benefit all market participants through increased liquidity and more opportunities to trade”).

⁹ 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.

apply equally to all Market Maker organizations that transact in FAANG.

The Exchange believes the proposal to introduce a MM FAANG Credit for executing a certain number of options contract sides on FAANG is reasonable, equitable and not unfairly discriminatory for the following reasons. First, the proposed Credit would apply equally to all Market Maker organizations that transact in FAANG. Second, the proposed Credit would encourage Market Maker organizations to increase trading activity in FAANG. The Exchange anticipates that Market Makers seeking to reach the proposed 500 contract threshold will provide additional liquidity and trading opportunities for all market participants. The Exchange believes the proposed MM FAANG Credit is reasonable, equitable and not unfairly discriminatory because it is designed to further the Exchange's goal of encouraging transactions in FAANG, a new index product.

Finally, the Exchange believes the proposal to eliminate the FAANG Rebate that is currently offered to Floor Brokers is reasonable, equitable and not unfairly discriminatory because it would apply equally to all Floor Brokers. Further, the proposal would encourage the fair and efficient use of Exchange resources given that this incentive program failed to meet its stated goal of encouraging Floor Brokers to bring FAANG business to the Trading Floor.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed MM FAANG Credit for Market Maker organizations would not place an unfair burden on competition as it would apply to all similarly situated Market Makers. The Exchange also believes the proposed Credit is procompetitive as it would further the Exchange's goal of introducing new products to the marketplace and encouraging Market Makers to provide liquidity in these products, which would in turn, benefit all market participants. Market participants that do not wish to trade in FAANG are not obliged to do so.

To the extent that there is an additional competitive burden on market participants that are not eligible for the MM FAANG Credit (*i.e.*, non-Market Maker organizations), the Exchange believes that this is

appropriate because the proposal would incent Market Makers to provide increased liquidity in tighter markets, which would create greater trading opportunities for all market participants. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

The proposed elimination of the FAANG Rebate currently available to Floor Brokers likewise does not impose an unfair burden on competition as it failed to achieve its intended goal of encouraging Floor Brokers to bring FAANG business to the Trading Floor and applies equally to all similarly situated Floor Brokers.

The Exchange does not believe that the proposed change will impair the ability of any market participants or competing order execution venues to maintain their competitive standing in the financial markets. Further, the proposed Rebate would be applied to all similarly situated participants (*i.e.*, Market Maker organizations), and, as such, the proposed change would not impose a disparate burden on competition either among or between classes of market participants.

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)⁹ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁰ 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)¹¹ 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-NYSEAMER-2018-58 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-NYSEAMER-2018-58. 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

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(2).

¹¹ 15 U.S.C. 78s(b)(2)(B).

Number SR–NYSEAMER–2018–58, and should be submitted on or before February 21, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019–01173 Filed 2–5–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85021; File No. SR–NYSE–2018–58]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change To Amend Rule 123C To Extend the Cut-Off Times for Order Entry and Cancellation for Participation in the Closing Auction and When the Exchange Will Begin Disseminating Order Imbalance Information for the Closing Auction

January 31, 2019.

I. Introduction

On November 30, 2018, the New York Stock Exchange LLC (“Exchange” or “NYSE”) 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 NYSE Rule 123C (The Closing Procedures) to extend the cut-off times for order entry and cancellation for participation in the closing auction and to change the times during which the Exchange will disseminate order imbalance information for the closing auction. The proposed rule change was published for comment in the **Federal Register** on December 18, 2018.³ The Commission has received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

As described in more detail in the Notice, the Exchange proposes to amend NYSE Rule 123C (The Closing Procedures) to: (1) Extend the cut-off time for submitting and cancelling orders to participate in the closing auction, from 3:45 p.m. to 3:50 p.m.;⁴

(2) change the time for determining the “last sale price” for purposes of calculating the Mandatory MOC/LOC Imbalance Publication, from 3:45 p.m. to 3:50 p.m.;⁵ (3) change the time for Mandatory MOC/LOC Imbalance Publication, Informational Imbalance Publication, and publication of Order Imbalance Information, from 3:45 p.m. to 3:50 p.m.;⁶ and (4) extend the time during which Exchange systems would disseminate closing imbalances to NYSE floor brokers, from 2:00 p.m. to 3:45 p.m., to 2:00 p.m. to 3:50 p.m.⁷ As stated in the Notice, the Exchange also proposes to make non-substantive changes to NYSE Rule 123C. The proposal would not change how the Exchange conducts the closing auction.

III. Discussion and Commission Findings

After careful review of the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁸ In particular, the Commission finds that the proposed rule change is consistent Section 6(b)(5) of the Act,⁹ which requires that the rules of a national security exchange are 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 mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange asserts that the extension of the time frame for Exchange members to enter and cancel orders for the closing auction should allow Exchange members more control to conduct end-of-day trading, and that the additional time for publication of Informational Imbalance Publication until 3:50 p.m. and the publication of the Mandatory MOC/LOC Imbalance Publication, when required by NYSE rule, should help investors to better understand imbalance and manage their orders. The Commission notes that the proposal is consistent with the rules of

other national securities exchanges with respect to order cut-off times,¹⁰ and that the Commission recently approved a proposed rule change by the Nasdaq Stock Market LLC to move the cut-off times for the entry of Market on Close and Limit on Close orders from 3:50 p.m. to 3:55 p.m.¹¹ The Commission also believes that it is appropriate, when changing order cut-off times, to make corresponding changes relating to the dissemination of order imbalance information.

IV. Conclusion

It is Therefore Ordered that, pursuant to Section 19(b)(2) of the Act,¹² the proposed rule change (SR–NYSE–2018–58) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019–01175 Filed 2–5–19; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2017–0043]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Office of Personnel Management (OPM).

The agreement between SSA and OPM sets forth the terms, conditions, and safeguards under which OPM will disclose civil service benefit and payment data to SSA. SSA is legally required to offset specific benefits by a percentage of civil service benefits received (Spousal and Survivors benefits, Supplemental Security Income (SSI) benefits, and Retirement and Disability Insurance Benefits are offset by a percentage of the recipients own Federal Government pension benefits). SSA administers the Old Age, Survivors, Disability Insurance (OASDI), SSI, and Special Veterans’ Benefits (SVB) programs. SSA will use the match

¹² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 84804 (Dec. 12, 2018), 83 FR 64910 (Dec. 18, 2018) (“Notice”).

⁴ See proposed NYSE Rule 123C(2) and (3).

⁵ See proposed NYSE Rule 123C(4)(a)(i).

⁶ See proposed NYSE Rule 123C(5) and (6)(a).

⁷ See proposed NYSE Rule 123C(6)(b).

⁸ In approving the proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ See The Nasdaq Stock Market LLC Rule 4754; Cboe BZX Exchange, Inc. Rule 11.23; and NYSE Arca, Inc. Rule 7.35–E(d)(2).

¹¹ See Securities Exchange Act Release No. 84454 (Oct. 19, 2018), 83 FR 53923 (Oct. 25, 2018) (SR–Nasdaq–2018–68).

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30–3(a)(12).

results under this agreement to meet its civil service benefit offset obligations. Appendices A, B, C, and D of this agreement contain specific information on the matching programs that SSA will conduct under this agreement. SSA's Office of the Chief Actuary (OCA) will also use OPM's data for statistical and research purposes in tracking the size of, and impact on, subpopulations of government annuitants affected by the Government Pension Offset (GPO), the Windfall Elimination Provision (WEP), and in cost estimates of proposals to change the two provisions.

DATES: The deadline to submit comments on the proposed matching program is 30 days from the date of publication of this notice in the **Federal Register**. The matching program will be applicable on October 1, 2018, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 966-0869, writing to Mary Ann Zimmerman, Acting Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G-401 WHR, 6401 Security Boulevard, Baltimore, MD 21235-6401, or emailing MaryAnn.Zimmerman@ssa.gov. All comments received will be available for public inspection by contacting Ms. Zimmerman at this street address.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Mary Ann Zimmerman, Acting Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, by any of the means shown above.

SUPPLEMENTARY INFORMATION: None.

Mary Zimmerman,

Acting Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies

SSA and OPM.

Authority for Conducting the Matching Program

The legal authority for SSA to conduct this matching activity for SSI purposes is section 1631(e)(1)(B) and (f) of the Social Security Act (Act) (42 U.S.C. 1383(e)(1)(B) and (f)), and for SVB purposes, is section 806 of the Act (42 U.S.C. 1006). The legal authority for SSA to conduct this matching activity for OASDI includes Section 224 of the Act (42 U.S.C. 424a), which provides for

the reduction of Social Security disability benefits when the disabled worker is also entitled to a Public Disability Benefit (PDB). Also, Section 215a(7)(A) of the Act (42 U.S.C. 415) requires a modification to the computation formula reducing the Primary Insurance Amount of a retired and disabled worker entitled to a pension from employment not covered under Social Security. Section 202k(5)(A) (42 U.S.C. 402) provides for the reduction of spouse's and survivor's benefits by a percentage of a pension received based on work not covered by Social Security.

Section 1631(f) of the Act (42 U.S.C. 1383(f)) requires Federal agencies to furnish SSA with information necessary to verify eligibility. Section 224(h)(1) of the Act (42 U.S.C. 424a(h)(1)) requires any Federal agency to provide SSA with information in its possession that SSA may require for the purposes of making a timely determination of the amount of reduction under section 224 of the Act (42 U.S.C. 424a).

Purpose(s)

The purpose of this agreement is to set forth the terms, conditions, and safeguards under which OPM will disclose civil service benefit and payment data to SSA. SSA is legally required to offset specific benefits by a percentage of civil service benefits received (Spousal and Survivors benefits, SSI benefits, and Retirement and Disability Insurance Benefits are offset by a percentage of the recipients own Federal Government pension benefits). SSA administers the OASDI, SSI, and SVB programs. SSA will use the match results under this agreement to meet its civil service benefit offset obligations. Appendices A, B, C, and D of this agreement contain specific information on the matching programs that SSA will conduct under this agreement. SSA's OCA will also use OPM's data for statistical and research purposes in tracking the size of, and impact on, subpopulations of government annuitants affected by the GPO, the WEP, and in cost estimates of proposals to change the two provisions.

Categories of Individuals

The individuals whose information is involved in this matching program are those individuals who are receiving civil service benefits and payments, and either Spousal and Survivors benefits, SSI or SVB benefits, or Retirement and Disability Insurance benefits.

Categories of Records

OPM will provide SSA with an electronic file containing civil service

benefit and payment data from the annuity and survivor master file. Each month, OPM will provide SSA with an electronic file that will include updated payment information for new civil service annuitants and annuitants whose civil service annuity has changed. This monthly file contains approximately 25,000 records. OPM will provide SSA with the entire master annuity file of approximately 2.7 million records once yearly for the month of the civil service cost-of-living allowance. OPM will furnish SSA with the following civil service benefit and payment data: Name; Social Security number (SSN); date of birth; civil service claim number; first potential month and year of eligibility; first month, day, and year of entitlement; amount of current gross civil service benefits; effective date (month, day, and year) of civil service amount; SSNs for disabled children; retroactive payments; and payments that are currently coded 'special pay.'

SSA will attempt to verify the SSNs furnished by OPM using the SSA Enumeration System database and the individuals' name, date of birth, and SSN. SSA will only use verified SSNs in the matches with its systems of records (SOR). SSA will match the SSN-verified OPM data against the Supplemental Security Record and Master Beneficiary Record to identify: SSI/SVB recipients who are also receiving a civil service pension; individuals who may be subject to PDB offset; and beneficiaries subject to a Federal pension offset.

System(s) of Records

OPM will provide SSA with monthly electronic files from the OPM SOR published as OPM/Central-1 (Civil Service Retirement and Insurance Records), as amended on March 20, 2008 (73 FR 15013). SSA will conduct the match using the individual's SSN, name, and date of birth on both the OPM file and SSA's databases covered under the following SSA SORs: the Master Files of Social Security Number (SSN) Holders and SSN Applications (Enumeration System), 60-0058, as published at 75 FR 82121 (December 29, 2010), as amended at 78 FR 40542 (July 5, 2013), 79 FR 8780 (February 13, 2014), 83 FR 31250-31251 (July 3, 2018), and 83 FR 54969 (November 1, 2018); the Master Beneficiary Record (MBR), 60-0090, as published at 71 FR 1826 (January 11, 2006), as amended at 72 FR 69723 (December 10, 2007), 78 FR 40542 (July 5, 2013), 83 FR 31250-31251 (July 3, 2018), and 83 FR 54969 (November 1, 2018); and the Supplemental Security Income Record

and Special Veterans Benefits (SSR/SVB), 60–0103, as published at 71 FR 1830 (January 11, 2006), as amended at 72 FR 69723 (December 10, 2007), 83 FR 31250–31251 (July 3, 2018), and 83 FR 54969 (November 1, 2018).

[FR Doc. 2019–01198 Filed 2–5–19; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 10666]

Notice of Intent To Re-Establish a Federal Advisory Committee

AGENCY: Department of State.

ACTION: Notice of Intent To Re-Establish the Shipping Coordinating Committee.

Under the provisions of Public Law 92–463, Federal Advisory Committee Act, notice is hereby given that the Department intends to re-establish the Shipping Coordinating Committee. The Department affirms that this advisory committee is necessary and in the public interest.

Good cause: This Committee's charter expired on January 27, 2019. The Department was unable to renew the Committee's charter prior to the expiration date due to the recent lapse in federal government appropriations. Notices of re-establishment must appear in the **Federal Register** at least 15 calendar days before a charter is filed unless the Secretariat approves a shorter timeframe for good cause (41 CFR 102–3.65(b)). The Department has requested, and the Secretariat has approved, publication of this notice concurrent with the filing of the charter due to the lapse in appropriations.

Nature and Purpose: The Committee was initially established in 1958 to provide a forum for interested members of government and the public-private citizens, members of the maritime shipping industry, non-governmental organizations, small businesses, environmental organizations, and labor groups to participate in discussions about shipping initiatives to be considered by the International Maritime Organization (IMO). The United States government, through the Committee, solicits the views of interested members of the public on a wide range of technical issues connected with international shipping safety, security, and environmental protection. Generally, meetings are convened prior to meetings of the IMO and other international meetings as necessary to discuss and make recommendations to the Secretary of State and to guide the U.S. delegations.

Any determinations of action to be taken as a result of the work of the Committee shall be made by the Chairman or other appropriate full-time salaried United States government officials.

For further information about this advisory committee, please contact: Lieutenant Commander Joel C. Coito, Executive Secretary, Shipping Coordinating Committee, U.S. Department of State, Office of Ocean and Polar Affairs, at coitojc@state.gov or by telephone at (202) 647–3946.

Joel C. Coito,

Executive Secretary, Shipping Coordinating Committee, U.S. Department of State.

[FR Doc. 2019–01199 Filed 2–5–19; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice: 10668]

Notice of Public Meeting

The Department of State will conduct an open meeting at 10:00 a.m. on February 21, 2019, in room 6K15–15 of the Douglas A. Munro Coast Guard Headquarters Building at St. Elizabeth's, 2703 Martin Luther King Jr. Avenue SE, Washington, DC 20593. The primary purpose of the meeting is to prepare for the sixth session of the International Maritime Organization's (IMO) Sub-Committee on Ship Systems and Equipment to be held at the IMO Headquarters, United Kingdom, March 4–8, 2019.

The agenda items to be considered include:

- Adoption of the Agenda
- Decisions of other IMO bodies
- Safety objectives and functional requirements of the Guidelines on alternative design and arrangements for SOLAS chapters II–1 and III
- Develop new requirements for ventilation of survival craft
- Consequential work related to the new Code for ships operating in polar waters
- Review SOLAS chapter II–2 and associated codes to minimize the incidence and consequences of fires on ro-ro spaces and special category spaces of new and existing ro-ro passenger ships
- Amendments to MSC.1/Circ.1315
- Amendments to chapter 9 of the FSS Code for fault isolation requirements for cargo ships and passenger ship cabin balconies fitted with individually identifiable fire detector systems
- Requirements for onboard lifting appliances and anchor handling winches

- Revised SOLAS regulations II–1/13 and II–1/13–1 and other related regulations for new ships
- Development of guidelines for cold ironing of ships and consideration of amendments to SOLAS chapters II–1 and II–2
- Unified interpretation of provisions of IMO safety, security and environment-related conventions
- Amendments to paragraph 4.4.7.6.17 of the LSA Code concerning single fall and hook systems with on-load release capability
- Revision of the Standardized Life-Saving Appliance Evaluation and Test Report Forms (MSC/Circ.980 and addenda)
- Biennial status report and provisional agenda for SSE 7
- Election of Chair and Vice-Chair for 2020
- Any other business

Members of the public may attend this meeting up to the seating capacity of the room. Upon request to the meeting coordinator, members of the public may also participate via teleconference, up to the capacity of the teleconference phone line. To access the teleconference line, participants should call (202) 475–4000 and use Participant Code: 796 771 84. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, LT Alexandra Miller, by email at Alexandra.S.Miller@uscg.mil, by phone at (202) 372–1356, or in writing at 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington, DC 20593–7509 not later than February 14, 2019, 7 days prior to the meeting. Requests made after February 14, 2019 might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Coast Guard Headquarters building. It is recommended that attendees arrive no later than 30 minutes ahead of the scheduled meeting for the security screening process. The Headquarters building is accessible by taxi, public transportation, and privately owned conveyance (upon request). In the case of inclement weather where the U.S. Government is closed or delayed, a public meeting may be conducted virtually by calling (202) 475–4000 or 1–855–475–2447, Participant code: 796 771 84. The meeting coordinator will confirm whether the virtual public meeting will be utilized. Members of the public can find out whether the U.S.

Government is delayed or closed by visiting www.opm.gov/status/.

Joel C. Coito,

Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.

[FR Doc. 2019-01292 Filed 2-5-19; 8:45 am]

BILLING CODE 4710-09-P

DEPARTMENT OF STATE

[Public Notice 10631]

60-Day Notice of Proposed Information Collection: Request for Commodity Jurisdiction Determination

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 April 8, 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-2018-0058" in the Search field. Then click the "Comment Now" button and complete the comment form.

- *Email:* The public email comments to DDTCPublicComments@state.gov. Include "ATTN: OMB Approval, Request for Commodity Jurisdiction Determination" in the subject of the email.

- *Mail:* The public may mail comments to the Directorate of Defense Trade Controls, Department of State, 2401 E St. NW, Suite H1205, Washington, DC 20522.

You must include the information collection title (Request for Commodity Jurisdiction Determination), form number (DS-4076), and the OMB control number (1405-0163) in all correspondence.

FOR FURTHER INFORMATION CONTACT:

Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents,

to Andrea Battista, who may be reached at battistaal@state.gov.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Commodity Jurisdiction Determination.

- *OMB Control Number:* 1405-0163.

- *Type of Request:* Revision of a Currently Approved Collection.

- *Originating Office:* Directorate of Defense Trade Controls (PM/DDTC).

- *Form Number:* DS-4076.

- *Respondents:* Any person requesting a commodity jurisdiction determination.

- *Estimated Number of Respondents:* 600.

- *Estimated Number of Responses:* 600.

- *Average Time per Response:* 4 hours.

- *Total Estimated Burden Time:* 2,400 annual hours.

- *Frequency:* On occasion.

- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

- Enhance the quality, utility, and clarity of the information to be collected.

- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

Pursuant to ITAR § 120.4, a person, as defined by ITAR § 120.14, may request a written determination from the Department of State stating whether a particular article or defense service is covered by the United States Munitions List (USML). Form DS-4076 is the means by which respondents may submit this request. Information submitted via DS-4076 will be shared with the Department of Defense, Department of Commerce, and other USG agencies, as needed, during the commodity jurisdiction process. Determinations will be made on a case-by-case basis based on the commodity's form, fit, function, and performance capability.

Methodology

Respondents must submit the DS-4076 electronically through DDTC's electronic system. Respondents may access the DS-4076 on DDTC's website, www.pmdtdc.state.gov, under Commodity Jurisdictions (CJs).

Anthony M. Dearth,

Chief of Staff, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2019-01309 Filed 2-5-19; 8:45 am]

BILLING CODE 4710-25-P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Minor Modifications

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the minor modifications approved for a previously approved project by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: December 1-31, 2018.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110-1788.

FOR FURTHER INFORMATION CONTACT:

Jason E. Oyler, General Counsel, telephone: (717) 238-0423, ext. 1312; fax: (717) 238-2436; email: joyler@srbcc.net. Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists previously approved projects, receiving approval of minor modifications, described below, pursuant to 18 CFR 806.18 for the time period specified above:

Minor Modifications Issued Under 18 CFR 806.18

1. Golf Enterprises, Inc. d.b.a. Valley Green Golf Course, Docket No. 20021019-2, Newberry Township, York County, Pa.; approval to add SUEZ Water Pennsylvania Inc.—Newberry System public water supply as a source of water for consumptive use; Approval Date: December 20, 2018.

Authority: Pub. L. 91-575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: February 1, 2019.

Jason E. Oyler,

Acting Secretary to the Commission.

[FR Doc. 2019-01248 Filed 2-5-19; 8:45 am]

BILLING CODE 7040-01-P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: December 1–31, 2018.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT:

Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: joyler@srbc.net. Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and § 806.22 (f) for the time period specified above:

Approvals By Rule Issued Under 18 CFR 806.22(e):

1. The Hershey Company; ABR–201812001; Hazle Township, Luzerne County, Pa.; Consumptive Use of Up to 0.051 mgd; Approval Date: December 6, 2018.

Approvals By Rule Issued Under 18 CFR 806.22(f):

1. XPR Resources, LLC; Pad ID: Alder Run Land LP 1H, ABR–201812002; Cooper Township, Clearfield County, Pa.; Consumptive Use of Up to 0.9990 mgd; Approval Date: December 14, 2018.

2. XPR Resources, LLC; Pad ID: Alder Run Land 3H, ABR–201812003; Cooper Township, Clearfield County, Pa.; Consumptive Use of Up to 0.9990 mgd; Approval Date: December 14, 2018.

3. SWN Production Company, LLC; Pad ID: NR–14–BRANT–PAD, ABR–201312001.R1; Great Bend Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 17, 2018.

4. SWN Production Company, LLC; Pad ID: NR–11–DAYTON–PAD, ABR–201312002.R1; Great Bend Township, Susquehanna County, Pa.; and Town of Windsor, Broome County, NY; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 17, 2018.

5. SWN Production Company, LLC; Pad ID: RU–40–BREESE–PAD; ABR–201312003.R1; New Milford Township,

Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: December 17, 2018.

6. ARD Operating, LLC; Pad ID: Kurt Haufler Pad A, ABR–201312005.R1; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: December 27, 2018.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: February 1, 2019.

Jason E. Oyler,

Acting Secretary to the Commission.

[FR Doc. 2019–01245 Filed 2–5–19; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will hold a public hearing on February 7, 2019, in Harrisburg, Pennsylvania. At this public hearing, the Commission will hear testimony on the projects listed in the **SUPPLEMENTARY INFORMATION** section of this notice. Such projects are intended to be scheduled for Commission action at its next business meeting, tentatively scheduled for March 15, 2019, which will be noticed separately. The public should take note that this public hearing will be the only opportunity to offer oral comment to the Commission for the listed projects. The deadline for the submission of written comments is February 18, 2019.

DATES: The public hearing will convene on February 7, 2018, at 2:30 p.m. The public hearing will end at 5:00 p.m. or at the conclusion of public testimony, whichever is sooner. The deadline for the submission of written comments is February 18, 2018.

ADDRESSES: The public hearing will be conducted at the Pennsylvania State Capitol, Room 8E–B, East Wing, Commonwealth Avenue, Harrisburg, Pa.

FOR FURTHER INFORMATION CONTACT: Ava Stoops, Administrative Specialist, telephone: (717) 238–0423; fax: (717) 238–2436.

Information concerning the applications for these projects is available at the Commission's Water Application and Approval Viewer at <https://mdw.srbc.net/waav>. Additional supporting documents are available to inspect and copy in accordance with the Commission's Access to Records Policy

at www.srbc.net/regulatory/policies-guidance/docs/access-to-records-policy-2009-02.pdf.

SUPPLEMENTARY INFORMATION: The public hearing will cover the following projects:

Projects Scheduled for Action

1. Project Sponsor and Facility: ADLIB Resources, Inc. (Meshoppen Creek), Springville Township, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.499 mgd (peak day) (Docket No. 20150301).

2. Project Sponsor: Aqua Pennsylvania, Inc. Project Facility: Beech Mountain System, Butler Township, Luzerne County, Pa. Application for groundwater withdrawal of up to 0.144 mgd (30-day average) from Beech Mountain Well 1.

3. Project Sponsor: Aqua Pennsylvania, Inc. Project Facility: Beech Mountain System, Butler Township, Luzerne County, Pa. Application for groundwater withdrawal of up to 0.144 mgd (30-day average) from Beech Mountain Well 2.

4. Project Sponsor: Aqua Pennsylvania, Inc. Project Facility: Beech Mountain System, Butler Township, Luzerne County, Pa. Application for groundwater withdrawal of up to 0.124 mgd (30-day average) from Beech Mountain Well 3.

5. Project Sponsor and Facility: Chesapeake Appalachia, L.L.C. (Susquehanna River), Braintrim Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 3.000 mgd (peak day) (Docket No. 20150303).

6. Project Sponsor: Corning Incorporated. Project Facility: Corning Innovation Support Center, Town of Big Flats, Chemung County, N.Y. Application for groundwater withdrawal of up to 0.540 mgd (30-day average) from Carpenter Road Well 1.

7. Project Sponsor: Corning Incorporated. Project Facility: Corning Innovation Support Center, Town of Big Flats, Chemung County, N.Y. Application for groundwater withdrawal of up to 0.540 mgd (30-day average) from Carpenter Road Well 2.

8. Project Sponsor and Facility: Farmers Pride, Inc., Bethel Township, Lebanon County, Pa. Application for renewal of groundwater withdrawal of up to 0.060 mgd (30-day average) from Well 1 (Docket No. 19881101).

9. Project Sponsor and Facility: Linde Corporation (Lackawanna River), Fell Township, Lackawanna County, Pa. Application for renewal of surface water withdrawal of up to 0.905 mgd (peak day) (Docket No. 20150307).

10. Project Sponsor and Facility: Shadow Ranch Resort, Inc. (Tunkhannock Creek), Tunkhannock Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 0.999 mgd (peak day) (Docket No. 20150309).

11. Project Sponsor and Facility: State College Borough Water Authority, Ferguson Township, Centre County, Pa. Application for renewal of groundwater withdrawal of up to 0.490 mgd (30-day average) from Well 57 (Docket No. 19890504).

12. Project Sponsor: SUEZ Water Pennsylvania Inc. Project Facility: Center Square Operation, Upper Allen Township, Cumberland County, Pa. Application for groundwater withdrawal of up to 0.107 mgd (30-day average) from Well 1.

13. Project Sponsor: SUEZ Water Pennsylvania Inc. Project Facility: Center Square Operation, Upper Allen Township, Cumberland County, Pa. Application for renewal of groundwater withdrawal of up to 0.379 mgd (30-day average) from Well 2 (Docket No. 19861104).

14. Project Sponsor and Facility: Sugar Hollow Water Services LLC (Martins Creek), Hop Bottom Borough, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.360 mgd (peak day) (Docket No. 20150304).

15. Project Sponsor and Facility: SWEPI LP (Cowanessque River), Westfield Township, Tioga County, Pa. Application for renewal of surface water withdrawal of up to 0.375 mgd (peak day) (Docket No. 20150311).

16. Project Sponsor and Facility: SWN Production Company, LLC (Martins Creek), Brooklyn Township, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.997 mgd (peak day) (Docket No. 20150310).

17. Project Sponsor and Facility: Village of Windsor, Broome County, N.Y. Application for groundwater withdrawal of up to 0.380 mgd (30-day average) from Well 1.

18. Project Sponsor and Facility: Village of Windsor, Broome County, N.Y. Application for groundwater withdrawal of up to 0.380 mgd (30-day average) from Well 2.

Commission-Initiated Project Approval Modifications

1. Project Sponsor and Facility: East Donegal Township Municipal Authority, East Donegal Township, Lancaster County, Pa. Conforming the grandfathering amount with the forthcoming determination for a withdrawal of up to 0.351 mgd (30-day

average) from Glatfelter Springs (Docket No. 20110305).

2. Project Sponsor and Facility: Hanover Country Club, Abbottstown Borough, Adams County, Pa. Conforming the grandfathering amount with the forthcoming determination for a groundwater withdrawal of up to 0.122 mgd (30-day average) from Well 1 and up to 0.108 mgd (30-day average) from Well 2 (Docket No. 20020828).

3. Project Sponsor and Facility: Mars Wrigley Confectionary US, LLC, Elizabethtown Borough, Lancaster County, Pa. Conforming the grandfathering amount with the forthcoming determination for groundwater withdrawal of up to 0.112 mgd (30-day average) from Well 6 (Docket No. 20010804).

Opportunity To Appear and Comment

Interested parties may appear at the hearing to offer comments to the Commission on any business listed above required to be subject of a public hearing. The presiding officer reserves the right to limit oral statements in the interest of time and to otherwise control the course of the hearing. Guidelines for the public hearing are posted on the Commission's website, www.srbc.net, prior to the hearing for review. The presiding officer reserves the right to modify or supplement such guidelines at the hearing. Written comments on any business listed above required to be subject of a public hearing may also be mailed to Ms. Ava Stoops, Administrative Specialist, Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pa. 17110-1788, or submitted electronically through www.srbc.net/about/meetings-events/public-hearing.html. Comments mailed or electronically submitted must be received by the Commission on or before February 18, 2019, to be considered.

Authority: Pub. L. 91-575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: February 1, 2019.

Jason E. Oyler,

Acting Secretary to the Commission.

[FR Doc. 2019-01246 Filed 2-5-19; 8:45 am]

BILLING CODE 7040-01-P

SUSQUEHANNA RIVER BASIN COMMISSION

Grandfathering (GF) Registration Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: December 1–31, 2018.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110-1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238-0423, ext. 1312; fax: (717) 238-2436; email: joyler@srbc.net. Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists GF Registration for projects, described below, pursuant to 18 CFR 806, Subpart E for the time period specified above:

Grandfathering Registration Under 18 CFR 806, Subpart E

1. Pennsylvania Department of Corrections—State Correctional Institute at Rockview, GF Certificate No. 201812001, Benner Township, Centre County, Pa.; Benner Spring, McBride Gap Reservoir, and consumptive use; Issue Date: December 5, 2018.

2. Town of Corning Water Department—East Corning Water District, GF Certificate No. 201812002, Town of Corning, Steuben County, N.Y.; Corning Manor Well 1 and Gibson Well; Issue Date: December 5, 2018.

3. Corning Country Club, GF Certificate No. 201812003, Town of Corning, Steuben County, N.Y.; Well 1, Well 2, and consumptive use; Issue Date: December 5, 2018.

4. Milton Hershey School, GF Certificate No. 201812004, Derry Township, Dauphin County, Pa.; Well 2; Issue Date: December 6, 2018.

5. Messiah College, GF Certificate No. 201812005, Upper Allen Township, Cumberland County, and Monaghan Township, York County, Pa.; Yellow Breeches Creek; Issue Date: December 6, 2018.

6. Motts LLP, GF Certificate No. 201812006, Menallen Township, Adams County, Pa., Well 4 and Well 6; Issue Date: December 6, 2018.

7. Elmira Country Club, GF Certificate No. 201812007, Town of Elmira, Chemung County, N.Y., consumptive use; Issue Date: December 6, 2018.

8. Village of Sherburne, GF Certificate No. 201812008, Village of Sherburne, Chenango County, N.Y., Well 2; Issue Date: December 6, 2018.

9. Fox Hill Country Club, GF Certificate No. 201812009, Exeter Borough, Luzerne County, Pa., Halfway House Well; Issue Date: December 7, 2018.

10. Norwich Pharmaceuticals, Inc.—Norwich Facility, GF Certificate No. 201812010, Town of North Norwich, Chenango County, N.Y., Well 1 and Well 2; Issue Date: December 7, 2018.

Authority: Public Law 91–575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: February 1, 2019.

Jason E. Oyler,

Acting Secretary to the Commission.

[FR Doc. 2019–01247 Filed 2–5–19; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2018–0044]

Surface Transportation Project Delivery Program; TxDOT Audit #5 Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT)

ACTION: Notice, request for comment.

SUMMARY: The Surface Transportation Project Delivery Program allows a State to assume FHWA’s environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Prior to the Fixing America’s Surface Transportation (FAST) Act, the Program required semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the Program. This notice announces and solicits comments on the fifth and last audit report for the Texas Department of Transportation’s (TxDOT) participation in accordance to these pre-FAST Act requirements.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590. You may also submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of

comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Dr.

Owen Lindauer, Office of Project Development and Environmental Review, (202) 366–2655, owen.lindauer@dot.gov, or Mr. Jomar Maldonado, Office of the Chief Counsel, (202) 366–1373, jomar.maldonado@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program (or NEPA Assignment Program) allows a State to assume FHWA’s environmental responsibilities for review, consultation, and compliance for Federal highway projects. This provision has been codified at 23 U.S.C. 327. Since December 16, 2014, TxDOT has assumed FHWA’s responsibilities under NEPA and the responsibilities for reviews under other Federal environmental requirements under this authority.

Prior to December 4, 2015, 23 U.S.C. 327(g) required the Secretary to conduct semiannual audits during each of the first 2 years of State participation, annual audits during years 3 and 4, and monitoring each subsequent year of State participation to ensure compliance by each State participating in the Program. The results of each audit were required to be presented in the form of an audit report and be made available for public comment. On December 4, 2015, the President signed into law the FAST Act, Public Law 114–94, 129 Stat. 1312 (2015). Section 1308 of the FAST

Act amended the audit provisions by limiting the number of audits to one audit each year during the first 4 years of a State’s participation. This notice announces the availability of the report for the fifth and final audit for TxDOT conducted prior to the FAST Act and solicits public comment on same.

Authority: Section 1313 of Public Law 112–141; Section 6005 of Public Law 109–59; Public Law 114–94; 23 U.S.C. 327; 49 CFR 1.85.

Issued on: January 8, 2019.

Brandye L. Hendrickson,

Deputy Administrator, Federal Highway Administration.

DRAFT

Surface Transportation Project Delivery Program, FHWA Audit #5 of the Texas Department of Transportation, August 1, 2017 to August 1, 2018

Executive Summary

This is a report of Federal Highway Administration’s (FHWA’s) fifth audit (Audit #5) of the Texas Department of Transportation (TxDOT) responsibilities assigned under a memorandum of understanding (MOU) effective December 16, 2014. From that date, TxDOT assumed FHWA’s National Environmental Policy Act (NEPA) responsibilities assigned for the environmental review and compliance and for other environmental review laws and requirements for highway projects in Texas (NEPA Assignment Program). The report concludes with a status update for FHWA’s observations from the fourth audit review (Audit #4).

The FHWA Audit #5 team (team) was formed in October 2017 and met regularly to prepare for the on-site portion of the audit. Prior to the on-site visit, the team: (1) Performed reviews of project files in TxDOT’s Environmental Compliance Oversight System (ECOS), (2) examined TxDOT’s responses to FHWA’s pre-audit information requests (PAIR), and (3) developed interview questions. The on-site portion of this audit, comprised of TxDOT interviews, was conducted on May 21–25, 2018.

The TxDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Overall, the team found continued evidence that TxDOT is committed to establishing a successful program. This report summarizes the team’s assessment of the status of several aspects of the NEPA Assignment Program, including a variety of successful practices and five observations that represent opportunities for TxDOT to improve its program. The team identified two categories of non-compliance

observations that TxDOT will need to address as corrective actions.

The TxDOT has continued to make progress toward meeting the responsibilities it has assumed in accordance with the MOU. The team finds TxDOT to be in substantial compliance with the terms of the MOU, and FHWA looks forward to working with TxDOT to renew the MOU.

Background

The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for highway projects. This Program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities for NEPA project decisionmaking, the State becomes solely responsible and liable for carrying out these obligations in lieu of and without further NEPA related approval by FHWA.

The State of Texas was assigned the responsibility for making project NEPA approvals and the responsibility for making other related environmental decisions for highway projects on December 16, 2014.

The FHWA responsibilities assigned to TxDOT are specified in the MOU. These responsibilities include: Compliance with the Endangered Species Act (ESA) Section 7 consultations with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, and Section 106 consultations with the Texas Historical Commission regarding impacts to historic properties. Some responsibilities may not be assigned and remain with FHWA. They include: (1) Responsibility for project-level conformity determinations under the Clean Air Act and (2) the responsibility for Government-to-Government consultation with federally-recognized Indian Tribes.

These audits are part of FHWA's oversight responsibility for the NEPA Assignment Program. The reviews are to assess a State's compliance with the provisions of the MOU as well as all applicable Federal laws and policies. They also are used to evaluate a State's progress toward achieving its performance measures as specified in the MOU; to evaluate the success of the NEPA Assignment Program; and to inform the administration of the findings regarding the NEPA Assignment Program. In December 2015, statutory changes in Section 1308 of the Fixing America's Surface Transportation Act (FAST Act), reduced the frequency

of these audit reviews to one audit per year during the first 4 years of State participation in the program. This audit is the last of the required audits.

Scope and Methodology

The team for Audit #5 included NEPA subject-matter experts from FHWA Texas Division Office, as well as FHWA offices in Washington, District of Columbia, Atlanta, Georgia, and Phoenix, Arizona. In addition to the NEPA experts, the team included FHWA planners, engineers, and air quality specialists from the Texas Division office. The diverse composition of the team, the process of developing the review report, and publishing it in the **Federal Register** help maintain an unbiased review and establish the audit as an official action taken by FHWA.

The scope and focus of this audit included reviewing the processes and procedures (*i.e.*, toolkits and handbooks) used by TxDOT to reach and document its independent project decisions. The team conducted a careful examination of highway project files in TxDOT's database called Environmental Compliance Oversight System (ECOS) and verified information on the TxDOT NEPA Assignment Program through inspection of other records and through interviews with TxDOT and other staff. The team gathered information that served as the basis for this audit from three primary sources: (1) TxDOT's response to a pre-Audit #5 information request (PAIR #5), (2) a review of a judgmental sample of project files in ECOS with approval dates after the execution of the MOU, and (3) interviews with TxDOT staff. In addition, TxDOT provided information in response to FHWA pre-audit questions and requests for documents and provided a written clarification to FHWA thereafter. That material covered the following six topics: program management, documentation and records management, quality assurance/quality control, legal sufficiency review, performance measurement, and training.

This review will also serve to assess the State's performance in carrying out the selected and identified procedures established for NEPA Assignment including compliance with transportation planning procedures in regard to funding eligibility requirements for placing TxDOT projects on the Statewide Transportation Improvement Program (STIP) and for Metropolitan Planning Organizations placing projects in the Metropolitan Transportation Plan (MTP)/Transportation Improvement Program (TIP) (MOU stipulation 3.3.1). Interviews with TxDOT's Finance

Division (Letting Management Office) and Transportation Planning and Programming Division personnel were included in Audit #5.

The intent of the review was to check that TxDOT overall has the procedures in place to implement the responsibilities assumed through the MOU, ensure that the staff is aware of those procedures, and that staff implements the procedures to achieve compliance with NEPA and other assigned responsibilities. The review did not evaluate project-specific decisions, as such decisions are the sole responsibility of TxDOT. The team focused on whether the procedures TxDOT followed complied with all Federal statutes, regulation, policy, procedure, process, guidance, and guidelines. In some cases, procedures within TxDOT cross multiple divisions (and 25 districts) and require close coordination amongst all parties internal to TxDOT to ensure compliance under the MOU.

The fifth audit intends to: (1) Evaluate whether TxDOT's NEPA process and procedures (both Federal and State) used for project decisionmaking and other actions comply with all the responsibilities it assumed in the MOU and (2) determine the status of observations in the Audit #4 report, as well as required corrective actions (see summary at end of this report). The NEPA approvals included categorical exclusion (CE) "d-list" approvals, findings of no significant impacts (FONSI), re-evaluations of environmental assessments (EAs), Section 4(f) decisions, approvals of a draft environmental impact statement (DEIS), re-evaluations of EISs, and records of decision.

The team defined the timeframe for highway project environmental approvals subject to this fifth audit to be between February 1, 2017, to January 31, 2018. The population of project approvals selected for review derived from 12 TxDOT-certified lists of NEPA approvals reported monthly. The project file review effort was divided into approvals made during Round 1 (Feb 1, 2017—July 31, 2017) and Round 2 (Aug 1, 2017—Jan 31, 2018). Round 1 of our ECOS Review initially consisted of 14 project FONSI, 12 EA re-evaluations (Re-Evals), 3 EIS Re-Evals, 16 CE determinations of actions not listed in regulation (Open-ended d-list CEs), 1 final EA, and 1 c-28 CE (for a rail project) for a total of 47 projects. Round 2 of our ECOS Review consisted of 4 FONSI, 6 EA Re-Evals, 2 EIS Re-Evals, 17 Open-ended d-list CE, and 1 final EA. The FHWA's Compliance Assessment Program (CAP) conducts a

review of project files independent of this audit. Two projects from CAP were considered in this review bringing the total to 32 projects that were initially reviewed. The total number of projects that were initially reviewed for the Audit #5 ECOS Review totaled 79 projects.

The interviews conducted by the team focused on TxDOT's leadership and staff at the Environmental Affairs Division (ENV) Headquarters in Austin and staff in six of TxDOT's Districts. The team conducted face-to-face interviews of TxDOT District staff in the San Angelo, Abilene, Wichita Falls, Fort Worth, Houston, and Lufkin Districts. The TxDOT staff from the Transportation Planning and Programming (TPP) Division and the Finance Division (FIN) were also interviewed. The team used the same ECOS project document review form to document findings related to projects. The team updated interview questions for districts and ENV, TPP, and FIN with new focus areas to gather relevant data to draw conclusions herein.

Overall Audit Opinion

The TxDOT continues to make progress in the implementation of its program that assumes FHWA's NEPA project-level decision authority and other environmental responsibilities. The team acknowledges TxDOT's effort to refine, and when necessary, establish additional written internal policies and procedures. The team found evidence of TxDOT's continuing efforts to train staff, clarify the roles and responsibilities of TxDOT staff, and in educate staff in an effort to assure compliance with all of the assigned responsibilities.

The team identified non-compliant observations in this audit that TxDOT will need to address through corrective actions. These non-compliance observations come from a review of TxDOT procedures, project file documentation, and interview information. This report also identifies several observations and successful practices that we recommend be expanded upon. The team finds TxDOT to be in substantial compliance with the terms of the MOU, and FHWA looks forward to working with TxDOT to renew the MOU.

Non-Compliance Observations

Non-compliance observations are instances where the team found TxDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or TxDOT's own procedures for compliance with the NEPA process. Such observations may

also include instances where TxDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects TxDOT to develop and implement corrective actions to address all non-compliance observations.

The MOU (Part 3.1.1) states that "[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the DOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR 1500–1508, DOT Order 5610.1C, and 23 CFR 771 as applicable." Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits TxDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as provisions in the MOU. The following non-compliance observations are presented as two categories of non-compliance observations: (1) With procedures specified in Federal laws, regulations, policy, or guidance and (2) with the State's environmental review procedures.

Non-Compliance Observation #1: Section 5.1.1 of the MOU requires the State to follow Federal laws, regulations, policy, and procedures to implement the responsibilities assumed. The follow is a list of the procedures and the instance where the team found the TxDOT to be non-compliant.

(a) Logical Termini and Independent Utility

The TxDOT approved a project to add capacity with project limits based on county lines. Using county lines to establish project limits is inconsistent with FHWA policies and guidance on establishing a project's logical termini because it sets an arbitrary boundary. (23 CFR 771.111(f); The Development of Logical Project Termini, FHWA guidance (November 5, 1993)).

(b) Plan Consistency Prior to NEPA Approval

Section 3.3.1 of the MOU requires that prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, TxDOT will ensure and document that the project is consistent with the current TIP, Regional Transportation Plan (RTP), or MTP. The team identified three projects where TxDOT made NEPA approval without meeting the MOU consistency requirement. This recurring deficiency was also identified for a project file in Audit #4.

(c) Public Involvement

The FHWA's regulation at 23 CFR 771.119(h) requires a second public notification to occur 30 days prior to issuing a FONSI for an action described in 23 CFR 771.115(a). The team reviewed a project file where TxDOT approved a FONSI for an action described in 23 CFR 771.115(a) (new controlled access freeway) without evidence of a required additional public notification. The TxDOT acknowledges this requirement in their updated public involvement handbook. This recurring deficiency was also identified in Audits #3 and 4.

(d) Section 4(f) De Minimis

The TxDOT determined Section 4(f) is required for a project without completing the required Section 4(f) *de minimis* determination (MOU 3.2.1 and 23 CFR 774).

(e) Certification of NEPA Compliance Missing at Project Construction Authorization

In two instances TxDOT requested, and received, construction authorization for a Federal-aid project without ensuring the completion of NEPA. (Section 8.7.1 of MOU). Section 8.7.1 of the MOU requires TxDOT to certify to FHWA, for Federal-aid funded projects, that TxDOT has fully carried out all responsibilities assumed under the MOU prior to the execution of any Federal-aid project agreement for physical construction. The TxDOT is aware of these instances and had implemented corrective action to address this issue by the time Audit #5 was in process.

Non-Compliance Observation #2: Section 7.2.1 of the MOU requires the State to develop State procedures to implement the responsibilities assumed. This review identified the following examples of deficient adherence to these State procedures.

(a) Noise Policy

One project did not follow the TxDOT Noise guidelines (Guidelines for Analysis and Abatement of Roadway Traffic Noise, 2011) by not addressing critical noise comments made by ENV prior to project approval. The TxDOT noise guidelines identifies procedures for compliance with 23 CFR part 772.

(b) Required TxDOT ENV Class of Action Pre-Approval Process

A TxDOT district approved a project that was not on the “c” or “d” list and the district did not receive the required pre-approval from ENV to process the project as an open-ended d-list CE.

Successful Practices and Other Observations

This section summarizes the TxDOTs practices that the team believes are successful as well as observations about issues that TxDOT may consider as areas to improve. Further information on these successful practices and observations is contained in the following subsections that address these six topic areas: Program management; documentation and records management; quality assurance/quality control; legal sufficiency; performance management; and training.

Throughout the following subsections, the team lists observations that FHWA recommends TxDOT consider in order to make improvements. The FHWA’s suggested implementation methods of action include: Corrective action, targeted training, revising procedures, continued self-assessment, improved QA/QC, or some other means. The team acknowledges that, by sharing the preliminary draft audit report with TxDOT, TxDOT has begun the process of implementing actions to address these observations to improve its program prior to the publication of this report.

1. Program Management**Successful Practices and Observations**

The team applauds TxDOT–ENV willingness to continue to engage in quarterly partnering meetings with FHWA that started in 2016. The exchange of information between FHWA and TxDOT has enhanced FHWA’s understanding of TxDOT’s program and has led to cooperation that has resulted in improved TxDOT processes and procedures. This will assist in making monitoring a success as well. District staff interviewed described the positive interaction that occurs among the District Transportation and Planning Director and the

Environmental Coordinator (EC) with district designers and engineers to discuss projects being developed and discuss issues and revise schedules if needed.

Observation #1: Planning Consistency at the Time of NEPA Approval

Section 3.3.1 of the MOU requires that prior to approving any CE determination, FONSI, Final EIS, or final EIS/ROD, TxDOT will ensure and document that the project is consistent with the current TIP, RTP, or MTP. The TxDOT’s use of Develop Authority (DA) in some project files as a basis for planning consistency satisfies this requirement so long as TxDOT has provided FHWA with a DA financial plan. The team urges TxDOT to provide FHWA with the financial documentation to support the use of DA.

Observation #2: TxDOT Inter-Division Coordination

The team learned through interviews that staff from divisions other than ENV (Transportation Planning and Programming, Finance, Right-of-way, and Rail) who support environmental reviews and decisions were unaware of their part they played in NEPA reviews. We urge TxDOT ENV to discuss needs and procedures for delivering compliant NEPA approval for Federal-aid projects with these other divisions. The TxDOT is aware of this issue and has implemented procedures to address it.

2. Documentation and Records Management

The team relied on information in ECOS, TxDOT’s official file of record, to evaluate project documentation and records management practices. Many TxDOT toolkit and handbook procedures mention the requirement to store official documentation in ECOS. The ECOS is also a tool for storage and management of information records, as well as for disclosure within TxDOT District Offices. The ECOS is how TxDOT identifies and procures information required to be disclosed to and requested by the public. The ECOS is being upgraded and there are more phased upgrades planned over time. The most recent work includes Expedited C-List (22), an automated process to add a Control Section Job number to an existing environmentally cleared project, and automated business rules to prevent incorrect project associations in ECOS.

Successful Practices and Observations

The team learned that ECOS continues to improve in download

speed and compatibility. The team learned from interviews that ECOS continues to improve reliability, download speeds, and has fewer technical problems. The phased ECOS updates continue to roll out.

Overall ECOS has provided a consistent repository for better documentation and is enhanced by staff use of a new naming convention per discipline. The EA checklist is working well in conjunction with the CORE Team concept.

3. Quality Assurance/Quality Control (QA/QC)**Successful Practices and Observations**

The team observed continued successful practices from previous audits in QA/QC. These successful practices include the use of NEPA Chats, increased Subject Matter Expert (SME) interactions with district staff after review of files, and the CORE Team concept (items described in previous audit reports). The TxDOT District Office environmental staff continues to do peer reviews of environmental decisions to double check the quality and accuracy of documentation.

The team learned through interviews that approved open-ended d-list projects were reviewed by Program Review Section (PR) as part of a thorough review of NEPA class of action. District staff said in interviews that they feel they can reach out to ENV staff and PR to ask questions to assist in the preparation of compliant and quality documents.

The ENV SME’s, we were told in interviews, are reaching out to the district staff with corrections and resolution of issues in documents, which is viewed as an improved way to relate and resolve issues found in file reviews. These communications often result in improvements in guidance/ checklists as well as a noted decrease in corrective actions from PR reviews. Interviewees told us that ECOS continues to improve and is perceived to be easier to use and that updates have resulted in fewer substantive errors. The team considers that self-assessments conducted by ENV for Section 4(f) and Public Involvement resulted in positive changes and improvements in quality documents by using established checklists and certifications and the CORE Team concept.

Observation#3: TxDOT Monthly Lists of NEPA Approvals

The review team identified a few projects listed on the monthly list incorrectly, projects missing from the list, and projects added on after

submittal to FHWA. The TxDOT is aware of this problem and is taking steps to address it.

Observation#4: QC for Re-Evaluations

The team noted in project file reviews that re-evaluation recordkeeping was inconsistent, especially for consultation re-evaluations. Because re-evaluations are not reviewed by TxDOT's PR, the team would urge TxDOT to subject at least a sample of re-evaluations to quality assurance review.

4. Legal Sufficiency Review

The team did not identify any observations and only presents a summary of TxDOT's approach to legal review. The General Counsel Division (GCD) currently has five lawyers on staff (lead attorney and four staff) plus outside counsel. After the lead attorney, the staff has between 6-months and two and half years of experience with GCD. Reviews are done primarily by the lead attorney and two staff with the other two assisting on an as needed basis such as the development of the administrative record and quick turnaround required for a DEIS. Additional assistance is provided by an outside law firm and a consultant attorney who has delivered environmental legal assistance to ENV for several years. The GCD assistance continues to be guided by ENV's Project Delivery Manual Sections 303.080 through 303.086. These sections provide guidance on conducting legal sufficiency review of FHWA-funded projects and those documents that are to be published in the **Federal Register** such as the Notice of Intent to prepare an EIS, Statute of Limitation (139(l)), and Notice of Availability of EIS.

During the last year GCD had a very large effort to address the MOPAC lawsuit particularly in developing the administrative record. They used their staff along with the Attorney General, consultant staff and outside staff. Another significant effort was a lawsuit on an EA/FONSI that required a very quick turnaround by the entire staff to a request for a preliminary injunction. The TxDOT was served notice of the lawsuit on March 27 and notified FHWA Chief Counsel, the U.S. Department of Justice, and the FHWA Texas Division Office on the same day as required by the MOU.

The FHWA Office of Chief Counsel provided legal sufficiency training to GCD in August 2017. The TxDOT would like to have the same training provided on a periodic basis. Recent staff training included a legal sufficiency course provided by FHWA Office of Chief Counsel, ENV self-developed courses,

the TRB Summer Seminar in July 2017 in Salt Lake City, and Advanced Administrative Law Seminars held in Austin.

Based on interviews noted above and information provided in the PAIR, TxDOT's current process is legally sufficient and the team considers that the requirements for legal sufficiency under the MOU continue to be fulfilled.

5. Performance Measurement

Successful Practices and Observations: The TxDOT continues to successfully monitor its metrics to measure performance. The TxDOT's summary of its performance measures was described in their self-assessment summary report. Completion of checklists for project quality control continue to be an important measure of overall quality control. The TxDOT draws a sample from the population of completed CE project files to assess their completeness and accuracy. A separate study focused on documentation from 21 EAs. The TxDOT lists the missing or deficient information from project files that serves as a basis for taking corrective actions. What results is continuous improvements based on corrective actions taken. Developments in ECOS have largely eliminated substantive error resulting from flawed Categorical Exclusion Determination Forms (CEDFs). In previous self-assessments, these CEDF errors were a common source of non-compliance.

The effectiveness of TxDOT's assumption of NEPA responsibilities on timeliness of EA decisionmaking was a focus of the TxDOT self-assessment summary report. Their thoughtful analysis states that start-to-finish comparisons of EAs prior to and after NEPA assignment suggest improvements in timeliness. Median and average EA project completion terms for pre-assignment projects suffer from long-duration project outliers that are absent from the set of assigned EA projects. Average time frames for EA completion post assignment were identified and were determined to be statistically valid. While timeliness for EA decisionmaking has been documented for the 4 years of NEPA assignment, it is also true that this trend fits neatly into a national trend of falling median time frames once long-duration outliers have been eliminated.

Observation#5: Audit #4 Corrective Actions

The team noted through the self-assessment summary report that as part of the measure of implemented corrective actions, because of the delay

in finalizing the Audit #4 report, TxDOT had not yet identified or implemented corrective actions for that audit result. We urge TxDOT to consider developing and implementing reasonable corrective actions whenever TxDOT becomes aware of deficiencies in their program. Since the completion of the interviews for this audit review TxDOT has implemented corrective actions (see Status of Non-compliance observations below).

6. Training Program

Successful Practices and Observations: Looking back over the last 4 years, TxDOT's training program has shown trends of: (a) Increased reliance on developing and delivering training by TxDOT staff compared with FHWA Resource Center staff or others, (b) increased organization and efficiency in available training as well as training tracking, and (c) greater clarity in basic and continuing training requirements (linked to the Texas Administrative Code).

Through an interview, the team learned that a new hands-on training workshop in biology consisting of a class room lecture and a field component to identify species (mussels, birds) has been delivered in west Texas (Junction) that engaged USFWS staff. So well received were these workshops that spin off workshops have occurred in east Texas and coastal Texas.

The TxDOT informed the team through an interview that through an annual survey to TxDOT staff and resource agencies, it learns of needs for new training. As a result, TxDOT has developed or is developing the following courses: (a) A basic NEPA training class that for local government staff and consultants that follows a 1.5-day general training class that targets local government staff, and (b) a NEPA class that bridges the NEPA 101 class and environmental SME classes training for non-environmental professionals.

The team learned through an interview that there is an interest from at least one transportation and planning director in a class in risk management on environmental decisionmaking. Now that TxDOT staff have experience in the range of NEPA decision making challenges, the team urges that TxDOT's training plan consider NEPA decision making training. Since the completion of the interviews for this audit review TxDOT has begun developing new training for non-environmental professionals to introduce them to environmental review topics.

Status of Non-Compliance Observations and Other Observations From Audit #4 (September 2018)

Audit #4 Non-Compliance Observation #1:

(a) Project Scope Analyzed for Impacts Differed From the Scope Approved

The TxDOT developed an update for their Scope Development Tool over the past 16 months and recently implemented those changes. For specific issues such as this one, TxDOT PR conducts a debrief among the project core team members and the Deputy Division Director.

(b) Plan Consistency Prior to NEPA Approval

The TxDOT continues to follow their NEPA approval procedures that include procedures to determine planning consistency. The TxDOT was asked to provide the documented financial plan for the use of "Develop Authority" to ensure that this approach complies with planning consistency. The TxDOT has provided a draft of this documentation. This is a recurrence from Audit #3.

(c) Public Involvement

The FHWA's regulation at 23 CFR 771.119(h) requires a second public notification to occur 30 days prior to issuing a FONSI for an action that normally would require the preparation of an EIS. The TxDOT acknowledges this requirement and has updated their public involvement handbook. This is a recurrence from Audit #3.

(d) Timing of NEPA Approval

One project file lacked documentation for Section 106 compliance prior to TxDOT making a NEPA approval. The regulation at 23 CFR 771.133 requires compliance with all applicable requirements or reasonable assurance that all requirements will be met at the time of NEPA approval. The TxDOT PR conducted a debrief among the project core team members and the Deputy Division Director. The TxDOT is preparing changes to ECOS to address this issue.

Audit #4 Non-Compliance Observation #2:

(a) Reporting of Approvals Made by TxDOT

The MOU section 8.7.1 requires the State to certify on a list the approvals it makes pursuant to the terms of the MOU and Federal review requirements so FHWA knows which projects completed NEPA and are eligible for Federal-aid funding. The FHWA identified a project whose approval was made pursuant to

State law and therefore should not have been on the certified list of projects eligible for Federal-aid funding. The TxDOT continually works to assure that only Federal projects are present on the monthly approval list. At the time the monthly report is prepared, only projects with NEPA approvals are present on the list. The TxDOT suggests that instances where a project's funding changes after the certified list is prepared could account for discrepancies between being federally funded and State funded at the time FHWA reviews the list.

(b) Noise Workshop Timing

One project did not follow TxDOT noise guidelines. The TxDOT is in the process of updating their Noise Policy and Guidelines and is seeking FHWA approval for those changes. This specific issue has been highlighted and discussed at the Environmental Coordinators Conference in September 2018.

(c) Endangered Species Act Section 7

Training efforts by TxDOT are ongoing. The TxDOT is aware of the concern for Section 7 compliance.

(d) Indirect & Cumulative Impacts

The TxDOT hosted a FHWA Resource Center training in February of 2018 regarding this topic and a more common-sense approach to performing the required analyses.

(e) Federal Approval Request for a State Funded Project

The review team reviewed a project file where TxDOT followed State environmental laws and then requested Federal-aid to purchase right-of-way. The TxDOT has removed Federal funds from the Right of Way portion of this project as corrective action.

Audit #4 Observations

1. Noise procedure clarification: The TxDOT ENV is currently in the process of proposing an update to their Noise Policy for FHWA approval in 2018 and will update their accompanying Noise Guidelines as well.

2. Section 7 of the Endangered Species Act:

The TxDOT continues to train staff on its revised ESA handbook and standard operating procedures. In certain districts with sensitive habitats (e.g., karst) or the possibility of a species present (e.g., a salamander), ENV managers plan to review a project's information in addition to the district's and/or ENV biologists. This enhanced review process is currently limited only to two

districts and could be expanded to include instances where such bias may occur.

3. Project description and logical termini: A project contained a description of the proposed project as the project's purpose. Another proposed added capacity project's description indicated a longer terminus compared to a schematic. The TxDOT is aware of these instances and discussed these matters with the parties involved.

4. Record keeping integrity: There were several project files where the team identified instances of missing information or information was not consistently linked or uploaded. The ECOS is being upgraded currently with phase three, and there are two more phased upgrades planned over time.

5. Effectiveness and change in QA/QC: The TxDOT has reorganized its Self Assessment Branch and is now called Program Review Section (PR). Their approach to QA feedback to TxDOT staff relies on SMEs to communicate results of QA reviews.

6. Performance measure awareness and effectiveness: The team noted through interviews of TxDOT District Office staff that many were unaware of TxDOT performance measures and their results to encourage continuous improvement. The TxDOT provided status on this observation in their response to for this audit that included one NEPA chat, and meetings with districts who participated in the May 2017 audit. The TxDOT district staff now have access to the 2016 and 2017 Self-Assessment reports via SharePoint.

7. Additional outreach on improvements: This observation relates to informal training to implement TxDOT procedures changes in its handbook. As part of information collected for Audit #5, TxDOT indicated that they include handbook changes on endangered species procedures were a topic briefed at a June 2017 NEPA Chat.

8. FAST Act training: At the time of Audit #4, TxDOT had neither developed nor delivered training to its staff concerning new requirements for the FAST Act for environmental review. Since that time TxDOT indicated a FAST Act briefing was provided by FHWA Headquarters staff at TxDOT's annual Environmental Conference in September 2017. The TxDOT also posted a guidance document entitled "Avoiding Migratory Birds and Handling Potential Violations" in the Natural Resource Management toolkit in January 2017 that provides high level guidance on FAST Act provisions related to swallow species on at-risk bridges. The TxDOT's natural resources management (NRM) section reviewed

this guidance with districts at one of the bimonthly district/NRM coordination meetings.

Next Steps

The team has worked with TxDOT in developing this draft report. As the next step, FHWA will publish a notice in the **Federal Register** to make the draft audit report available to the public for a 30-day review comment period [23 U.S.C. 327(g)]. No later than 60 days after the close of the comment period, FHWA will consider all comments submitted in finalizing this draft audit report. Once finalized, the final audit report will be published in the **Federal Register**.

[FR Doc. 2019-01250 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2018-0334]

Hours of Service of Drivers: National Cattlemen's Beef Association; Livestock Marketing Association; American Farm Bureau Federation; American Beekeeping Federation; American Honey Producers Association; and National Aquaculture Association; Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received a joint application from the National Cattlemen's Beef Association, Livestock Marketing Association, American Farm Bureau Federation, American Beekeeping Federation, American Honey Producers Association and the National Aquaculture Association for an exemption from certain provisions in the hours-of-service (HOS) rules. The applicants request approval to, after 10 consecutive hours off duty: drive through the 16th consecutive hour after coming on duty; and drive a total of 15 hours during that 16-hour period. The requests are made on behalf of drivers who transport livestock, insects, and aquatic animals. FMCSA requests public comment on the joint applicants' request for exemption.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA-2018-0334 by any of the following methods:

- **Federal eRulemaking Portal:** www.regulations.gov. See the *Public Participation and Request for Comments* section below for further information.

- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

- **Hand Delivery or Courier:** West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

- **Fax:** 1-202-493-2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit 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., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

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

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202-366-2722. Email: MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2018-0334), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit

your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to www.regulations.gov and put the docket number, "FMCSA-2018-0334" in the "Keyword" box, and click "Search." When the new screen appears, click on "Comment Now!" button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemption

A joint exemption application has been submitted by the National Cattlemen's Beef Association, Livestock Marketing Association, American Farm Bureau Federation, American Beekeeping Federation, American Honey Producers Association and the National Aquaculture Association ("applicants").

The applicants seek an exemption from the hours-of-service (HOS) requirements that: (1) Limit the maximum driving hours for property-carrying drivers to 11 [49 CFR 395.3(a)(3)]; and (2) limit the duty period for those drivers to 14 consecutive hours [49 CFR 395.3(a)(2)]. The applicants seek an exemption that after 10 consecutive hours off duty would allow them to: (1) Drive through the 16th consecutive hour after coming on duty; and (2) drive a total of 15 hours during that 16-hour period. The applicants cite the fact that livestock haulers are currently permitted to operate in "an exempt zone within a radius of 150 air miles" of the source of an agricultural commodity. The Agency, in implementing this provision, has stated that time spent working within the 150 air-mile radius does not count toward the driver's daily and weekly HOS limits. Accordingly, the 15- and 16-hour limits requested by the applicants would begin after a livestock hauler travels outside the 150 air-mile radius. The requested exemptions would apply to all livestock, insect, and aquatic animal transporters and their drivers.

According to applicants, for purposes of this exemption application, livestock is defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471]. The term "insects" should be interpreted to mean insects that are used as pollinators such as honeybees. The term "aquatic species" is defined in the National Aquaculture Policy Act as "any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant." 16 U.S.C. 2801. However, this application does *not* seek to include aquatic plants.

Applicants advise that their drivers would comply with all other HOS rules, including the 60/70 hour limits. They advise that drivers operating under the proposed exemption would reach the 60-hour on-duty limit as early as at the end of the 90th hour and would then take 34 consecutive hours off duty. They then could resume duty at the start of the 125th hour.

The applicants cite 2018 Motor Carrier Management Information System

data from the Agency that identified 60,569 livestock motor carriers with 179,406 vehicles and 190,661 drivers. The FMCSA noted that 78,154 of those drivers operated within a 100 air-mile radius HOS exemption, leaving 112,507 CMV drivers who would likely be subject to the Agency's HOS regulations. The applicants are concerned that the 11- and 14-hour rules were not crafted with livestock haulers in mind and thus do not accommodate the unique character of their loads and nature of their trips. In certain circumstances, livestock haulers are required to carry live animals over significant distances. Those circumstances are dictated by factors primarily related to the health and welfare of the livestock; the lifecycle of the livestock; and the locations of farms and ranches, viable grazing lands and feedlots, and final processing facilities. The applicants state that the maximum driving and on-duty limits of the HOS regulations as applied to their operations may place the well-being of livestock at risk during transport and impose significant burdens on livestock haulers, particularly in rural communities across the country.

The applicants state that, while the majority of their trips fall within the current HOS regulations, some of the longer trips cannot be completed under the 11- and 14-hour rules. These trips are affected by "immutable factors" such as weather. In the cattle industry, the locations of cow-calf operations, grazing lands, feedlots, and processing facilities necessarily determine how far a livestock hauler must travel in a single trip. Livestock haulers transport animals from farms and ranches to auction markets, where the stock is sold. Once sold, the animals are often transported to grazing lands and feed yards, mostly located in the Central Plains and Southwest. After grazing and feeding, livestock are transported a final time to processing facilities, where they are transformed into consumable meat and sold. In addition, transportation of bees necessary to pollinate numerous crops, tree nuts, fruits, and vegetables are some of the longest trips in the country. While most these trips can be concluded within the current HOS rules, the applicants estimate that 25–30 percent of livestock-hauling trips would be conducted under the requested exemption.

The applicants cite the following negative impacts to their industry if the exemption is not granted: (1) Livestock haulers would be unable to test innovative fatigue risk-management safety countermeasures; (2) public safety measures to ensure animal welfare and

prevent the spread of disease would continue to be hampered by the current HOS rules; and (3) driver shortages and resulting transportation cost increases would be further aggravated.

The applicants assert that granting this exemption would not negatively impact motor vehicle safety because the exemption would likely be used by a limited number of commercial drivers who are experienced, plan their trips carefully, operate specialized equipment, and routinely undergo transportation training. The applicants add the following relating to an equivalent level of safety if the exemption is granted: (1) Livestock haulers are a defined, safe subset of all CMV drivers; (2) transporting live animals requires prudent route planning, specialized equipment, and safe driving practices; and (3) many livestock haulers already undergo specialized training that includes fatigue prevention, recognition, and management. As this last point relates to an equivalent level of safety, according to the applicants, the HOS rules are intended to mitigate the risk of driver fatigue and its role in CMV crashes. However, research demonstrates that the number of driving hours is only one aspect of fatigue management—as many factors contribute to safe driving. The applicants propose to craft industry-sponsored training programs that include appropriate fatigue management principles.

The exemption is requested for a period of five years. A copy of the application for exemption is available for review in the docket for this notice.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator of Policy.

[FR Doc. 2019-01276 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2018-0208]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 14 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate

commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on December 28, 2018. The exemptions expire on December 28, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2018–0208, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On November 27, 2018, FMCSA published a notice announcing receipt of applications from 14 individuals requesting an exemption from vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (83 FR 60954). The public comment period ended on December 27, 2018, and one comment was received.

FMCSA has evaluated the eligibility of these applicants and determined that

granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received one comment in this proceeding. The commenter acknowledged that each applicant has been examined by an ophthalmologist or optometrist who has certified that, in the doctor’s opinion, the applicant has sufficient vision to perform all the tasks necessary to operate a CMV. However, they also noted that the 14 individuals listed in this notice should be subject to frequent testing to ensure that their driving abilities are not impacted by their vision.

FMCSA has evaluated the eligibility of each of these applicants and determined that granting the exemptions would result in a level of safety that is equal to, or greater than, that which would exist without the exemptions. As discussed in Section IV of this notice: Basis for Exemption Determination, each individual possesses a valid license to operate a CMV, and each individual has demonstrated his or her ability to safely operate a CMV in intrastate commerce for a three-year period as part of the application process. In addition, each applicant must continue to be physically examined every year by an ophthalmologist or optometrist and a Certified Medical Examiner so that they may continue to be qualified to operate a CMV in interstate commerce.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for up to five years from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows applicants to operate CMVs in interstate commerce. FMCSA grants

exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver’s medical certification.

The Agency’s decision regarding these exemption applications is based on medical reports about the applicants’ vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the November 27, 2018, **Federal Register** notice (83 FR 60954) and will not be repeated in this notice.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The 14 exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, aphakia, cataract, chorioretinal scar, complete loss of vision, corneal scar, diabetic retinopathy, glaucoma, macular drusen, and retinal detachment. In most cases, their eye conditions were not recently developed. Nine of the applicants were either born with their vision impairments or have had them since childhood. The five individuals that sustained their vision conditions as adults have had it for a range of 3 to 13 years. Although each applicant has one eye that does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor’s opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors’ opinions are supported by the applicants’ possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants’ intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These

conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 3 to 59 years. In the past three years, no drivers were involved in crashes, and no drivers were convicted of moving violations in CMVs. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10) and (b) by a certified Medical Examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 14 exemption applications, FMCSA exempts the following drivers from the vision requirement, 49 CFR

391.41(b)(10), subject to the requirements cited above:

Doyle L. Bowen (NM)
Guillermo Casio Gamero (WA)
William L. Cave (MD)
Marc C. Goss (NE)
Richard J. Hard (IN)
Dennis W. Johnson (MO)
Ken I. Johnson (GA)
Ibrahim F. Khashan (GA)
Shelby M. Kuehler (KS)
Kendall S. Lane (OK)
Leonard Morris (NJ)
Gale L. O'Neil (PA)
Michael L. Sheldon (NE)
Pedro T. Tellez Alvarez (CA)

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01253 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2018-0237]

Hours of Service of Drivers: American Concrete Pavement Association, Inc.; Application for Exemptions

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; grant of application for exemptions.

SUMMARY: FMCSA announces its decision to grant the American Concrete Pavement Association, Inc. (ACPA) exemptions from two requirements of the hours-of-service (HOS) regulations for drivers of certain commercial motor vehicles (CMVs): The 30-minute rest break provision; and the requirement that short-haul drivers utilizing the record of duty status (RODS) exception return to their work-reporting location within 12 hours of coming on duty. The first exemption will enable drivers transporting ready-mixed concrete and related materials and equipment in vehicles other than those outfitted with

rotating mixer drums, to use 30 minutes or more of on-duty "waiting time" to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break. The second exemption will allow these drivers to use the short-haul exception but return to their work-reporting location within 14 hours instead of the usual 12 hours.

DATES: This exemption is applicable February 6, 2019 and expires February 6, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202-366-2722. Email: MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to www.regulations.gov and insert the docket number, "FMCSA-2018-0237" in the "Keyword" box and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by compliance with the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b))

with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemptions

ACPA seeks two exemptions for drivers transporting ready-mixed concrete and related materials and equipment from the hours-of-service (HOS) 30-minute rest break provision in 49 CFR 395.3(a)(3)(ii) and the restriction of the record of duty status (RODS) exception for short-haul operations to drivers who return to their normal work-reporting location within 12 hours [49 CFR 395.1(e)(1)(ii)(A)].

ACPA requested the first exemption from the HOS rest break provision to allow drivers transporting ready-mixed concrete and related materials in vehicles other than those outfitted with rotating mixer drums, to use 30 minutes or more of on-duty “waiting time” to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break. According to ACPA, concrete mixtures are extremely perishable, as all steps in the process of a typical mainline paving project are time-critical. Employees must coordinate and direct a complex series of logistical steps, one of the most important elements of which is the delivery of the concrete within a time frame specified by the transportation agency or owner. The concrete is essentially made to order, then delivered by end-dump trucks so there is a steady and constant delivery of material that keeps pace with the paving equipment. Any issue that delays the well-orchestrated, just-in-time delivery of concrete can result in batches being turned away by inspectors, the paving operation being shut down temporarily, and ultimately, cause time and cost overruns. The criticality of concrete delivery from plant to paving site is arguably one of the most important factors in a paving process, according to ACPA.

ACPA requested the second exemption to allow the same drivers to use the short-haul RODS exception, but with a 14-hour duty period instead of 12 hours. ACPA advises that while some short-haul drivers will be able to take advantage of the exception from the 30-minute break, other drivers are often required to be on duty more than 12

hours in a day and therefore are not eligible to use the short-haul exception.

ACPA pointed out that FMCSA granted drivers of ready-mixed concrete delivery vehicles an exemption from the minimum 30-minute rest break provision (80 FR 17819, April 2, 2015).¹ Section 5206(b)(1)(A) of the Fixing America’s Surface Transportation Act made that exemption permanent (Pub. L. 114–94, 129 Stat. 1312, 1537, Dec. 4, 2015). Similarly, on January 26, 2018, FMCSA granted an exemption to the National Asphalt Pavement Association (NAPA) for drivers transporting asphalt and related materials and equipment from 1) the 30-minute rest break requirement, and 2) the 12-hour daily on-duty limit on the short-haul exception, which was expanded to 14 hours [83 FR 3864]. ACPA states that the reasoning supporting the NAPA exemption is equally applicable to drivers of ready-mixed concrete vehicles. The ACPA stated that the same reasoning supporting the exemptions from the 30-minute break time rule and allowing a 14-hour daily on-duty period for drivers engaged in the transportation of asphalt and related materials and equipment applies to drivers of ready-mixed concrete vehicles.

ACPA stated that drivers would remain subject to all other HOS regulations and would receive sufficient rest due to the nature of their operations that limit driving to an average of 80–100 miles per day during the paving season. ACPA believes that granting these exemptions would achieve the same level of safety provided by compliance with the two HOS rules. The requested exemptions are for 5 years. A copy of ACPA’s application for exemptions is available for review in the docket for this notice.

V. Public Comments

On September 6, 2018, FMCSA published notice of this application and requested public comment (83 FR 45300). The Agency received 29 comments. Nearly all the respondents supported the requested exemptions, including the Associated General Contractors of America (AGC), the American Road and Transportation Builders Association (ARTBA), Koss Construction Company (Koss), trucking companies, and individuals affiliated with the concrete paving industry.

¹ The hours-of-service regulations define “ready mixed concrete delivery vehicle” to mean “a vehicle designed to deliver ready-mixed concrete on a daily basis and equipped with a mechanism under which the vehicle’s propulsion engine provides the power to operate a mixer drum to agitate and mix the product en route to the delivery site.” 49 CFR 395.2.

AGC said, “In further recognition of the unique nature of construction operations and its outstanding safety record, Congress in the FAST Act provided the same two exemptions ACPA is seeking to drivers of ready-mixed concrete delivery vehicles. Both are perishable products that are not usable if they are not dropped and spread within a brief delivery window. Because of this short delivery window, the routes from the production facility to the delivery site for both products are limited to less than 40 miles, and the time spent driving a CMV is typically only a few hours per day. Thus, in both cases, the drivers do not face the same fatigue factors as drivers of long-haul trucks, and therefore do not pose the same risk of a fatigue-related accident as long-haul drivers.”

ARTBA commented: “Transportation construction industry drivers are not long-haul operators who consistently spend many consecutive hours on the road in a given day. They are short-haul drivers who typically travel less than 20 miles one way. Many of our drivers spend substantial amounts of time off the road during the work day, loading and unloading materials or equipment. Others may be responsible for positioning a piece of mobile equipment at the beginning of the work day, but may not be back behind the wheel until day’s end, so that their daily drive time is actually minimal.”

Koss echoed that comment: “Concrete being delivered to our jobsites is time sensitive and the 30-minute rest period impacts the ability of our drivers to deliver our highly perishable material to the jobsite within the required time frame to meet each owner’s stringent quality requirements. This needless loss of material is frustrating since production and delivery methods create significant rest periods throughout the day for our drivers that exceed the 30-minute DOT rest requirement. . . . Due to the limited construction season, we must maximize every available hour of daylight. Limiting our drivers to 12 hours of on duty time creates additional cost by carrying extra resources to deploy creative shifts to maximize up time of our fleet.”

One anonymous respondent opposed the requested exemptions. According to this individual, “I ask that the 30-minute break remain a requirement. Further, I ask that the department consider revising the rules so that drivers engaged in physically demanding unloading within a 100-air mile radius are limited to 12 hours on duty rather than 14 or 16.”

VI. FMCSA Decision

FMCSA has evaluated ACPA's application and the public comments and decided to grant the exemptions. The Agency believes that all drivers transporting ready-mixed concrete and related materials and equipment in vehicles other than those outfitted with rotating mixer drums, will likely achieve a level of safety that is equivalent to or greater than, the level of safety achieved without the exemptions [49 CFR 381.305(a)].

The first exemption from the HOS 30-minute break provision will allow drivers transporting ready-mixed concrete and related materials to use 30 minutes or more of on-duty "waiting time" to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break. The second exemption will allow drivers to use the short-haul RODS exception but with a 14-hour duty period instead of the usual 12 hours.

VII. Terms and Conditions for the Exemptions

- Drivers must have a copy of this notice or equivalent signed FMCSA exemption document in their possession while operating under the terms of the exemptions. The exemption document must be presented to law enforcement officials upon request.
- Drivers must return to the work reporting location and be released from work within 14 consecutive hours.

Preemption

In accordance with 49 U.S.C. 31315(d), during the period these exemptions are in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemptions.

Notification to FMCSA

Exempt motor carriers must notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5), involving any of its CMVs operating under the terms of the exemptions. The notification must include the following information:

- Name of the exemption: "ACPA"
- Name of the operating motor carrier,
- Date of the accident,
- City or town, and State, in which the accident occurred, or closest to the accident scene,
- Driver's name and license number,
- Vehicle number and State license number,
- Number of individuals suffering physical injury,
- Number of fatalities,

(i) The police-reported cause of the accident,

(j) Whether the driver was cited for violation of any traffic laws, motor carrier safety regulations, and

(k) The driver's total on-duty time period prior to the accident.

Reports filed under this provision shall be emailed to MCPSD@DOT.GOV.

Termination

FMCSA does not believe the drivers covered by these exemptions will experience any deterioration of their safety record.

Interested parties or organizations possessing information that would show that any or all of these motor carriers are not achieving the requisite level of safety should immediately notify FMCSA. The Agency will evaluate any information submitted and, if safety is being compromised or if the continuation of the exemptions is inconsistent with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA will immediately take steps to revoke the exemptions of the company or companies and drivers in question.

Issued on: January 30, 2019.

Raymond P. Martinez,
Administrator.

[FR Doc. 2019-01267 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2018-0207]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 18 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on December 11, 2018. The exemptions expire on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcsamedical@dot.gov, FMCSA,

Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2018-0207, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On November 9, 2018, FMCSA published a notice announcing receipt of applications from 18 individuals requesting an exemption from vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (83 FR 56140). The public comment period ended on December 10, 2018, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual

acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for up to five years from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows applicants to operate CMVs in interstate commerce. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on medical reports about the applicants' vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the November 9, 2018, **Federal Register** notice (83 FR 56140) and will not be repeated in this notice.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The 18 exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, aphakia, cataract, central vein occlusion, complete loss of vision, hamartoma, macular scar, optic nerve hypoplasia, and prosthesis. In most cases, their eye conditions were not recently developed. 11 of the applicants were either born with their vision impairments or have had them since childhood. The seven individuals that sustained their vision conditions as adults have had it for a range of 3 to 16 years. Although each applicant has one eye that does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors' opinions are supported by the applicants' possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 3 to 37 years. In the past three years, no drivers were involved in crashes, and no drivers were convicted of moving violations in CMVs. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10) and (b) by a certified Medical Examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual

medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 18 exemption applications, FMCSA exempts the following drivers from the vision requirement, 49 CFR 391.41(b)(10), subject to the requirements cited above:

Alejandro R. Almaguer (FL)
 Abdallah A. Alserhan (IL)
 Jason D. Burke (MD)
 Patricio C. Carvalho (MD)
 John B. Casper (OK)
 Denis Cuzimencov (NC)
 Liam F. Gilliland (MA)
 Steven M. Huddleston (NM)
 Bradley W. Leonard (SD)
 Edward J. Lewis (UT)
 Bradley W. Lovelace (NC)
 Tyler McFee (OH)
 Joseph L. Rigsby (AL)
 Stephen A. Scales (IL)
 Paul K. Sears (GA)
 Michael D. Vander Zwaag (IA)
 Phillip J. Vecchioni (MD)
 Nathaniel C. Volk (IL)

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01265 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA-1999-6156; FMCSA-2000-7006; FMCSA-2000-7363; FMCSA-2002-12294; FMCSA-2002-12844; FMCSA-2004-17195; FMCSA-2004-18885; FMCSA-2004-19477; FMCSA-2006-26066; FMCSA-2008-0106; FMCSA-2008-0231; FMCSA-2008-0292; FMCSA-2010-0187; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0366; FMCSA-2011-0380; FMCSA-2013-0030; FMCSA-2014-0004; FMCSA-2014-0010; FMCSA-2014-0299; FMCSA-2015-0351; FMCSA-2016-0028; FMCSA-2016-0033; FMCSA-2016-0206]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 71 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirements in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before March 8, 2019.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA-1999-6156; FMCSA-2000-7006; FMCSA-2000-7363; FMCSA-2002-12294; FMCSA-2002-12844; FMCSA-2004-17195; FMCSA-2004-18885; FMCSA-2004-19477; FMCSA-2006-26066; FMCSA-2008-0106; FMCSA-2008-0231; FMCSA-2008-0292; FMCSA-2010-0187; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0366; FMCSA-2011-0380; FMCSA-2013-0030; FMCSA-2014-0004; FMCSA-2014-0010; FMCSA-2014-0299; FMCSA-2015-0351; FMCSA-2016-0028; FMCSA-2016-0033; FMCSA-2016-0206 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200

New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.

- *Fax:* 1-202-493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202-366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:**I. Public Participation***A. Submitting Comments*

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-1999-6156; FMCSA-2000-7006; FMCSA-2000-7363; FMCSA-2002-12294; FMCSA-2002-12844; FMCSA-2004-17195; FMCSA-2004-18885; FMCSA-2004-19477; FMCSA-2006-26066; FMCSA-2008-0106; FMCSA-2008-0231; FMCSA-2008-0292; FMCSA-2010-0187; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0366; FMCSA-2011-0380; FMCSA-2013-0030; FMCSA-2014-0004; FMCSA-2014-0010; FMCSA-2014-0299; FMCSA-2015-0351; FMCSA-2016-0028; FMCSA-2016-0033; FMCSA-2016-0206), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA-1999-6156; FMCSA-2000-7006; FMCSA-2000-

7363; FMCSA-2002-12294; FMCSA-2002-12844; FMCSA-2004-17195; FMCSA-2004-18885; FMCSA-2004-19477; FMCSA-2006-26066; FMCSA-2008-0106; FMCSA-2008-0231; FMCSA-2008-0292; FMCSA-2010-0187; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0366; FMCSA-2011-0380; FMCSA-2013-0030; FMCSA-2014-0004; FMCSA-2014-0010; FMCSA-2014-0299; FMCSA-2015-0351; FMCSA-2016-0028; FMCSA-2016-0033; FMCSA-2016-0206, in the keyword box, and click "Search." When the new screen appears, click on the "Comment Now!" button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-1999-6156; FMCSA-2000-7006; FMCSA-2000-7363; FMCSA-2002-12294; FMCSA-2002-12844; FMCSA-2004-17195; FMCSA-2004-18885; FMCSA-2004-19477; FMCSA-2006-26066; FMCSA-2008-0106; FMCSA-2008-0231; FMCSA-2008-0292; FMCSA-2010-0187; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0366; FMCSA-2011-0380; FMCSA-2013-0030; FMCSA-2014-0004; FMCSA-2014-0010; FMCSA-2014-0299; FMCSA-2015-0351; FMCSA-2016-0028; FMCSA-2016-0033; FMCSA-2016-0206, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET,

Monday through Friday, except Federal holidays.

C. Privacy Act

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

II. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for five years if it finds that such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the five-year period. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 71 individuals listed in this notice have requested renewal of their exemptions from the vision standard in 49 CFR 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable two-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will

take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than five years from its approval date and may be renewed upon application. FMCSA grants exemptions from the vision standard for a two-year period to align with the maximum duration of a driver's medical certification. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 71 applicants has satisfied the renewal conditions for obtaining an exemption from the vision standard (see 64 FR 54948; 65 FR 159; 65 FR 20245; 65 FR 45817; 65 FR 57230; 65 FR 77066; 66 FR 66969; 67 FR 46016; 67 FR 57267; 67 FR 67234; 67 FR 68719; 67 FR 71610; 68 FR 2629; 69 FR 8260; 69 FR 17263; 69 FR 31447; 69 FR 53493; 69 FR 62741; 69 FR 62742; 69 FR 64742; 69 FR 64806; 69 FR 64810; 69 FR 71098; 69 FR 71100; 70 FR 2705; 70 FR 44946; 71 FR 19604; 71 FR 27033; 71 FR 43557; 71 FR 62147; 71 FR 62148; 71 FR 63379; 72 FR 185; 72 FR 1050; 72 FR 1051; 72 FR 1053; 72 FR 1054; 72 FR 1056; 73 FR 35194; 73 FR 35198; 73 FR 36954; 73 FR 36955; 73 FR 42403; 73 FR 46973; 73 FR 48275; 73 FR 54889; 73 FR 61922; 73 FR 61925; 73 FR 63047; 73 FR 74563; 73 FR 74565; 73 FR 75806; 73 FR 75807; 73 FR 76439; 73 FR 76440; 73 FR 78421; 73 FR 78423; 75 FR 36779; 75 FR 38602; 75 FR 44051; 75 FR 47883; 75 FR 50799; 75 FR 59327; 75 FR 63257; 75 FR 64396; 75 FR 65057; 75 FR 66423; 75 FR 69737; 75 FR 72863; 75 FR 77492; 75 FR 77590; 75 FR 77591; 75 FR 77949; 75 FR 77951; 75 FR 79079; 75 FR 79081; 75 FR 79083; 75 FR 79084; 75 FR 80887; 76 FR 1499; 76 FR 2190; 76 FR 5425; 77 FR 5874; 77 FR 17109; 77 FR 17117; 77 FR 27845; 77 FR 38384; 77 FR 46153; 77 FR 60010; 77 FR 64582; 77 FR 64583; 77 FR 68199; 77 FR 68202; 77 FR 70537; 77 FR 74273; 77 FR 74730; 77 FR 74733; 77 FR 74734; 77 FR 75496; 77 FR 76166; 77 FR 76167; 78 FR 800; 78 FR 41975; 78 FR 56986; 79 FR 18392; 79 FR 21996; 79 FR 29498; 79 FR 35220; 79 FR 38661; 79 FR 51643; 79 FR 56104; 79 FR 56117; 79 FR 59348; 79 FR 64001; 79 FR 65759; 79 FR 72756; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 73689; 79 FR 74168; 79 FR 74169; 80 FR 603; 80 FR 9304; 80 FR 48411; 81 FR 17237; 81 FR 28138; 81 FR 39320; 81 FR 59266; 81 FR 70253; 81 FR 71173; 81 FR 74494; 81 FR 80161; 81 FR 81230; 81 FR 96165; 81 FR 96191). They have submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision

deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315, the following groups of drivers received renewed exemptions in the month of January and are discussed below. As of January 3, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 23 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (64 FR 54948; 65 FR 159; 65 FR 45817; 65 FR 77066; 66 FR 66969; 67 FR 71610; 69 FR 8260; 69 FR 17263; 69 FR 31447; 69 FR 53493; 69 FR 62742; 69 FR 64810; 71 FR 19604; 71 FR 27033; 71 FR 62147; 71 FR 62148; 72 FR 185; 73 FR 35194; 73 FR 35198; 73 FR 36954; 73 FR 36955; 73 FR 46973; 73 FR 48275; 73 FR 54889; 73 FR 61922; 73 FR 61925; 73 FR 63047; 73 FR 74563; 73 FR 74565; 73 FR 75806; 73 FR 75807; 73 FR 76439; 73 FR 76440; 73 FR 78421; 73 FR 78423; 75 FR 36779; 75 FR 44051; 75 FR 47883; 75 FR 50799; 75 FR 59327; 75 FR 63257; 75 FR 64396; 75 FR 65057; 75 FR 77590; 75 FR 77591; 75 FR 77949; 75 FR 77951; 75 FR 79081; 77 FR 5874; 77 FR 17109; 77 FR 17117; 77 FR 27845; 77 FR 38384; 77 FR 46153; 77 FR 60010; 77 FR 64582; 77 FR 64583; 77 FR 68202; 77 FR 70537; 77 FR 74730; 78 FR 41975; 78 FR 56986; 79 FR 18392; 79 FR 21996; 79 FR 29498; 79 FR 35220; 79 FR 38661; 79 FR 51643; 79 FR 56104; 79 FR 56117; 79 FR 59348; 79 FR 64001; 79 FR 65759; 79 FR 73689; 80 FR 48411; 81 FR 17237; 81 FR 28138; 81 FR 39320; 81 FR 59266; 81 FR 70253; 81 FR 71173; 81 FR 74494; 81 FR 80161; 81 FR 81230; 81 FR 96165; 81 FR 96191);

Robert J. Ambrose (MA)

Nathan A. Buckles (IN)

David F. Cialdea (MA)

Robert J. Clarke (NY)

David R. Cox (OR)

Paul A. Gregerson (IA)

Victor B. Hawks (VA)

Jesse P. Jamison (TN)

Oscar Juarez (ID)

Mearl C. Kennedy (OH)

James W. Lappan (KS)

Joseph A. Leigh, Jr. (NC)

Bruce J. Lewis (RI)

John C. McLaughlin (SD)

Jack W. Murphy, Jr. (OH)

John C. Rodriguez (PA)

Jeffrey Sanders (NC)

Edward P. Schrader II (WA)
Randal J. Shabloski (PA)
Curtis L. Shannon (MN)
Julius Simmons, Jr. (SC)
Allen J. Stolz (WI)
Danny A. Wright (IN)

The drivers were included in docket numbers FMCSA–1999–6156; FMCSA–2000–7363; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0292; FMCSA–2010–0187; FMCSA–2010–0327; FMCSA–2011–0366; FMCSA–2011–0380; FMCSA–2013–0030; FMCSA–2014–0004; FMCSA–2014–0010; FMCSA–2015–0351; FMCSA–2016–0028; FMCSA–2016–0033; FMCSA–2016–0206. Their exemptions are applicable as of January 3, 2019, and will expire on January 3, 2021.

As of January 9, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following ten individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (71 FR 63379; 72 FR 1051; 73 FR 78423; 75 FR 79083; 77 FR 74734; 79 FR 73686; 81 FR 96165):

David L. Cattoor (NV)
Arthur Dolengewicz (NY)
Terrence L. McKinney (TX)
Ellis T. McKneely (LA)
Ronald C. Morris (NV)
Steven M. Scholfield (KY)
David C. Stitt (KS)
Kevin L. Truxell (FL)
Bruce A. Walker (WI)
Lee A. Wiltjer (IL)

The drivers were included in docket number FMCSA–2006–26066. Their exemptions are applicable as of January 9, 2019, and will expire on January 9, 2021.

As of January 10, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following ten individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (75 FR 69737; 76 FR 1499; 77 FR 74733; 79 FR 72756; 79 FR 73397; 80 FR 9304; 81 FR 96165):

Eric C. Hammer (MO)
Robert K. Ipock (NC)
Perry D. Jensen (WI)
Jesse L. Lichtenberger (PA)
James G. Pitchford (OH)
Frederick E. Schaub (IA)
Michael G. Somma (NY)
Jason E. Thomas (ND)
Richard L. Totels (TX)
Diane L. Wedebrand (IA)

The drivers were included in docket numbers FMCSA–2010–0287; FMCSA–2014–0299. Their exemptions are applicable as of January 10, 2019, and will expire on January 10, 2021.

As of January 12, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following ten individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 20245; 65 FR 57230; 67 FR 67234; 69 FR 53493; 69 FR 62741; 69 FR 64742; 71 FR 62147; 71 FR 62148; 73 FR 61925; 73 FR 74565; 75 FR 59327; 75 FR 66423; 75 FR 72863; 76 FR 2190; 77 FR 68199; 77 FR 74273; 79 FR 73687; 81 FR 96165):

Timothy Bradford (TN)
Douglas K. Esp (MT)
Donald L. Hamrick (KS)
Gary L. Killian (NC)
Thomas L. Oglesby (GA)
Preston S. Salisbury (MT)
Kevin W. Schaffer (IL)
George A. Teti (FL)
David W. Ward (NC)
Ralph W. York (NM)

The drivers were included in docket numbers FMCSA–2000–7006; FMCSA–2004–18885; FMCSA–2010–0354. Their exemptions are applicable as of January 12, 2019, and will expire on January 12, 2021.

As of January 13, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following four individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 45817; 65 FR 77066; 67 FR 46016; 67 FR 57267; 67 FR 71610; 69 FR 71098; 71 FR 63379; 72 FR 1050; 72 FR 1054; 73 FR 78421; 75 FR 79079; 77 FR 76166; 79 FR 73687; 81 FR 96165):

David S. Brumfield (KY)
Arthur A. Sappington (IN)
William H. Smith (AL)
Edward C. Williams (AL)

The drivers were included in docket numbers FMCSA–2000–7363; FMCSA–2002–12294; FMCSA–2006–26066. Their exemptions are applicable as of January 13, 2019, and will expire on January 13, 2021.

As of January 14, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following three individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 64806; 70 FR 2705; 72 FR 1056; 73 FR 76439; 75 FR 79084; 77 FR 75496; 79 FR 74169; 81 FR 96165):

Christopher L. Depuy (OH); Larry J. Folkerts (IA); Francis M. McMullin (PA).

The drivers were included in docket number FMCSA–2004–19477. Their exemptions are applicable as of January 14, 2019, and will expire on January 14, 2021.

As of January 17, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following four individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (67 FR 68719; 68 FR 2629; 69 FR 71100; 72 FR 1053; 73 FR 76440; 75 FR 80887; 77 FR 76167; 79 FR 74168; 81 FR 96165):

Howard F. Breikreutz (MN)
John E. Evenson (WI)
Craig M. Landry (LA)
Kenneth E. Vigue, Jr. (WA)

The drivers were included in docket number FMCSA–2002–12844. Their exemptions are applicable as of January 17, 2019, and will expire on January 17, 2021.

As of January 31, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 17263; 69 FR 31447; 70 FR 44946; 71 FR 43557; 73 FR 42403; 75 FR 38602; 75 FR 72863; 75 FR 77492; 76 FR 2190; 76 FR 5425; 78 FR 800; 80 FR 603; 81 FR 96165):

Gary S. Alvarez (MA)
Brett K. Hasty (GA)
Gary D. Layton (TX)
Rocky D. Moorhead (NM)
Myron A. Smith (MN)
Jose M. Suarez (TX)
Richard L. Zacher (OR)

The drivers were included in docket numbers FMCSA–2004–17195; FMCSA–2010–0354; FMCSA–2010–0385. Their exemptions are applicable as of January 31, 2019, and will expire on January 31, 2021.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a certified Medical Examiner, as defined by 49 CFR 390.5, who attests that the driver is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file or keep a copy of his/her driver's qualification if he/her is self-employed. The driver must also have a copy of the exemption when

driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 71 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above. In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01260 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-1998-3637; FMCSA-2000-7006; FMCSA-2001-10578; FMCSA-2002-12432; FMCSA-2002-12844; FMCSA-2004-19477; FMCSA-2005-23238; FMCSA-2006-26066; FMCSA-2008-0266; FMCSA-2008-0340; FMCSA-2010-0082; FMCSA-2010-0201; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2012-0040; FMCSA-2012-0337; FMCSA-2012-0339; FMCSA-2014-0007; FMCSA-2014-0010; FMCSA-2014-0298; FMCSA-2014-0299; FMCSA-2014-0300; FMCSA-2016-0207; FMCSA-2016-0210; FMCSA-2016-0212]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 52 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV)

drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirements in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before March 8, 2019.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA-1998-3637; FMCSA-2000-7006; FMCSA-2001-10578; FMCSA-2002-12432; FMCSA-2002-12844; FMCSA-2004-19477; FMCSA-2005-23238; FMCSA-2006-26066; FMCSA-2008-0266; FMCSA-2008-0340; FMCSA-2010-0082; FMCSA-2010-0201; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2012-0040; FMCSA-2012-0337; FMCSA-2012-0339; FMCSA-2014-0007; FMCSA-2014-0010; FMCSA-2014-0298; FMCSA-2014-0299; FMCSA-2014-0300; FMCSA-2016-0207; FMCSA-2016-0210; FMCSA-2016-0212 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.

- *Fax:* 1-202-493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the SUPPLEMENTARY INFORMATION section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202-366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-1998-3637; FMCSA-2000-7006; FMCSA-2001-10578; FMCSA-2002-12432; FMCSA-2002-12844; FMCSA-2004-19477; FMCSA-2005-23238; FMCSA-2006-26066; FMCSA-2008-0266; FMCSA-2008-0340; FMCSA-2010-0082; FMCSA-2010-0201; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2012-0040; FMCSA-2012-0337; FMCSA-2012-0339; FMCSA-2014-0007; FMCSA-2014-0010; FMCSA-2014-0298; FMCSA-2014-0299; FMCSA-2014-0300; FMCSA-2016-0207; FMCSA-2016-0210; FMCSA-2016-0212), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA-1998-3637; FMCSA-2000-7006; FMCSA-2001-10578; FMCSA-2002-12432; FMCSA-2002-12844; FMCSA-2004-19477; FMCSA-2005-23238; FMCSA-2006-26066; FMCSA-2008-0266; FMCSA-2008-0340; FMCSA-2010-0082; FMCSA-2010-0201; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2012-0040; FMCSA-2012-0337; FMCSA-2012-0339; FMCSA-2014-0007; FMCSA-2014-0010; FMCSA-2014-0298; FMCSA-2014-0299; FMCSA-2014-0300; FMCSA-2016-0207; FMCSA-2016-0210; FMCSA-2016-0212, in the keyword box, and click "Search." When the new screen appears, click on the "Comment Now!" button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility,

please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-1998-3637; FMCSA-2000-7006; FMCSA-2001-10578; FMCSA-2002-12432; FMCSA-2002-12844; FMCSA-2004-19477; FMCSA-2005-23238; FMCSA-2006-26066; FMCSA-2008-0266; FMCSA-2008-0340; FMCSA-2010-0082; FMCSA-2010-0201; FMCSA-2010-0287; FMCSA-2010-0327; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2012-0040; FMCSA-2012-0337; FMCSA-2012-0339; FMCSA-2014-0007; FMCSA-2014-0010; FMCSA-2014-0298; FMCSA-2014-0299; FMCSA-2014-0300; FMCSA-2016-0207; FMCSA-2016-0210; FMCSA-2016-0212, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. Privacy Act

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

II. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for five years if it finds that such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the five-year period. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding vision found in 49

CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 52 individuals listed in this notice have requested renewal of their exemptions from the vision standard in 49 CFR 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable two-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than five years from its approval date and may be renewed upon application. FMCSA grants exemptions from the vision standard for a two-year period to align with the maximum duration of a driver's medical certification. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 52 applicants has satisfied the renewal conditions for obtaining an exemption from the vision standard (see 63 FR 30285; 63 FR 54519; 65 FR 20245; 65 FR 57230; 65 FR 77069; 66 FR 53826; 66 FR 66966; 67 FR 54525; 67 FR 57266; 67 FR 68719; 67 FR 71610; 68 FR 2629; 68 FR 8794; 68 FR 69434; 69 FR 52741; 69 FR 64806; 69 FR 64810; 69 FR 71100; 70 FR 2705; 70 FR 8659; 70 FR 74102; 71 FR 5105; 71 FR 19600; 71 FR 53489; 71 FR 63379; 71 FR 66217; 72 FR 1051; 72 FR 1054; 72 FR 1056; 72 FR 5489; 73 FR 11989; 73 FR 36955; 73 FR 51336; 73 FR 51689; 73 FR 63047; 73 FR 74565; 73 FR 75803; 73 FR 76439; 73 FR 78423; 74 FR 980; 74 FR 6207; 74 FR 6209; 75 FR 13653; 75 FR 25919; 75 FR 36779; 75 FR 39729; 75 FR 52062;

75 FR 54958; 75 FR 64396; 75 FR 65057; 75 FR 69737; 75 FR 70078; 75 FR 72863; 75 FR 77942; 75 FR 77949; 75 FR 79081; 75 FR 79083; 75 FR 79084; 76 FR 1499; 76 FR 2190; 76 FR 4413; 76 FR 4414; 76 FR 5425; 76 FR 8809; 77 FR 17107; 77 FR 23799; 77 FR 33558; 77 FR 38384; 77 FR 40946; 77 FR 52389; 77 FR 64582; 77 FR 68200; 77 FR 68202; 77 FR 70534; 77 FR 70537; 77 FR 74273; 77 FR 74733; 77 FR 74734; 77 FR 75496; 78 FR 797; 78 FR 798; 78 FR 1919; 78 FR 9772; 78 FR 12813; 78 FR 12817; 79 FR 18391; 79 FR 35218; 79 FR 38659; 79 FR 46300; 79 FR 51643; 79 FR 53514; 79 FR 56104; 79 FR 59357; 79 FR 64001; 79 FR 65759; 79 FR 65760; 79 FR 69985; 79 FR 72756; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 74169; 80 FR 603; 80 FR 2473; 80 FR 3305; 80 FR 3308; 80 FR 3723; 80 FR 5615; 80 FR 8927; 80 FR 9304; 80 FR 18693; 81 FR 70248; 81 FR 72664; 81 FR 80161; 81 FR 81230; 81 FR 86063; 81 FR 90046; 81 FR 94013; 81 FR 96165; 81 FR 96180; 82 FR 12683; 82 FR 13048). They have submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315, the following groups of drivers received renewed exemptions in the month of February and are discussed below. As of February 5, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 32 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (63 FR 30285; 63 FR 54519; 65 FR 20245; 65 FR 57230; 65 FR 77069; 66 FR 53826; 66 FR 66966; 67 FR 57266; 67 FR 71610; 68 FR 69434; 69 FR 52741; 69 FR 64806; 69 FR 64810; 70 FR 2705; 70 FR 74102; 71 FR 5105; 71 FR 19600; 71 FR 53489; 71 FR 63379; 71 FR 66217; 72 FR 1051; 72 FR 1056; 73 FR 11989; 73 FR 36955; 73 FR 51336; 73 FR 51689; 73 FR 63047; 73 FR 74565; 73 FR 75803; 73 FR 76439; 73 FR 78423; 74 FR 6209; 75 FR 13653; 75 FR 25919; 75 FR 36779; 75 FR 39729;

75 FR 52062; 75 FR 54958; 75 FR 64396; 75 FR 65057; 75 FR 69737; 75 FR 70078; 75 FR 72863; 75 FR 77949; 75 FR 79081; 75 FR 79083; 75 FR 79084; 76 FR 1499; 76 FR 2190; 76 FR 4413; 77 FR 17107; 77 FR 38384; 77 FR 40946; 77 FR 52389; 77 FR 64582; 77 FR 68200; 77 FR 68202; 77 FR 70537; 77 FR 74273; 77 FR 74733; 77 FR 74734; 77 FR 75496; 78 FR 797; 79 FR 18391; 79 FR 35218; 79 FR 38659; 79 FR 46300; 79 FR 51643; 79 FR 53514; 79 FR 56104; 79 FR 59357; 79 FR 64001; 79 FR 65759; 79 FR 65760; 79 FR 69985; 79 FR 72756; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 74169; 80 FR 603; 80 FR 3305; 80 FR 8927; 80 FR 9304; 81 FR 70248; 81 FR 72664; 81 FR 80161; 81 FR 81230; 81 FR 86063; 81 FR 90046; 81 FR 94013; 81 FR 96165; 81 FR 96180; 82 FR 12683; 82 FR 13048):

Kurtis A. Anderson (SD)
 Terry L. Anderson (PA)
 Ricky J. Childress (AL)
 Bryan K. DeBorde (WA)
 Roger P. Dittrich (IL)
 Craig E. Dorrance (MT)
 David L. Dykman (ID)
 Ricky L. Gillum (KY)
 Johnny J. Gowdy (MS)
 Harold J. Haier (NY)
 Ronald Holshouser (MO)
 Timothy L. Kelly (TX)
 Lewis A. Kielhack (IL)
 John N. Lanning (CA)
 Bruce T. Loughary (AR)
 Samson B. Margison (OH)
 Joe A. McIlroy (NY)
 Charles J. Morman (FL)
 Timothy W. Nappier (MI)
 David J. Nocton (MN)
 Edward P. Paloskey (PA)
 Monte L. Purciful (IN)
 Kevin L. Quastad (IA)
 Antonio Rivera (PA)
 Carl W. Russell (OK)
 Randal C. Schmude (WI)
 Ronald B. Shafer (MI)
 Ranjodh Singh (CA)
 James D. St. Peter (NC)
 Lee F. Taylor (NJ)
 David J. Triplett (KY)
 David L. Von Hagen (IA)

The drivers were included in docket numbers FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2001–10578; FMCSA–2004–19477; FMCSA–2005–23238; FMCSA–2006–26066; FMCSA–2008–0266; FMCSA–2008–0340; FMCSA–2010–0082; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0327; FMCSA–2010–0354; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0298; FMCSA–2014–0299; FMCSA–2016–0207; FMCSA–2016–0210; FMCSA–2016–0212. Their exemptions are applicable as of February 5, 2019, and will expire on February 5, 2021.

As of February 7, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, Thomas J. Boss (IL) has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (67 FR 68719; 68 FR 2629; 69 FR 71100; 72 FR 1054; 74 FR 980; 76 FR 4414; 78 FR 798; 80 FR 5615; 82 FR 13048).

The driver was included in docket number FMCSA–2002–12844. The exemption is applicable as of February 7, 2019, and will expire on February 7, 2021.

As of February 11, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (77 FR 70534; 78 FR 9772; 80 FR 3308; 82 FR 13048):

Douglas Eamens (NY);
 Johnie Reed (VA)

The drivers were included in docket number FMCSA–2012–0337. Their exemptions are applicable as of February 11, 2019, and will expire on February 11, 2021.

As of February 18, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following ten individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (80 FR 2473; 80 FR 18693; 82 FR 13048):

David C. Berger (PA)
 Kenneth Dionisi (MI)
 Keith A. Looney (AR)
 Raymond L. Bradshaw (TX)
 Wolfgang K. Faulkingham (ME)
 Van C. Mac (IL)
 Jeffrey L. Coachman (NY)
 Jackie Lee (FL)
 Luis Ramos (FL)
 Vantha Yeam (PA)

The drivers were included in docket number FMCSA–2014–0300. Their exemptions are applicable as of February 18, 2019, and will expire on February 18, 2021.

As of February 25, 2019, and in accordance with 49 U.S.C. 31136(e) and 31315, the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (67 FR 54525; 68 FR 8794; 69 FR 64806; 70 FR 2705; 70 FR 8659; 72 FR 1056; 72 FR 5489; 73 FR 51689; 73 FR 63047; 73 FR 76439; 74 FR 6207; 75 FR 77942; 75 FR 79083; 75 FR 79084; 76 FR 5425; 76 FR 8809; 77 FR 23799; 77 FR 33558; 77 FR 75496; 78 FR 1919; 78 FR 12813; 78 FR 12817; 80 FR 3723; 82 FR 13048):

Lester W. Carter (CA)
 Jerry W. Parker (OH)
 Cameron R. Whitford (NY)
 Dennis E. Fisher (NY)
 Gary W. Phelps (PA)
 Dennis R. O'Dell, Jr. (OK)
 Charles D. Reddick (GA)

The drivers were included in docket number FMCSA–2002–12432; FMCSA–2004–19477; FMCSA–2008–0266; FMCSA–2010–0385; FMCSA–2012–0040; FMCSA–2012–0339. Their exemptions are applicable as of February 25, 2019, and will expire on February 25, 2021.

Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a certified Medical Examiner, as defined by 49 CFR 390.5, who attests that the driver is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file or keep a copy of his/her driver's qualification if he/her is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

V. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 52 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above. In accordance with 49 U.S.C. 31136(e) and 31315, each

exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01259 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2018-0333]

Agency Information Collection Activities; Revision of a Currently-Approved Information Collection: Motor Carrier Identification Report

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval to revise an ICR titled, "Motor Carrier Identification Report," which is used to identify FMCSA regulated entities, help prioritize the agency's activities, aid in assessing the safety outcomes of those activities, and for statistical purposes. This ICR is being revised due to a final rule dated January 17, 2017, titled, "Unified Registration System; Suspension of Effectiveness," effective January 14, 2017, which suspended its regulations requiring existing interstate motor carriers, freight forwarders, brokers, intermodal equipment providers (IEPs), hazardous materials safety permit (HMSP) applicants, and cargo tank facilities under FMCSA jurisdiction to submit required registration and biennial update information to the Agency via a new electronic on-line Unified Registration System (URS). During this suspension, entities needing to file will follow the same procedures and forms used to submit information to FMCSA as they did prior to January 14, 2017, including use of Form MCS-150 or MCS-150B. The Form MCS-150 or MCS-150B will also be used by the small number of Mexico-domiciled motor carriers that seek authority to operate beyond the United States municipalities on the United States-Mexico border and their commercial zones.

This ICR is necessary to ensure regulated entities are registered with the DOT.

DATES: We must receive your comments on or before April 8, 2019.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA-2018-0333 using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Fax:* 1-202-493-2251.

- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>, and follow the online instructions for accessing the dockets, or go to the street address listed above.

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

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the "help" section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Secrist, Office of Registration and Safety Information, Department of Transportation, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202-385-2367; email Jeffrey.secris@dot.gov.

SUPPLEMENTARY INFORMATION:

Background: Title 49, United States Code Section 504(b)(2) provides the Secretary of Transportation (Secretary) with authority to require carriers, lessors, associations, or classes of these entities to file annual, periodic, and special reports containing answers to questions asked by the Secretary. The Secretary may also prescribe the form of records required to be prepared or compiled and the time period during which records must be preserved (See § 504(b)(1) and (d)). FMCSA will use this data to administer its safety programs using a database of entities that are subject to its regulations. This database necessitates that these entities notify FMCSA of their existence. For example, under 49 CFR 390.19(a), FMCSA requires all motor carriers beginning operations to file a Form MCS-150 titled, "Motor Carrier Identification Report," or MCS-150B titled, "Combined Motor Carrier Identification Report and HM Permit Applications." This report is filed by all motor carriers conducting operations in interstate, intrastate transporting hazardous materials or international commerce before beginning operations. It asks the respondent to provide the name of the business entity that owns and controls the motor carrier operation; address and telephone of principal place of business; assigned identification number(s), type of operation, types of cargo usually transported; number of vehicles owned, term leased and trip leased; driver information; and certification statement signed by an individual authorized to sign documents on behalf of the business entity.

Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Public Law 107-87, 115 Stat. 833, 864-866 (December 18, 2001) (49 U.S.C. 13902 note), directed the Agency to issue an interim final rule (IFR) to ensure that new entrant motor carriers are knowledgeable about the Federal Motor Carrier Safety Regulations (FMCSRs) and standards. On August 28, 2002, the Agency published an IFR titled, "Registration Enforcement" (67 FR 31978).

Existing applicants will use the MCS-150 or MCS-150B to update their

information in the Motor Carrier Management Information System. Applicants filing for the first time will be required to file on-line. Form MCS-150 or MCS-150B will be used for Mexico-domiciled carriers that seek authority to operate beyond the United States municipalities on the United States-Mexico border and their commercial zones. The information collected from the respondents is readily available to the public. This revised ICR captures the burden of continued use of the MCS-150 or MCS-150B for motor carriers updating their registration information and for the registration of Mexico-domiciled carriers.

The hazardous material declarations, Class 3A, Class 3B, and Div. 2.2 (Ammonia), are being removed. They are obsolete and do not require new or existing applicants to identify those declarations when applying for a USDOT number as a hazardous materials motor carrier.

The remaining hazardous materials entries on the forms and their respective instructions are being redesignated alphabetically to reflect the removal of the Class 3A, Class 3B, and Div. 2.2 (Ammonia) entries.

In the Filing Options section of the instructions for the forms, the Agency name is corrected.

In the hazardous materials list in the instructions for the forms, the entry for Combustible Liquid is revised to correct the 49 CFR reference.

The instructions for the forms are being revised to clarify the definitions of "Intrastate Hazmat Carrier" and "Intrastate Non-Hazmat Carrier."

Title: Motor Carrier Identification Report

OMB Control Number: 2126-0013.

Type of Request: Revision of a currently-approved collection.

Respondents: Motor carriers, freight forwarders, intermodal equipment providers, brokers, motor carriers with hazardous materials safety permit, cargo tank facilities and Mexican motor carriers.

Estimated Number of Responses: 679,651 responses [674,674 responses for 1C-1 + 3,299 responses for 1C-2 + 1,678 responses for 1C-3].

Estimated Time per Response: 20 minutes for new filings and 7.5 minutes for biennial updates and changes to complete the Form MCS-150.

Expiration Date: April 30, 2019.

Frequency of Response: On occasion and biennially.

Estimated Total Annual Burden: 119,878 hours [119,071 hours for IC-1 + 278 hours for IC-2 + 529 hours for IC-3].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87.

Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2019-01277 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2016-0002]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 11 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on September 6, 2018. The exemptions expire on September 6, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202-366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2016-0002, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On November 14, 2018 FMCSA published a notice announcing its decision to renew exemptions for 11 individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (83 FR 56905). The public comment period ended on December 14, 2018, and two comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5-1951.

49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

III. Discussion of Comments

FMCSA received two comments in this preceding. Kyle Guimarin agrees with the decision of renewing the 11 people, allowing them to drive a CMV in interstate commerce. Davis Benton also agrees with FMCSA's decision to renew the 11 people, exempting them from the hearing requirements required to operate a vehicle in interstate commerce.

IV. Conclusion

Based upon its evaluation of the 11 renewal exemption applications and comments received, FMCSA announces its decision to exempt the following drivers from the hearing requirement in 49 CFR 391.41 (b)(11).

As of September 6, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 11 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (83 FR 56905).

Pricilla Brackenridge, (IL)
 Gary Cordano, (NV)
 Renaldo Martinez, (TX)
 Michael Smith, (CO)
 David Chappelle, (TX)
 Samuel Fennell, (OH)
 Katrina Parker, (NJ)
 Michael Sweet, (GA)
 Mathias Conway, (MI)
 Richard Hoots, (AR)
 D'Neille Smith, (OH)

The drivers were included in docket number FMCSA–2016–0002. Their exemptions are applicable as of September 6, 2018, and will expire on September 6, 2020.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019–01261 Filed 2–5–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0058]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from three individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2018–0058 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

To avoid duplication, please use only one of these four methods. See the “Public Participation” portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions

regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2018–0058), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA–2018–0058, in the keyword box, and click “Search.” When the new screen appears, click on the “Comment Now!” button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2018–0058, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. Privacy Act

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

II. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the FMCSRs for a five-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the five-year period. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

The three individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy*: § 391.41(b)(8), paragraphs 3, 4, and 5.]

The advisory criteria states the following:

If an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure

medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the Medical Examiner in consultation with the treating physician. Before certification is considered, it is suggested that a six-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver had a seizure or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a five-year period or more.

As a result of Medical Examiners misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified Medical Examiner based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a Notice of Final Disposition titled, Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders, (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." Since the January 15, 2013 notice, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in 49 CFR 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (MEP) (78 FR 3069).

III. Qualifications of Applicants

Christopher M. Dowling

Mr. Dowling is a 39-year-old class A CDL holder in Indiana. He has a history of a seizure disorder and has been seizure free since 2006. He takes anti-seizure medication with the dosage and frequency remaining the same since April 2016. His physician states that he is supportive of Mr. Dowling receiving an exemption.

Robert Drake

Mr. Drake is a 46-year-old class D driver in Arizona. He has a history of epilepsy and has been seizure free since 2010. He takes anti-seizure medication with the dosage and frequency remaining the same since 2007. His physician states that he is supportive of Mr. Brown receiving an exemption.

Daniel H. Threatt

Mr. Threatt is a 21-year-old class C driver in North Carolina. He has a history of epilepsy and has been seizure free since 2009. His anti-seizure medication was discontinued in 2010. His physician states that he is supportive of Mr. Threatt receiving an exemption.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the dates section of the notice.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01275 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2019-0003]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of denials.

¹ See http://www.ecfr.gov/cgi-bin/text-id?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391_171.a and <https://www.gpo.gov/jdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

SUMMARY: FMCSA announces its decision to deny applications from 62 individuals who requested an exemption from the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a CMV in interstate commerce.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2019-0003, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

FMCSA received applications from 62 individuals who requested an exemption from the vision standard in the FMCSRs. FMCSA has evaluated the eligibility of these applicants and concluded that granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation 49 CFR 391.41(b)(10).

III. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption if it finds such an exemption would likely

achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such an exemption.

The Agency's decision regarding these exemption applications is based on the eligibility criteria, the terms and conditions for Federal exemptions, and an individualized assessment of each applicant's medical information provided by the applicant.

IV. Conclusion

The Agency has determined that these applicants do not satisfy the eligibility criteria or meet the terms and conditions of the Federal exemption and granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation 49 CFR 391.41(b)(10). Therefore, the 62 applicants in this notice have been denied exemptions from the physical qualification standards in 49 CFR 391.41(b)(10).

Each applicant has, prior to this notice, received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final action by the Agency. This notice summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denial.

The following three applicants did not have sufficient driving experience over the past three years under normal highway operating conditions:

Colin H. Goss (KY); Samuel R. Jennings (WA); and Michael A. Tomsha (IA).

The following 29 applicants had no experience operating a CMV:

Michael J. Baragona (NY)
Daniel E. Barnes (FL)
David R. Baskin (PA)
Victor D. Calderon (FL)
Onesimus C. Callaway (WA)
Daryl K. Chavis (MO)
Kevin F. Christof (TX)
William T. Comer (OH)
Kevin E. Curry (TX)
Patrick M. Cynar (IL)
Wondimu L. Fantawu (OH)
Phillip T. Ferraro (NJ)
Juan A. Flores (TX)
Gregory B. Gosha (AL)
Raymond W. Gudenau (MI)
Lucian D. Jackson (OH)
Anthony Jenkins (AL)
Eric C. Johnson (PA)
Candice Lambert (IL)
Dakota P. Mayberry (IL)
Ryan K. McConnell (SC)
Cameron A. Mote (TX)

Edwin J. Orellana (NJ)
Javier A. Outeiro (UT)
Ryan T. Roberts (MN)
Robert Singley (NY)
Matthew A. Spaits (CO)
Joshua B. Wells (KY)
Matthew Zappi (PA)

The following four applicants did not have three years of experience driving a CMV on public highways with their vision deficiencies:

Dale R. Bratcher (NM)
Robert A. Maston (GA)
Thomas W. Rush (TN)
Lance L. Russell (NY)

The following 16 applicants did not have three years of recent experience driving a CMV on public highways with their vision deficiencies:

Ronald D. Averill (CO)
Mihail Bendos (WA)
Jeffrey W. Blackmon (TX)
Waynetta J. Evans (FL)
James L. Fourcher (UT)
William C. Kelley (WI)
Earl D. Lilley (TX)
Alan M. Mahler (IN)
Scott M. McDonnell (MI)
Ricky Moore (LA)
Anthony J. Mumphrey (IA)
William L. Peterson (NE)
Gregory D. Shirah (AL)
Shannon R. Smit (AZ)
Steve Trought (FL)
Joshua D. Wilcox (MD)

The following applicant, William T. Satterley (KY), did not have sufficient driving experience over the past three years under normal highway operating conditions (gaps in driving record).

The following seven applicants were denied for multiple reasons:

Megin Berlin (NE)
Curtis V. Boys (IL)
Howard L. Jenkins (VA)
Joan C. Landis (FL)
Carlos Smith (LA)
Thomas L. Stollings (IN)
Michael R. Wilder (CO)

The following two applicants have not had stable vision for the preceding three-year period:

Earl W. Gibson (MO); and Donald E. Ratliff (KY).

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01254 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA–2018–0136]

Qualification of Drivers; Exemption Applications; Hearing**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 30 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. The exemptions enable these hard of hearing and deaf individuals to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on December 16, 2018. The exemptions expire on December 16, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:**I. Public Participation***A. Viewing Documents and Comments*

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2018–0136, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in

the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

II. Background

On November 14, 2018, FMCSA published a notice announcing receipt of applications from 30 individuals requesting an exemption from the hearing requirement in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (83 FR 56897). The public comment period ended on December 14, 2018, and two comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

III. Discussion of Comments

FMCSA received two comments in this preceeding. An anonymous commenter noted that he does not see an issue in allowing the applicants an exemption, since previous applicants have been granted exemptions. Billy Gann of Plymouth, Indiana noted that he has a hearing exemption and medical certificate.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption for up to five years from the hearing standard in 49 CFR 391.41(b)(11) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce. FMCSA grants

exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver’s medical certification.

The Agency’s decision regarding these exemption applications is based on current medical information and literature, and the 2008 Evidence Report, “Executive Summary on Hearing, Vestibular Function and Commercial Motor Driving Safety.” The evidence report reached two conclusions regarding the matter of hearing loss and CMV driver safety: (1) No studies that examined the relationship between hearing loss and crash risk exclusively among CMV drivers were identified; and (2) evidence from studies of the private driver’s license holder population does not support the contention that individuals with hearing impairment are at an increased risk for a crash. In addition, the Agency reviewed each applicant’s driving record found in the Commercial Driver’s License Information System (CDLIS), for commercial driver’s license (CDL) holders, and inspections recorded in the Motor Carrier Management Information System (MCMIS). For non-CDL holders, the Agency reviewed the driving records from the State Driver’s Licensing Agency (SDLA). Each applicant’s record demonstrated a safe driving history. Based on an individual assessment of each applicant that focused on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce, the Agency believes the drivers granted this exemption have demonstrated that they do not pose a risk to public safety.

Consequently, FMCSA finds that in each case exempting these applicants from the hearing standard in 49 CFR 391.41(b)(11) is likely to achieve a level of safety equal to that existing without the exemption.

IV. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must report any crashes or accidents as defined in 49 CFR 390.5; (2) each driver must report all citations and convictions for disqualifying offenses under 49 CFR part 383 and 49 CFR 391 to FMCSA; and (3) each driver is prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local

enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements.

V. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 30 exemption applications, FMCSA exempts the following drivers from the hearing standard, 49 CFR 391.41(b)(11), subject to the requirements cited above.

Andy R. Bernard, (OH) ..	William Brogni, (FL)
Robert Chavez, (TX)	David Chellin, (MN)
Joshua P. Cogan, (MD)	Joseph A. Conversa, (IL)
Ronald E. Cottrell, (OR)	Joseph N. Dooley, (MO)
Janet Donaldson, (CA) ...	Heath Focken, (NE)
Ahmed Gabr, (NC)	Stephen A. Goen, (GA)
Jaymes Harr, (IA)	Michael J. Hague, (RI)
Daniel R. Hanson, (PA)	Arnold Hatton, (DE)
Nima Jafari, (KS)	Raymond L. Levine, (CA)
Donte Mason, (TN)	Xavier Matthews, (FL)
Eric B. Oberhausen, (CA).	Taryn Peterson, (IA)
Melvin R. Ross, (OH)	Greivin Salazar, (MI)
Jerry Shortland, (OH)	John Sylvester, (TX)
John Whitlock, (IL)	Eric Woods, (MD)

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01258 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2018-0209]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 11 individuals for an

exemption from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions will enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA-2018-0209 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.

- *Fax:* 1-202-493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-2018-0209), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone

number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA-2018-0209, in the keyword box, and click "Search." When the new screen appears, click on the "Comment Now!" button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2018-0209, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. Privacy Act

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

II. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the FMCSRs for a five-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end

of the five-year period. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

The 11 individuals listed in this notice have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

In July 1992, the Agency first published the criteria for the Vision Waiver Program, which listed the conditions and reporting standards that CMV drivers approved for participation would need to meet (Qualification of Drivers; Vision Waivers, 57 FR 31458, July 16, 1992). The current Vision Exemption Program was established in 1998, following the enactment of amendments to the statutes governing exemptions made by § 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 401 (June 9, 1998). Vision exemptions are considered under the procedures established in 49 CFR part 381 subpart C, on a case-by-case basis upon application by CMV drivers who do not meet the vision standards of 49 CFR 391.41(b)(10).

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past three years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA-1998-3637.

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrated the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., "Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process," Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used three consecutive years of data, comparing the experiences of drivers in the first two years with their experiences in the final year.

III. Qualifications of Applicants

Manuel Gonzalez

Mr. Gonzalez, 47, has a prosthetic left eye due to a traumatic incident in childhood. The visual acuity in his right eye is 20/20, and in his left eye, no light perception. Following an examination in 2018, his ophthalmologist stated, "The patient has good vision in his right eye and should be able to perform the driving tasks required to operate a commercial vehicle." Mr. Gonzalez reported that he has driven straight

trucks for 20 years, accumulating 640,000 miles. He holds an operator's license from Illinois. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Henry J. Hughes

Mr. Hughes, 59, has had exotropia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/200. Following an examination in 2018, his optometrist stated, "Henry does have adequate vision for driving a commercial vehicle." Mr. Hughes reported that he has driven straight trucks for 10 years, accumulating 250,000 miles, and tractor-trailer combinations for 31 years, accumulating 3.1 million miles. He holds a Class A CDL from Minnesota. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Frederick L. McCurry

Mr. McCurry, 58, has a macular scar in his right eye due to toxoplasmosis in 1974. The visual acuity in his right eye is light perception, and in his left eye, 20/20. Following an examination in 2018, his optometrist stated, "In my medical opinion, this patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle according to federal regulations." Mr. McCurry reported that he has driven straight trucks for two years, accumulating 1,000 miles, and tractor-trailer combinations for 20 years, accumulating 500,000 miles. He holds a Class AM CDL from Virginia. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Luis M. Perez-Francisco

Mr. Perez-Francisco, 33, has a chorioretinal scar in his left eye due to toxoplasmosis in childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/150. Following an examination in 2018, his optometrist stated, "In my medical opinion, the patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Perez-Francisco reported that he has driven straight trucks for six years, accumulating 90,480 miles. He holds an operator's license from New Jersey. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Emmanuel A. Sepulveda

Mr. Sepulveda, 32, has had amblyopia in his right eye since childhood. The

visual acuity in his right eye is counting fingers, and in his left eye, 20/20. Following an examination in 2018, his optometrist stated, "I certify in my professional opinion, Mr. Sepulveda has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Sepulveda reported that he has driven straight trucks for two years, accumulating 60,000 miles, and tractor-trailer combinations for three years, accumulating 216,000 miles. He holds a Class A CDL from California. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Martin Serrano

Mr. Serrano, 58, has had a chorioretinal scar in his right eye since 1993. The visual acuity in his right eye is counting fingers, and in his left eye, 20/40. Following an examination in 2018, his ophthalmologist stated, "The patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Serrano reported that he has driven tractor-trailer combinations for 30 years, accumulating 420,000 miles. He holds a class A CDL from Illinois. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Kirby L. Sundet

Mr. Sundet, 46, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/15, and in his left eye, counting fingers. Following an examination in 2018, his optometrist stated, "After passing all testing requirements, it is my opinion that Mr. Sundet can safely operate commercial vehicles and I recommend he be given a waiver to operate commercial vehicles." Mr. Sundet reported that he has driven straight trucks for five years, accumulating 500,000 miles. He holds a Class A CDL from Minnesota. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Karl M. Vanderstucken

Mr. Vanderstucken, 56, has a prosthetic right eye due to a traumatic incident in 1995. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2018, his ophthalmologist stated, "In my professional opinion the patient has sufficient vision to operate a commercial vehicles [sic] driving task as required." Mr. Vanderstucken reported that he has driven straight trucks for 26 years, accumulating 2.34 million miles.

He holds a Class B CDL from Texas. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Nyrone Whyte

Mr. Whyte, 29, has complete loss of vision in his right eye due to a traumatic incident in 1998. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2018, his optometrist stated, "Mr. Whyte has met the vision criteria for driving a commercial vehicle." Mr. Whyte reported that he has driven straight trucks for seven years, accumulating 259,000. He holds a Class A CDL from Connecticut. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Byron L. Wright

Mr. Wright, 57, has had a hamartoma in his left eye since 1991. The visual acuity in his right eye is 20/20, and in his left eye, 20/200. Following an examination in 2018, his ophthalmologist stated, "I believe he has sufficient vision to safely drive a commercial vehicle." Mr. Wright reported that he has driven straight trucks for 35 years, accumulating 960,960 miles. He holds an operator's license from Delaware. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

Bradford C. Zipse

Mr. Zipse, 54, has a retinal scar in his left eye due to an infection in 2007. The visual acuity in his right eye is 20/15, and in his left eye, 20/400. Following an examination in 2018, his optometrist stated, "In my medical opinion, Mr. Zipse has sufficient vision to perform the driving tasks required to operate a commercial vehicle." Mr. Zipse reported that he has driven straight trucks for 30 years, accumulating 750,000 miles. He holds an operator's license from Wisconsin. His driving record for the last three years shows no crashes and no convictions for moving violations in a CMV.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments and material received before the close of business on the closing date indicated in the dates section of the notice.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01264 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2014-0212]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for three individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on August 28, 2018. The exemptions expire on August 28, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2014-0212, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket

Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On October 25, 2018, FMCSA published a notice announcing its decision to renew exemptions for three individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (83 FR 53951). The public comment period ended on November 26, 2018, and one comment was received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. Epilepsy: § 391.41(b)(8), paragraphs 3, 4, and 5.]

III. Discussion of Comments

FMCSA received one comment in this proceeding. The commenter stated his concerns about drivers who have experienced a seizure operating commercial motor vehicles. He also stated his recommendation that drivers who have experienced a seizure be seizure free for a certain period before

receiving an exemption. FMCSA does not grant exemptions to drivers unless the drivers meet established guidelines for the time since the last seizure was experienced.

IV. Conclusion

Based on its evaluation of the three renewal exemption applications and the comment received, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8): Peter R. Bender, (MN); Terry D. Hamber, (NC); and Louis W. Lerch, (IA).

The drivers were included in docket number FMCSA-2014-0212. Their exemptions are applicable as of August 28, 2018, and will expire on August 28, 2020.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01274 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-1998-4334; FMCSA-2000-7165; FMCSA-2000-7363; FMCSA-2002-12294; FMCSA-2004-18885; FMCSA-2008-0174; FMCSA-2008-0231; FMCSA-2008-0266; FMCSA-2008-0292; FMCSA-2010-0082; FMCSA-2010-0114; FMCSA-2010-0161; FMCSA-2010-0187; FMCSA-2011-0276; FMCSA-2012-0160; FMCSA-2012-0214; FMCSA-2012-0279; FMCSA-2012-0280; FMCSA-2013-0169; FMCSA-2013-0174; FMCSA-2014-0003; FMCSA-2014-0007; FMCSA-2014-0011; FMCSA-2014-0296; FMCSA-2014-0298; FMCSA-2015-0344; FMCSA-2016-0025; FMCSA-2016-0027; FMCSA-2016-0031; FMCSA-2016-0033; FMCSA-2016-0207; FMCSA-2016-0208; FMCSA-2016-0210; FMCSA-2016-0212]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 67 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202-366-4001, fmcamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-1998-4334; FMCSA-2000-7165; FMCSA-2000-7363; FMCSA-2002-12294; FMCSA-2004-18885; FMCSA-2008-0174; FMCSA-2008-0231; FMCSA-2008-0266; FMCSA-2008-0292; FMCSA-2010-0082; FMCSA-2010-0114; FMCSA-2010-0161; FMCSA-2010-0187; FMCSA-2011-0276; FMCSA-2012-0160; FMCSA-2012-0214; FMCSA-2012-0279; FMCSA-2012-0280; FMCSA-2013-0169; FMCSA-2013-0174; FMCSA-2014-0003; FMCSA-2014-0007; FMCSA-2014-0011; FMCSA-2014-0296; FMCSA-2014-0298; FMCSA-2015-0344; FMCSA-2016-0025; FMCSA-2016-0027; FMCSA-2016-0031; FMCSA-2016-0033; FMCSA-2016-0207; FMCSA-2016-0208; FMCSA-2016-0210; FMCSA-2016-0212, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC

20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On November 9, 2018, FMCSA published a notice announcing its decision to renew exemptions for 67 individuals from the vision requirement in 49 CFR 391.41(b)(10) to operate a CMV in interstate commerce and requested comments from the public (83 FR 56143). The public comment period ended on December 10, 2018, and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this preceding.

IV. Conclusion

Based on its evaluation of the 67 renewal exemption applications and comments received, FMCSA confirms its decision to exempt the following drivers from the vision requirement in 49 CFR 391.41(b)(10).

In accordance with 49 U.S.C. 31136(e) and 31315, the following groups of drivers received renewed exemptions in the month of December and are discussed below. As of December 3, 2018, and in accordance with 49 U.S.C.

31136(e) and 31315, the following 38 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (63 FR 66227; 64 FR 16520; 65 FR 33406; 65 FR 57234; 67 FR 46016; 67 FR 57266; 67 FR 57627; 69 FR 51346; 69 FR 52741; 71 FR 50970; 71 FR 53489; 73 FR 38497; 73 FR 46973; 73 FR 48273; 73 FR 51336; 73 FR 51689; 73 FR 54888; 73 FR 63047; 73 FR 75807; 75 FR 25918; 75 FR 34209; 75 FR 39725; 75 FR 39729; 75 FR 44051; 75 FR 47883; 75 FR 47886; 75 FR 52062; 75 FR 52063; 75 FR 61833; 75 FR 63257; 75 FR 64396; 76 FR 67248; 76 FR 79761; 77 FR 36338; 77 FR 38381; 77 FR 46153; 77 FR 46793; 77 FR 51846; 77 FR 52388; 77 FR 52389; 77 FR 56262; 77 FR 59245; 77 FR 60008; 77 FR 60010; 77 FR 64582; 77 FR 71671; 78 FR 64274; 78 FR 76705; 78 FR 77778; 79 FR 1908; 79 FR 14333; 79 FR 14571; 79 FR 28588; 79 FR 35220; 79 FR 38659; 79 FR 41740; 79 FR 46153; 79 FR 46300; 79 FR 52388; 79 FR 53514; 79 FR 56099; 79 FR 56104; 79 FR 58856; 79 FR 65760; 79 FR 70928; 79 FR 72754; 80 FR 76345; 81 FR 21647; 81 FR 26305; 81 FR 52514; 81 FR 59266; 81 FR 66724; 81 FR 68098; 81 FR 70248; 81 FR 70253; 81 FR 71173; 81 FR 72664; 81 FR 74494; 81 FR 80161; 81 FR 81230; 81 FR 90046; 81 FR 90050; 81 FR 94013; 81 FR 96180; 81 FR 96191);

Gary R. Andersen (NE)
Theodore N. Belcher (VA)
Daniel S. Billig (MN)
Thomas A. Black (MO)
Robert S. Bowen (GA)
Brian E. Broux (CA)
John M. Brown (KY)
Tracy L. Butcher (VA)
Jonathan E. Carriaga (NM)
Irvin L. Eaddy (SC)
Terry J. Edwards (MO)
Stephen R. Ehlenburg (IL)
Frank J. Faria (CA)
Christopher K. Foot (NV)
Claudia E. Gerez-Betancourt (TX)
Billy R. Gibbs (MD)
Samuel R. Graziano (PA)
Tyrane Harper (AL)
Christopher M. Keen (KS)
Theodore Kirby (MD)
Johnny Montemayor (TX)
Derrick P. Moore (MN)
Richard L. Moores (CO)
Aaron F. Naylor (PA)
Billy R. Oguynn (AL)
Ronald W. Patten (ME)
Benny D. Patterson (OH)
Alexander L. Resh (PA)
David T. Rueckert (WA)
Benito Saldana (TX)
Daniel Salinas (OR)
Kenneth D. Sisk (NC)
Sherman L. Taylor (FL)
Richard T. Traigle (LA)

Melvin V. Van Meter (PA)
Emejildo M. Vargas (NH)
Christopher M. Vincent (NC)
Wilbert Walden (NC)

The drivers were included in docket numbers FMCSA-1998-4334; FMCSA-2000-7165; FMCSA-2002-12294; FMCSA-2008-0174; FMCSA-2008-0231; FMCSA-2008-0266; FMCSA-2010-0082; FMCSA-2010-0114; FMCSA-2010-0161; FMCSA-2010-0187; FMCSA-2011-0276; FMCSA-2012-0160; FMCSA-2012-0214; FMCSA-2012-0279; FMCSA-2013-0169; FMCSA-2013-0174; FMCSA-2014-0003; FMCSA-2014-0007; FMCSA-2014-0011; FMCSA-2014-0296; FMCSA-2015-0344; FMCSA-2016-0025; FMCSA-2016-0027; FMCSA-2016-0031; FMCSA-2016-0033; FMCSA-2016-0207; FMCSA-2016-0208; FMCSA-2016-0210. Their exemptions are applicable as of December 3, 2018, and will expire on December 3, 2020.

As of December 8, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 45817; 65 FR 77066; 67 FR 71610; 69 FR 53493; 69 FR 62742; 69 FR 64810; 71 FR 62148; 71 FR 66217; 73 FR 61922; 73 FR 61925; 73 FR 74565; 75 FR 77949; 77 FR 68202; 79 FR 65759; 81 FR 96180):

Ronald W. Garner (WA)
Wayne R. Mantela (KY)
Carl M. McIntire (OH)
Bernice R. Parnell (NC)
Patrick W. Shea (MA)
Roy F. Varnado, Jr. (LA)
Michael J. Welle (MN)

The drivers were included in docket numbers FMCSA-2000-7363; FMCSA-2004-18885; FMCSA-2008-0292. Their exemptions are applicable as of December 8, 2018, and will expire on December 8, 2020.

As of December 20, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following five individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (77 FR 64839; 77 FR 75494; 79 FR 73393; 81 FR 96180):

Ronald J. Bergman (OH)
Noah E. Bowen (OH)
Lawrence D. Malecha (MN)
Jerry M. Puckett (OH)
Emin Toric (GA)

The drivers were included in docket number FMCSA-2012-0280. Their exemptions are applicable as of December 20, 2018, and will expire on December 20, 2020.

As of December 25, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 69985; 80 FR 8927; 81 FR 96180):

Thurman T. Clayton (LA)
Tig G. Cornell (ID)
Jon R. Davidson (CO)
Edwin T. Donaldson (PA)
Keith C. Lendt (MN)
Joseph McTear (TX)
Daniel R. Thompson (PA)

The drivers were included in docket number FMCSA–2014–0298. Their exemptions are applicable as of December 25, 2018, and will expire on December 25, 2020.

As of December 30, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following ten individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (81 FR 86063; 82 FR 96180):

Brian T. Castoldi (CT)
Willie George (NY)
David E. Goff (MA)
Michal Golebiowski (IL)
Loyd F. Hovey (NY)
George T. Huffman (IL)
Julio Rivera (FL)
Willie J. Smith (TX)
John D. Stork (IL)
James R. Wagner (IL)

The drivers were included in docket number FMCSA–2016–0212. Their exemptions are applicable as of December 30, 2018, and will expire on December 30, 2020.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019–01257 Filed 2–5–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0018]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 11 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on November 24, 2018. The exemptions expire on November 24, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2018–0018, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without

edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

II. Background

On October 24, 2018, FMCSA published a notice announcing receipt of applications from 11 individuals requesting an exemption from vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (83 FR 53727). The public comment period ended on November 23, 2018, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for up to five years from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows applicants to operate CMVs in interstate commerce. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver’s medical certification.

The Agency’s decision regarding these exemption applications is based on medical reports about the applicants’ vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and

discussed in detail in the October 24, 2018, **Federal Register** notice (83 FR 53727) and will not be repeated in this notice.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The 11 exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, central retinal vein occlusion, complete loss of vision, macular scarring, neuroretinitis, prosthesis, and retinal detachment. In most cases, their eye conditions were not recently developed. Seven of the applicants were either born with their vision impairments or have had them since childhood. The four individuals that sustained their vision conditions as adults have had it for a range of 4 to 19 years. Although each applicant has one eye that does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors' opinions are supported by the applicants' possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 7 to 60 years. In the past three years, one driver was involved in a crash, and one driver was convicted of a moving violation in a CMV. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the likelihood that they have adapted their

driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10) and (b) by a certified Medical Examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 11 exemption applications, FMCSA exempts the following drivers from the vision requirement, 49 CFR 391.41(b)(10), subject to the requirements cited above:

Brian K. Aldridge (OH)
Lane D. Fuller (KS)
Alfred R. Knotts, Jr. (PA)
Jerome Nezworski (MI)
Marcel Spinu (WA)
William Walden (AL)
Peter A. Clarke (WA)
Justin M. Goins (MI)
Margurette Mungro (NC)
James E. Smith (FL)
Francisco J. Torres (PA)

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01262 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA-2018-0056]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 12 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on December 3, 2018. The exemptions expire on December 3, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA–2018–0056, in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On October 25, 2018, FMCSA published a notice announcing receipt of applications from 12 individuals requesting an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) and requested comments from the public (83 FR 53938). The public comment period ended on November 26, 2018, and one comment was received.

FMCSA has evaluated the eligibility of these applicants and determined that granting exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to

¹ See <http://www.ecfr.gov/cgi-bin/text-id.x?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391> and <https://www.gpo.gov/fdsys/pkg/CFR-2015->

assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. Epilepsy: § 391.41(b)(8), paragraphs 3, 4, and 5.]

III. Discussion of Comments

FMCSA received one comment in this proceeding. This comment supported granting these exemptions.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption for up to five years from the epilepsy and seizure disorder prohibition in 49 CFR 391.41(b)(8) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce. FMCSA grants exemptions from the FMCSRs for a two-year period to align with the maximum duration of a driver's medical certification.

In reaching the decision to grant these exemption requests, FMCSA considered the 2007 recommendations of the Agency's Medical Expert Panel (MEP). The January 15, 2013, **Federal Register** notice (78 FR 3069) provides the current MEP recommendations which is the criteria the Agency uses to grant seizure exemptions.

The Agency's decision regarding these exemption applications is based on an individualized assessment of each applicant's medical information, including the root cause of the respective seizure(s) and medical information about the applicant's seizure history, the length of time that has elapsed since the individual's last seizure, the stability of each individual's treatment regimen and the duration of time on or off of anti-seizure medication. In addition, the Agency reviewed the treating clinician's medical opinion related to the ability of the driver to safely operate a CMV with a history of seizure and each applicant's driving record found in the Commercial Driver's License Information System (CDLIS) for commercial driver's license (CDL) holders, and interstate and intrastate inspections recorded in the Motor Carrier Management Information System (MCMIS). For non-CDL holders, the Agency reviewed the driving records from the State Driver's Licensing Agency (SDLA). A summary of each applicant's seizure history was

[title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf](https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf).

discussed in the October 25, 2018, **Federal Register** notice (83 FR 53938) and will not be repeated in this notice.

These 12 applicants have been seizure-free over a range of 20 years while taking anti-seizure medication and maintained a stable medication treatment regimen for the last two years. In each case, the applicant's treating physician verified his or her seizure history and supports the ability to drive commercially.

The Agency acknowledges the potential consequences of a driver experiencing a seizure while operating a CMV. However, the Agency believes the drivers granted this exemption have demonstrated that they are unlikely to have a seizure and their medical condition does not pose a risk to public safety.

Consequently, FMCSA finds that in each case exempting these applicants from the epilepsy and seizure disorder prohibition in 49 CFR 391.41(b)(8) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must remain seizure-free and maintain a stable treatment during the two-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified Medical Examiner, as defined by 49 CFR 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 12 exemption applications, FMCSA exempts the following drivers from the epilepsy and seizure disorder prohibition, 49 CFR 391.41(b)(8), subject to the requirements cited above: Mitchell A. Bowles (GA)

Michael C. Davis, Jr. (SC)
 Richard E. Davis (CA)
 Nicolas Donez, Jr. (CO)
 Scott D. Engelman (PA)
 Everett J. Letourneau (MN)
 Jason D. Lewis (CA)
 Johnny L. Ricks (GA)
 Isaac E. Rogers (IL)
 Donald J. Smith (NY)
 Lucas T. Sorey (NC)
 Ronald E. Wagner (OH)

In accordance with 49 U.S.C. 31315(b)(1), each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-01252 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2000-7165; FMCSA-2002-11714; FMCSA-2004-17984; FMCSA-2004-18885; FMCSA-2005-21711; FMCSA-2006-24783; FMCSA-2007-27897; FMCSA-2008-0021; FMCSA-2008-0106; FMCSA-2008-0174; FMCSA-2008-0231; FMCSA-2008-0266; FMCSA-2009-0206; FMCSA-2009-0303; FMCSA-2010-0082; FMCSA-2010-0114; FMCSA-2010-0161; FMCSA-2010-0187; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0379; FMCSA-2011-0380; FMCSA-2012-0104; FMCSA-2012-0160; FMCSA-2012-0215; FMCSA-2012-0216; FMCSA-2013-0169; FMCSA-2013-0170; FMCSA-2014-0002; FMCSA-2014-0003; FMCSA-2014-0005; FMCSA-2014-0006; FMCSA-2014-0010; FMCSA-2014-0011; FMCSA-2014-0296; FMCSA-2016-0027; FMCSA-2016-0028; FMCSA-2016-0206]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 83 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV)

drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202-366-4001, fmcsamedical@dot.gov, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2000-7165; FMCSA-2002-11714; FMCSA-2004-17984; FMCSA-2004-18885; FMCSA-2005-21711; FMCSA-2006-24783; FMCSA-2007-27897; FMCSA-2008-0021; FMCSA-2008-0106; FMCSA-2008-0174; FMCSA-2008-0231; FMCSA-2008-0266; FMCSA-2009-0206; FMCSA-2009-0303; FMCSA-2010-0082; FMCSA-2010-0114; FMCSA-2010-0161; FMCSA-2010-0187; FMCSA-2010-0354; FMCSA-2010-0385; FMCSA-2011-0379; FMCSA-2011-0380; FMCSA-2012-0104; FMCSA-2012-0160; FMCSA-2012-0215; FMCSA-2012-0216; FMCSA-2013-0169; FMCSA-2013-0170; FMCSA-2014-0002; FMCSA-2014-0003; FMCSA-2014-0005; FMCSA-2014-0006; FMCSA-2014-0010; FMCSA-2014-0011; FMCSA-2014-0296; FMCSA-2016-0027; FMCSA-2016-0028; FMCSA-2016-0206, in the keyword box, and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. Privacy Act

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

II. Background

On November 14, 2018, FMCSA published a notice announcing its decision to renew exemptions for 83 individuals from the vision requirement in 49 CFR 391.41(b)(10) to operate a CMV in interstate commerce and requested comments from the public (83 FR 56902). The public comment period ended on December 14, 2018, and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the 83 renewal exemption applications and comments received, FMCSA confirms its decision to exempt the following drivers from the vision requirement in 49 CFR 391.41(b)(10).

In accordance with 49 U.S.C. 31136(e) and 31315, the following groups of drivers received renewed exemptions in the month of October and are discussed below. As of October 1, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 21 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for

interstate CMV drivers (73 FR 15567; 73 FR 27015; 73 FR 35197; 73 FR 48275; 74 FR 43217; 74 FR 43220; 74 FR 57551; 74 FR 57553; 74 FR 60022; 75 FR 4623; 75 FR 19674; 75 FR 34211; 75 FR 34212; 75 FR 44051; 75 FR 47888; 75 FR 72863; 76 FR 2190; 76 FR 66123; 77 FR 543; 77 FR 23797; 77 FR 27847; 77 FR 36338; 77 FR 38386; 77 FR 40945; 77 FR 46153; 78 FR 51269; 78 FR 64274; 78 FR 76707; 78 FR 77778; 78 FR 77782; 79 FR 10609; 79 FR 22003; 79 FR 23797; 79 FR 27681; 79 FR 35220; 79 FR 37843; 79 FR 38649; 79 FR 40945; 79 FR 45868; 79 FR 46153; 80 FR 36398; 80 FR 67481; 81 FR 20435; 81 FR 26305; 81 FR 39320; 81 FR 60115; 81 FR 66720; 81 FR 66724; 81 FR 72642; 81 FR 81230; 81 FR 90050; 81 FR 91239; 81 FR 96196);

Timothy D. Beaulier (MI)
Sean O. Feeny (FL)
Gregory L. Kockelman (MN)
Odilio Monterroso De Leon (TX)
Kent A. Perry (WY)
Benjamin R. Sauder (PA)
Douglas R. Strickland (NC)
Teddy S. Bioni (PA)
David M. Field (NH)
Michael M. Martinez (NM)
Aaron L. Paustian (IA)
Enoc Ramos III (TX)
Roberto E. Soto (TX)
Raymond White (NC)
James F. Epperson (IN)
Spencer B. Jacobs (TX)
Duane A. McCord (IL)
Markus Perkins (LA)
Noel S. Robbins (PA)
Robert B. Steinmetz (OR)
Brian C. Wittenburg (NC)

The drivers were included in docket numbers FMCSA-2008-0021; FMCSA-2008-0106; FMCSA-2009-0206; FMCSA-2009-0303; FMCSA-2010-0114; FMCSA-2010-0354; FMCSA-2012-0104; FMCSA-2013-0169; FMCSA-2014-0002; FMCSA-2014-0005; FMCSA-2016-0027; FMCSA-2016-0028; FMCSA-2016-0206. Their exemptions are applicable as of October 1, 2018, and will expire on October 1, 2020.

As of October 6, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 19 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (67 FR 15662; 67 FR 37907; 69 FR 26206; 70 FR 48797; 70 FR 61493; 71 FR 26602; 71 FR 32183; 71 FR 41310; 72 FR 39879; 72 FR 52419; 73 FR 27018; 73 FR 35194; 73 FR 36955; 73 FR 38498; 73 FR 48273; 74 FR 41971; 75 FR 25918; 75 FR 36778; 75 FR 36779; 75 FR 39725; 75 FR 39729; 75 FR 44050; 75 FR 44051; 75 FR 61833; 75 FR 77942; 76 FR 5425; 76 FR 54530; 77 FR 15184;

77 FR 17109; 77 FR 27845; 77 FR 27850; 77 FR 36338; 77 FR 38384; 77 FR 46153; 77 FR 56262; 78 FR 67454; 78 FR 78477; 79 FR 4803; 79 FR 14571; 79 FR 23797; 79 FR 28588; 79 FR 35212; 79 FR 35218; 79 FR 35220; 79 FR 38661; 79 FR 46153; 79 FR 47175; 79 FR 51642; 79 FR 51643; 79 FR 64001; 81 FR 71173);

Ramon Adame (IL)
Scott F. Chalfant (DE)
Ronald M. Green (OH)
Daniel Hollins (KY)
Daniel W. Johnson (NY)
Mark A. Smith (IA)
Nicholas J. Vance (OH)
John E. Breslin (NV)
Curtis E. Firari (WI)
David W. Grooms (IN)
Ralph E. Holmes (MD)
Matthew B. Lairamore (OK)
Charles E. Stokes (FL)
Howard T. Bubel (ND)
Kelly L. Foster (UT)
Billy R. Holdman (IL)
Charles S. Huffman (KS)
Gary McKown (WV)
Samuel M. Stoltzfus (PA)

The drivers were included in docket numbers FMCSA-2002-11714; FMCSA-2005-21711; FMCSA-2006-24783; FMCSA-2007-27897; FMCSA-2008-0106; FMCSA-2008-0174; FMCSA-2010-0082; FMCSA-2010-0161; FMCSA-2010-0385; FMCSA-2011-0379; FMCSA-2011-0380; FMCSA-2013-0170; FMCSA-2014-0003; FMCSA-2014-0006; FMCSA-2014-0010. Their exemptions are applicable as of October 6, 2018, and will expire on October 6, 2020.

As of October 15, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following nine individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 33997; 69 FR 61292; 71 FR 55820; 73 FR 46973; 73 FR 54888; 73 FR 65009; 75 FR 47883; 75 FR 52063; 75 FR 57105; 75 FR 63257; 77 FR 38381; 77 FR 51846; 77 FR 52388; 77 FR 60010; 81 FR 71173);

William C. Ball (NC)
Kevin C. Palmer (OR)
Ted L. Smeltzer (IN)
Kelly R. Konesky (AZ)
Charles O. Rhodes (FL)
Stephen B. Whitt (NC)
Hollis J. Martin (AL)
Gordon G. Roth (KS)
Darrell F. Woosley (IL)

The drivers were included in docket numbers FMCSA-2004-17984; FMCSA-2008-0231; FMCSA-2010-0187; FMCSA-2012-0160. Their exemptions are applicable as of October 15, 2018, and will expire on October 15, 2020.

As of October 21, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following five individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 56099; 79 FR 70928; 81 FR 71173):

Todd A. Carlson (MN)
Raymond Holt (CA)
Ronald Gaines (FL)
Juan C. Puente (TX)
Billy R. Hampton (NC)

The drivers were included in docket number FMCSA-2014-0011. Their exemptions are applicable as of October 21, 2018, and will expire on October 21, 2020.

As of October 22, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following five individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (73 FR 51689; 73 FR 63047; 75 FR 39725; 75 FR 47883; 75 FR 61883; 75 FR 63257; 75 FR 64396; 77 FR 64582; 79 FR 56104; 81 FR 71173):

Randall J. Benson (MN)
Jeromy W. Leatherman (PA)
James D. Drabek, Jr. (IL)
Sylvester Silver (VA)
Delone W. Dudley (MD)

The drivers were included in docket numbers FMCSA-2008-0266; FMCSA-2010-0161; FMCSA-2010-0187. Their exemptions are applicable as of October 22, 2018, and will expire on October 22, 2020.

As of October 23, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following six individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (77 FR 52381; 77 FR 64841; 79 FR 56097; 81 FR 71173):

Roger A. Duester (TX)
Benny L. Sanchez (CA)
Charlene E. Geary (SD)
Sandeep Singh (CA)
David N. Hinchliffe (TX)
James T. Stalker (OH)

The drivers were included in docket number FMCSA-2012-0215. Their exemptions are applicable as of October 23, 2018, and will expire on October 23, 2020.

As of October 27, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following eight individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 33406; 65 FR 57234; 67 FR 57266; 69 FR 52741;

69 FR 53493; 69 FR 62742; 71 FR 53489; 71 FR 62148; 73 FR 61925; 75 FR 59327; 77 FR 64583; 79 FR 56117; 81 FR 71173);

David W. Brown (TN)
 Jeffrey M. Keyser (OH)
 Zbigniew P. Pietranik (WI)
 Monty G. Calderon (OH)
 David G. Meyers (NY)
 Joseph F. Wood (MS)
 Zane G. Harvey, Jr. (VA)
 Rodney M. Pegg (PA)

The drivers were included in docket numbers FMCSA–2000–7165; FMCSA–2004–18885. Their exemptions are applicable as of October 27, 2018, and will expire on October 27, 2020.

As of October 31, 2018, and in accordance with 49 U.S.C. 31136(e) and 31315, the following ten individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (77 FR 56261; 77 FR 65933; 79 FR 58856; 79 FR 59348; 79 FR 72754; 81 FR 71173):

Donald L. Blakeley II (NV)
 Sanford L. Goodwin (TX)
 Steven W. Miller (PA)
 Scott E. Tussey (KY)
 Marty R. Brewster (KS)
 Thomas J. Long III (PA)
 James J. Monticello (IN)
 Henry L. Chrestensen (IA)
 Matthew J. Mantooth (KY)
 Klifford N. Siemens (KS)

The drivers were included in docket numbers FMCSA–2012–0216; FMCSA–2014–0296. Their exemptions are applicable as of October 31, 2018, and will expire on October 31, 2020.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 30, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019–01263 Filed 2–5–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2018–0077]

Petition for Waiver of Compliance

Under part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that on September 24, 2018, Strasburg Rail Road Company (SRC) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 243. FRA assigned the petition Docket Number FRA–2018–0077.

Specifically, SRC seeks relief from 49 CFR part 243, *Training, Qualification, and Oversight, of Safety-Related Railroad Employees*. SRC believes its existing training methodology works well as evidenced by no training-related incidents in the past 60 years. SRC states that given the nature of its operations, (*i.e.* historic, tourist, and excursion utilizing steam locomotives and vintage passenger equipment), size, and limited resources, 49 CFR part 243 is unnecessary, time consuming, arbitrary, and completely inappropriate. SRC believes that their participation in the Confidential Close Call Reporting System enables their employees to take a proactive role in railroad safety by reporting and recommending solutions to systemic risks on the railroad before harm occurs to any person, property, or equipment.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be

submitted by any of the following methods:

- *website:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 25, 2019 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy> Notice for the privacy notice of www.regulations.gov.

Issued in Washington, DC.

Robert C. Lauby,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2019–01222 Filed 2–5–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2018–0100]

Petition for Waiver of Compliance

Under part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that on November 15, 2018, Norfolk Southern Railway Company (NS), petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232, *Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices*. FRA

assigned the petition Docket Number FRA-2018-0100.

Specifically, NS proposes to create a 3D simulation using web-based software to satisfy the "hands-on" portion of the training required by 49 CFR 232.203(e), in connection with periodic refresher training. Refresher training is required at intervals not to exceed 3 years, and shall consist of classroom and hands-on training, as well as testing. NS states that due to the velocity of their operations network, it is often difficult to provide a consistent training and testing environment regarding car selection, defects, and availability. Further, NS contends that this proposal's one-on-one training will be more conducive to learning than a group setting.

The NS proposal will simulate a Class I Brake Test and places the user in a virtual 3D scenario requiring concrete responses to an array of preprogrammed defects on various types of freight cars and brake systems while performing the brake test. To successfully complete the scenario, the user must identify key components and identify and correct all defects, including but not limited to closed cut-out cocks, uncoupled air hoses, closed angle cocks, wrongly positioned retainer valves, and fouled brake rigging.

NS seeks to apply this waiver system wide to all NS craft personnel responsible for performing freight air brakes tests, including supervisors, freight car repair personnel, and conductors.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the

comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 25, 2019 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacyNotice> for the privacy notice of regulations.gov.

Issued in Washington, DC.

Robert C. Lauby,
*Associate Administrator for Railroad Safety
Chief Safety Officer.*

[FR Doc. 2019-01223 Filed 2-5-19; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Special Permits

AGENCY: Pipeline and Hazardous
Materials Safety Administration
(PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington, DC 20590-0001, (202) 366-4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington DC or at <http://regulations.gov>.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 1, 2019.

Donald P. Burger,
*Chief, General Approvals and Permits
Branch.*

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) Affected	Nature of the special permits thereof
20815-N	COLEP PORTUGAL, S.A	178.33-7(a)	To authorize the manufacture, mark, sale, and use of non-DOT specification receptacles with a reduced wall thickness. (modes 1, 2, 3, 4, 5).
20816-N	AIR PRODUCTS AND CHEMICALS, INC.	178.274, 178.277	To authorize the manufacture of portable tanks built to ASME Section XII specifications. (modes 1, 2, 3).
20820-N	UNION TANK CAR COMPANY.	180.509(e)(4)	To authorize the inspection and testing of tank car tanks using ACFM (non-destructive test method) in lieu of the methods in 49 CFR 180.509(e)(4). (mode 2).
20821-N	SPACEFLIGHT, INC	173.185(a)	To authorize the transportation in commerce of low production lithium ion batteries contained in equipment via air transportation. (mode 4).
20822-N	Return Solutions, Inc		To authorize the manufacture, mark, sale, and use of non-DOT specification packaging for the transportation in commerce of certain materials authorized to be disposed of under 21 CFR Part 1317, Subpart B. (modes 1, 2).
20824-N	WORTHINGTON CYLINDER CORPORATION.	178.65(f)(2)(iii)	To authorize the manufacture, mark, sale, and use of non-DOT specification cylinders conforming to the DOT 39 specification, except as provided herein. (modes 1, 2, 3, 4).
20826-N	CHRIS' ROCKET SUPPLIES, LLC.	173.62	To authorize the transportation in commerce of Division 1.3 and 1.4 rocket motors, reloading kits, and igniters in non-specification outer packaging as Division 1.4. (mode 1).
20828-N	BATTERIES PLUS, LLC	173.159(e)(1)	To authorize the transportation in commerce of batteries and lightbulbs containing mercury on the same transport vehicle without being subject to the requirements of the HMR. (mode 1).

[FR Doc. 2019-01296 Filed 2-5-19; 8:45 am]
 BILLING CODE 4909-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on special permit applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety

has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before March 8, 2019.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Approvals and

Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington, DC 20590-0001, (202) 366-4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington DC or at <http://regulations.gov>.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 1, 2019.

Donald P. Burger,
 Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA—GRANTED

Application No.	Applicant	Regulation(s) Affected	Nature of the special permits thereof
14857-M	WESTERN SALES & TESTING OF AMARILLO INC.	180.209(a), 180.209(b)	To modify the special permit to authorize additional hazmat, editorial changes to CGA neck thread inspection procedures and edit incorrect link to DOT referenced procedure.
20796-M	SODASTREAM USA, INC.	172.400, 172.200, 172.300	To modify the special permit to bring it in line with other Sodastream cylinder permits.

SPECIAL PERMITS DATA—WITHDRAWN

Application No.	Applicant	Regulation(s) Affected	Nature of the special permits thereof
20827-N	Department of Defense, U.S. Special Operations Command.	173.185(a)	To authorize the transportation in commerce of spacecraft containing low production lithium ion batteries via air transportation.

[FR Doc. 2019-01295 Filed 2-5-19; 8:45 am]

BILLING CODE 4909-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety

has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before February 21, 2019.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Approvals and

Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington, DC 20590-0001, (202) 366-4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Avenue Southeast, Washington DC or at <http://regulations.gov>.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 1, 2019.

Donald P. Burger,
Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) Affected	Nature of the special permits thereof
2709-M	COPPERHEAD CHEMICAL COMPANY, INC.	173.24(c), 173.54(e), 173.62, 177.834(l)(1).	To modify the special permit to remove the temperature-control requirement for shipments. (modes 1, 3).
7945-M	MEGGITT SAFETY SYSTEMS, INC.	173.304a(a)(1)	To modify the special permit to authorize additional Class 2.2 hazmat to the permit. (modes 1, 2, 3, 4, 5).
10511-M	SCHLUMBERGER TECHNOLOGY CORP.	173.304a	To modify the special permit to authorize a new pressure housing for transporting hazmat. (modes 1, 2, 4, 5).
11646-M	BAKER PETROLITE LLC	172.203(a), 172.301(c), 177.834(h).	To modify the special permit to authorize additional Class 3, 6.1, 8 and 9 hazmat. (mode 1).
12116-M	PROSERV UK LTD	173.201, 173.301(f), 173.302a, 173.304a.	To authorize the addition of new Type 5 Severs Service Cylinders. (modes 1, 2, 3, 4).
12899-M	CORE LABORATORIES L.P.	173.301(f), 173.302a(a), 173.304a(a), 173.304a(d), 173.201(c), 173.202(c), 173.203(c), 175.3.	To modify the special permit to authorize an alternative to marking the necks of cylinders. (modes 1, 2, 3, 4).
14574-M	KMG ELECTRONIC CHEMICALS, INC.	180.407(c), 180.407(e), 180.407(f).	To modify the special permit to authorize an additional cargo tank wagon. (mode 1).
14756-M	UNIVATION TECHNOLOGIES, LLC.	173.242(c)	To modify the special permit to authorize the 5 year periodic pressure test to be performed pneumatically with nitrogen and to allow party status to the permit. (modes 1, 2, 3).
15146-M	CHEMTRONICS INC	173.304(d)	To modify the special permit to authorize the use of the limited quantity marking. (modes 1, 2, 3, 4).
16011-M	AMERICASE, LLC	173.185(f), 172.500, 172.600, 172.700(a), 172.200, 172.400, 172.300.	To clarify that suspected damaged, defective or recalled lithium batteries can be transported according to the permit. (modes 1, 2, 3).
16095-M	CLAY AND BAILEY MANUFACTURING COMPANY.	172.203(a), 178.345-1, 180.413.	To modify the special permit to authorize a new design with a gasket in the cover vs. an O-ring in the base for sealing the manway. (modes 1, 3).
16394-M	CELLCO PARTNERSHIP	173.185(f), 172.600, 172.400a, 172.200, 172.300.	To modify the permit to bring the permit provisions in line with regulatory citations. (modes 1, 2, 3).
16413-M	AMAZON.COM, INC	172.301(c), 173.185(c)(1)(iii), 173.185(c)(3)(i).	To modify the special permit to authorize an additional mode of transportation (mode 2).
16532-M	EQ INDUSTRIAL SERVICES, INC.	173.185(f)(2), 173.185(f)(3)	To modify the special permit to authorize a different alternative packaging. (modes 1, 2).

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) Affected	Nature of the special permits thereof
20351-M	ROEDER CARTAGE COMPANY, INCORPORATED.	180.407(c), 180.407(c), 180.407(e), 180.407(f).	To modify the permit to authorize additional tanks for dedicated transportation of authorized hazmat. (mode 1).
20378-M	LG CHEM	172.101(j)	To modify the special permit to authorize fiberboard boxes as outer packaging. (mode 4).
20500-M	CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL.	.....	To modify the special permit issued on an emergency basis and make it permanent. (mode 1).
20584-M	BATTERY SOLUTIONS, LLC	173.185(f)(3), 173.185(c)(1)(iii), 173.185(c)(1)(iv), 173.185(c)(1)(v), 173.185(c)(3), 173.185(f).	To modify the special permit to authorize the use of thermally insulating fire suppressant material in a sufficient quantity and manner that will suppress lithium battery fires, heat and smoke and absorbs the smoke, gases and flammable vapors and electrolytes during a thermal runaway incident. (modes 1, 2, 3).
20612-M	WILCO MACHINE & FAB, INC.	178.345-7(a)(1), 178.345-3(a).	To modify the special permit to remove the annual testing requirement for some specific tanks. (mode 1).
20661-M	SAFT AMERICA INC	172.400, 172.300, 173.301(g), 173.302a(a)(1), 173.185(b).	To modify the special permit to authorize the use of batteries not manufactured by Saft in the battery assemblies, and an increase in the maximum rated energy capacity permitted for the containerized battery assembly, that references to the UN Test Manual be updated to take account of the January 1, 2019, effective date of Amendment 1 to the Sixth Revised edition under international regulations. (modes 1,3). Some editorial corrections in the SP are also requested. (modes 1, 3).
20673-M	Airopack B.V.	173.306(a)	To modify the special permit to provide editorial changes and to clarify test procedures. (modes 1, 2, 3, 4, 5).
20684-M	LINDE GAS NORTH AMERICA LLC.	179.7, 179.300-15, 180.519(a).	To authorize domestic use of the tank cars. (mode 2).
20689-M	DEPARTMENT OF DEFENSE (MILITARY SURFACE DEPLOYMENT & DISTRIBUTION COMMAND).	171.2(k)	To modify the special permit that was issued on an emergency basis and make it permanent. (modes 1, 3).

[FR Doc. 2019-01297 Filed 2-5-19; 8:45 am]

BILLING CODE 4909-60-P

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In accordance with section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Iraq
Kuwait
Lebanon
Libya
Qatar

Saudi Arabia
Syria
United Arab Emirates
Yemen

Dated: December 31, 2018.

Douglas Poms,

International Tax Counsel, (Tax Policy).

[FR Doc. 2019-01136 Filed 2-5-19; 8:45 am]

BILLING CODE 4810-25-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0589]

Agency Information Collection Activity Under OMB Review: Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.246-76, Purchase of Shellfish (Formerly 852.270-3)

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Office of Acquisition and Logistics, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA

submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 8, 2019.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0589" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Rafael Taylor, Procurement Policy and Warrant Management Service (003A2A), Department of Veterans Affairs, 425 I Street NW, Washington, DC 20001, (202) 382-2787 or email Rafael.Taylor@va.gov. Please refer to "OMB Control No. 2900-0589" in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Under the PRA of 1995 (Pub. L. 104-13; 44 U.S.C. 3501-3521).

Title: Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 852.246-76, Purchase of Shellfish, (formerly 852.270-3).

OMB Control Number: 2900-0589.

Type of Review: Revision of a currently approved collection.

Abstract: As of the result of final rule RIN 2900-AQ04, VA Acquisition Regulation, this Paperwork Reduction Act submission seeks modification of Office of Management and Budget (OMB) approval No. 2900-0589 for collection of information for both commercial and noncommercial item supply and service solicitations and contracts for the then approved clause 852.270-3, Purchase of Shellfish.

Clause 852.270-3 was moved to a new section and renumbered as 852.246-76 to conform to the FAR requirement to place clauses and their prescriptions in the appropriate parts. The title and content of the clause remain unchanged. There is no change in the information collection burden that is associated with

this proposed modification of the information collection request. In the final rule RIN 2900-AQ04, VA provided a 60-day comment period for the public to respond to the proposed rule. The comment period for the proposed rule ended on June 25, 2018 and VA received no comments. The VA adopted as final the rule effective on October 24, 2018, thus necessitating the modification of the information collection request.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 83 FR 45482 on September 11, 2018.

Affected Public: Business or other for-profit and not-for-profit institutions.

Estimated Annual Burden: VAAR clause 852.246-76 (formerly 852.270-3)—0.41 hour.

Estimated Average Burden per Respondent: VAAR clause 852.246-76 (formerly 852.270-3)—1 minute.

Frequency of Response: On occasion.

Estimated Number of Respondents: Clause 852.246-76 (formerly 852.270-3)—25.

By direction of the Secretary.

Danny S. Green,

Interim VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2019-01156 Filed 2-5-19; 8:45 am]

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Part II

Department of Health and Human Services

Office of Inspector General

42 CFR Part 1001

Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees; Proposed Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Part 1001

RIN 0936-AA08

Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees

AGENCY: Office of Inspector General (OIG), Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: In this proposed rule, the Department of Health and Human Services (Department or HHS) proposes to amend the safe harbor regulation concerning discounts, which are defined as certain conduct that is protected from liability under the Federal anti-kickback statute, section 1128B(b) of the Social Security Act (the Act). The amendment would revise the discount safe harbor to explicitly exclude from the definition of a discount eligible for safe harbor protection certain reductions in price or other remuneration from a manufacturer of prescription pharmaceutical products to plan sponsors under Medicare Part D, Medicaid managed care organizations as defined under section 1903(m) of the Act (Medicaid MCOs), or pharmacy benefit managers (PBMs) under contract with them. In addition, the Department is proposing two new safe harbors. The first would protect certain point-of-sale reductions in price on prescription pharmaceutical products, and the second would protect certain PBM service fees.

DATES: To ensure consideration, comments must be delivered to the address provided below by 5 p.m. Eastern Standard Time on April 8, 2019.

ADDRESSES: In commenting, please reference file code OIG-0936-P. Because of staff and resource limitations, we cannot accept comments by facsimile (fax) transmission. However, you may submit comments using one of three ways (no duplicates, please):

1. *Electronically.* You may submit electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. (Attachments should be in Microsoft Word, if possible.)

2. *By regular, express, or overnight mail.* You may mail your printed or written submissions to the following address: Aaron Zajic, Office of Inspector General, Department of Health and Human Services, Attention: OIG-0936-P, Room 5527, Cohen Building, 330 Independence Avenue SW, Washington, DC 20201.

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

3. *By hand or courier.* You may deliver, by hand or courier, before the close of the comment period, your printed or written comments to: Aaron Zajic, Office of Inspector General, Department of Health and Human Services, Cohen Building, Room 5527, 330 Independence Avenue SW, Washington, DC 20201.

Because access to the interior of the Cohen Building is not readily available to persons without Federal Government identification, commenters are encouraged to schedule their delivery with one of our staff members at (202) 619-0335.

Inspection of Public Comments: All comments received before the end of the comment period will be posted on <http://www.regulations.gov> for public viewing. Hard copies will also be available for public inspection at the Office of Inspector General, Department of Health and Human Services, Cohen Building, 330 Independence Avenue SW, Washington, DC 20201, Monday through Friday from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (202) 619-0335.

FOR FURTHER INFORMATION CONTACT: Aaron Zajic, (202) 619-0335.

SUPPLEMENTARY INFORMATION:

Social Security Act citation	United States Code citation
1128B	42 U.S.C. 1320a-7b.
1128D	42 U.S.C. 1320a-7d.
1102	42 U.S.C. 1302.

I. Purpose and Need for Regulatory Action as Determined by the Secretary

Pursuant to section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987 and its legislative history, Congress required the Secretary of Health and Human Services (the Secretary) to promulgate regulations setting forth various “safe harbors” to the anti-kickback statute, which would be evolving rules that would be periodically updated to reflect changing business practices and technologies in the health care industry. In accordance with this authority, OIG published a

safe harbor to protect certain discounts and reductions in price.¹ The purpose of this proposed rule is to update the discount safe harbor to address the modern prescription drug distribution model and ensure safe harbor protections extend only to arrangements that present a low risk of harm to the Federal health care programs and beneficiaries.

A. Rebates to Medicare Part D and Medicaid Managed Care Plans

Since 2010, the prices of existing drugs have been rising in the United States much more rapidly than warranted either by inflation or costs.² Since 2016, the prescription drug component of the consumer price index grew 2 percent less than inflation, and one official measure of drug price inflation was actually negative in 2018, for the first time in almost 50 years. Nevertheless, this January, drug companies once again announced large price increases—by one analysis averaging around 6 percent per drug. The Department’s research shows that these price increases are largely unsupported by objective economic criteria (e.g., inflation, increased costs of goods sold, increased demand) and reflect significant distortions in the distribution chain.³

Prescription drug manufacturers prospectively set the list price (*i.e.*, wholesale acquisition cost) of the drugs they sell to wholesalers and other large purchasers. Manufacturers also retrospectively pay PBMs or other entities in the drug supply chain, under rebate arrangements, that meet certain volume-based or market-share criteria. Industry parlance refers to the “net price” of a drug as the drug’s list price absent the rebate amount. Since the passage of the anti-kickback statute and

¹ Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR 35952 (July 29, 1991). We note that to qualify as a “discount,” the remuneration must involve a reduction in price to a buyer. The safe harbor acknowledges that a “rebate” may qualify as a discount. However, some payments, while labeled as “rebates,” may not have the effect of reducing the price of an item or service to a buyer.

The determination of whether a particular payment is a protected discount depends on the circumstances. Rebates paid by drug manufacturers to or through PBMs to buy formulary position are not reductions in price. In the Secretary’s view, such a payment would not qualify as “a discount or other reduction in price.” 42 U.S.C. 1320a-7b(3)(A).

² Schondelmeyer SW, Purvis L. Trends in Retail Prices of Prescription Drugs Widely Used by Older Americans: 2006 to 2015. AARP Public Policy Institute. December 2017.

³ Observations on Trends in Prescription Drug Spending. U.S. Department of Health and Human Services. Assistant Secretary for Planning and Evaluation. March 8, 2016.

the establishment of the various safe harbors, the list prices of branded prescription drugs, and the “rebate” payments by manufacturers to PBMs, have grown substantially.⁴ The phenomenon of list prices rising faster than “net prices” is referred to as the “gross to net bubble.”⁵

The prominence of rebate arrangements in the prescription drug supply chain has been cited as a potential barrier to lowering drug costs.⁶ For instance, the system may create incentives for manufacturers to raise list prices and discourage manufacturers from reducing their list prices or, in some cases, penalize them if they do.⁷ Often, a portion of PBM compensation is derived from the savings they create, or the gap between the list price and “net price.” This compensation may be derived from retaining a portion of the rebate, as well as receiving “price protection” payments from manufacturers.⁸ Rebates and price protection payments increase when list prices increase.⁹ Thus, there may be a greater incentive for a PBM to encourage the use of drugs with higher list prices, typically via preferred formulary placement, than the use of lower price drugs that would generate lower rebates or price protection payments. A manufacturer choosing to lower the list price of a drug would be reducing the gap between list price and “net” price,

⁴ 2018 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds 143 (2018); see also Jared S. Hopkins, *Drugmakers Raise Prices on Hundreds of Medicines*, Wall St. J. (Jan. 1, 2019).

⁵ New Data Show the Gross-to-Net Rebate Bubble Growing Even Bigger. Drug Channels Institute. June 14, 2017.

⁶ E.g., *A perspective from our CEO: Gilead Subsidiary to Launch Authorized Generics to Treat HCV*. Gilead Pharmaceuticals. <https://www.gilead.com/news-and-press/company-statements/authorized-generics-for-hcv>.

⁷ Letter from David A. Balto on Behalf of Consumer Action to Federal Trade Commission (Dec. 6, 2017). https://www.ftc.gov/system/files/documents/public_comments/2017/12/00303-142565.pdf.

⁸ Price protection provisions in PBM contracts provide a cost or growth-rate threshold above which a manufacturer provides an additional payment to the PBM. If a manufacturer increases its price beyond the cost or rate specified, the PBM is held harmless for some or all of the increase. These payments may be for multiple years, and may or may not be described as rebates in PBM contracts with plan sponsors.

⁹ “Under this proposed structure, the PDP sponsor achieves cost control with less earnings volatility while the manufacturer achieves increased volume and regular revenue increases.” Pharmacy manufacturer rebate negotiation strategies: A common ground for a common purpose. Milliman. November 17, 2015.

which would reduce either the size of the rebate or price protection guarantee. This could result in a drug being removed from the formulary or being placed in a less-preferred formulary tier. As a result, the current system works to the disadvantage of beneficiaries, and the Federal health care programs.

1. The Rebate-Based System Harms Beneficiaries

There are significant concerns about the ways in which the current rebate framework may be increasing financial burdens for beneficiaries. Many rebates do not flow through to consumers at the pharmacy counter as reductions in price. In these instances, beneficiaries experience out-of-pocket costs more closely related to the list price than the rebated amount during the deductible, coinsurance, and coverage gap phases of their benefits.¹⁰ More often, they are applied to reduce premiums for all enrollees. However, beneficiaries may not be fully benefitting from these premium reductions. Part D plan sponsors include estimates of the amount of rebates they expect to receive in their bids, which in turn drive premiums. A 2011 OIG study found that Part D plan sponsors commonly underestimated rebates in their bids. When this occurs, “beneficiary premiums are higher than they otherwise would be.”¹¹

In addition, OIG work shows that the increases in costs for Part D brand-name drugs have led to higher out-of-pocket spending for some beneficiaries. OIG found that beneficiaries’ out-of-pocket costs for drugs with an average price of more than \$1,000 per month in catastrophic coverage increased by 47 percent from 2010 to 2015. While beneficiaries paid an average of \$175 per month in 2010 for each high-priced drug in catastrophic coverage, this amount increased to \$257 per month in 2015.¹² OIG also found that “the

¹⁰ See, e.g., Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program, 82 FR 56336, 56419 (Nov. 28, 2017); MedPAC, Status Report on the Medicare Prescription Drug Program 403 (Mar. 2017); CMS, Medicare Part D—Direct and Indirect Remuneration (DIR) (2017), <https://www.cms.gov/newsroom/fact-sheets/medicare-part-d-direct-and-indirect-remuneration-dir>; Nicole M. Gastala et al., Medicare Part D: Patients Bear the Cost of ‘Me Too’ Brand-Name Drugs, 35 Health Affairs (2016).

¹¹ OIG, Concerns with Rebates in the Medicare Part D Program (2011).

¹² OIG, High-Price Drugs Are Increasing Federal Payments for Medicare Part D Catastrophic Coverage, *supra* note 24, at 10.

percentage of beneficiaries who were responsible for out-of-pocket costs of at least \$2,000 per year for brand-name drugs nearly doubled [between 2011 and 2015],”¹³ some of which is potentially driven by changing drug mix and some by increases in list prices.

The following is one example in the context of a branded prescription drug dispensed at a retail pharmacy. In this example, a drug has a Wholesale Acquisition Cost (WAC)/list price of \$100. A manufacturer sells the drug to a wholesaler at a 2 percent discount off of the WAC. Thus, the drug is sold to the wholesaler at \$98. The wholesaler in this example sells the drug to a pharmacy for \$100. A PBM negotiates on behalf of a plan both a negotiated reimbursement rate with a pharmacy that dispenses the drug and a rebate from the manufacturer for including the drug on the plan’s formulary, tier placement within the formulary, etc. Under its contract with the PBM, the pharmacy agrees to be paid a negotiated rate such as, by way of example only, $1.20 \times \text{WAC}/\text{list price}$ minus 15 percent plus a \$2 dispensing fee.

When a patient has a prescription for the medication, the pharmacy files a claim on behalf of the patient to the patient’s prescription insurance. This claim is processed by the plan and/or the PBM on the plan’s behalf. The PBM determines what they pay the pharmacy and the amount remaining for the patient to pay the pharmacy. In this instance, the pharmacy is paid \$104 for the drug. After the transaction, the plan and/or PBM may also receive rebates from the manufacturer, and in some cases, pay the pharmacy less than the original amount.

In this example, the PBM has negotiated a rebate with the manufacturer, of 30 percent of the WAC/list price (\$30), which is passed on entirely to the plan sponsor. Thus, in this example, the plan receives back \$30 in rebates, reducing its net cost for the drug to \$74 (*i.e.*, \$104–\$30). This rebate does not reduce the price charged at the pharmacy counter or the beneficiary’s out-of-pocket cost, and the beneficiary’s \$26 coinsurance is actually 35 percent of the net cost of the drug (\$104–\$30), compared to the 25 percent coinsurance described in the benefits summary (which is based on negotiated pharmacy reimbursement and not net price).

¹³ OIG, Increases in Reimbursement for Brand-Name Drugs in Part D, *supra* note 16, at 9.

Transaction	Brand	Notes
List Price	\$100	(A).
Pharmacy Reimbursement	\$104	(P).
Rebates to Health Insurer	(\$30)	(B) = 30% Rebate from Manufacturer * (A).
Net Drug Cost	\$74	(C) = (P) – (B).*
Patient Coinsurance	(\$26)	(D) = 25% * (P).
Net Cost to Health Insurer	\$48	(E) = (C) – (D).
Patient Coinsurance	\$26	(D)
Gross Drug Cost	\$104	(P).
Net Drug Cost	\$74	(C).
Share of Gross Cost	25%	(H) = (P)/(A).
Share of Net Cost	35%	(I) = (D)/(C).

* The Federal Government shares in the rebates received by PBMs and Part D plan sponsors. See also: <https://www.cms.gov/newsroom/factsheets/medicare-part-d-direct-and-indirect-remuneration-dir>.

Under the current rebate-based system, beneficiaries may not receive the benefits of reduced prices and costs that other parties do. The Department recognizes that parties to prescription drug sales are frequently paid based on a percentage of the WAC/list price and therefore, as the list price increases, so does the revenue to these parties. For example, in the context of branded prescription drugs, the absolute net revenue to the PBM and manufacturer generally may increase as the WAC increases.¹⁴ The net revenue to the pharmacy also may increase, but that would be contingent on the pharmacy's contract with the PBM. While the insurer's costs will increase as the WAC increases, under the current system, PBMs often offset the increase for insurers via a higher rebate from the manufacturer. In contrast, when a beneficiary is in the deductible phase, their out-of-pocket spending is more closely related to the WAC price than the net price. The rebate from the manufacturer is not utilized to offset beneficiary costs. Similarly, the beneficiary's coinsurance, which is often partly a percentage of WAC, will often increase as list price increases. Under the current system, rebates are often not applied at the point of sale to offset the beneficiary's deductible or coinsurance or otherwise reduce the price paid at the pharmacy counter.

Beyond the effects of rebates on beneficiary cost-sharing, the rebate system could be skewing decisions on which drugs appear on a beneficiary's drug formulary, and a drug's placement on the formulary. It may also have a paradoxical effect on competition, which would normally be expected to decrease prices among competitors. The use of rebates creates a financial incentive to make formulary decisions

¹⁴ Perverse Market Incentives Encourage High Prescription Drug Prices. Garthwaite and Scott Morton. Pro-Market: The blog of the Stigler Center at the University of Chicago Booth School of Business. November 1, 2017.

based on rebate potential, not the quality or effectiveness of a drug.¹⁵ Research suggests that in many therapeutic classes, the approval of a new drug leads to higher list prices not just for the new drug, but for the existing drugs as well.^{16 17 18} Comments submitted in response to a Request for Information¹⁹ from the Department reiterate these concerns, suggest that PBMs may favor drugs with higher rebates over drugs with lower costs, and raise new concerns about “bundled” rebates²⁰ discouraging the adoption of new, lower-cost brand drugs and biosimilars.

2. High List Prices Harm Federal Health Care Programs

The current rebate framework for prescription pharmaceutical products does not appear to translate into lower Medicare and Medicaid per beneficiary spending on prescription drugs, when age and inflation are accounted for, and, to the extent that the rebate structure fuels high list prices, may in fact increase Medicare and Medicaid costs, which is antithetical to the purposes of both the discount exception and the discount safe harbor. This issue is particularly salient for the Centers for Medicare & Medicaid Services (CMS),

¹⁵ Shire, Pfizer antitrust lawsuits could rewrite the rules for formulary contracts: report. Arlene Weintraub. Fierce Pharma. October 10, 2017.

¹⁶ Hartung DM, et al. The cost of multiple sclerosis drugs in the US and the pharmaceutical industry: Too big to fail? *Neurology* 2015; 84(21):2185–92.

¹⁷ https://www.achp.org/wp-content/uploads/Rheumatoid-Arthritis_Final.pdf.

¹⁸ https://www.achp.org/wp-content/uploads/Diabetes_FINAL_Revised-12.7.15.pdf.

¹⁹ <https://www.federalregister.gov/documents/2018/05/16/2018-10435/hhs-blueprint-to-lower-drug-prices-and-reduce-out-of-pocket-costs>.

²⁰ Some manufacturer-PBM contracts tie the rebates or formulary position of one product, to the rebate or formulary position of other products made by the same manufacturer. These agreements may discourage PBM adoption of a lower-cost competitor in one therapeutic class because they would forgo manufacturer payments for the other drugs.

the single largest payor of prescription drugs in the nation.

The Medicare Part D and Medicaid programs, as purchasers of health care items and services, stand to benefit from robust competition on both the cost and quality of the products they cover. The cost to the Medicare Part D program and the Medicaid program for certain brand and specialty prescription pharmaceutical products has been rising at a rate far greater than the rate of general inflation.^{21 22}

In 2016, gross drug spending in Medicare Part D was \$146 billion, of which Part D plans paid \$90 billion and beneficiaries paid \$49.7 billion (excluding the coverage gap discount program).²³ OIG recently released a report finding that from 2011 to 2015, reimbursement for Part D brand drugs increased by 77 percent, despite a 17 percent decrease in the number of prescriptions for these drugs.²⁴ In another recent report, OIG found that Federal payments for catastrophic coverage under Part D more than tripled from 2010 to 2015, growing from \$10.8 billion to \$33.2 billion.²⁵ With respect to catastrophic coverage in particular, OIG found that spending for high-priced drugs, those with average prices of more than \$1,000 per month, contributed

²¹ See, e.g., OIG, INCREASES IN REIMBURSEMENT FOR BRAND-NAME DRUGS IN PART D 5 (2018); MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, MEDICAID PAYMENT FOR OUTPATIENT PRESCRIPTION DRUGS (2018), <https://www.macpac.gov/wp-content/uploads/2015/09/Medicaid-Payment-for-Outpatient-Prescription-Drugs.pdf>.

²² Generic drugs prices have generally decreased over the last decade, save for a period of price increases in 2013–2014. See Schondelmeyer SW, Purvis L. Trends in Retail Prices of Prescription Drugs Widely Used by Older Americans: 2006 to 2015. AARP Public Policy Institute. December 2017.

²³ Analysis by the CMS Office of the Actuary.

²⁴ OIG, Increases in Reimbursement for Brand-Name Drugs in Part D 5 (2018).

²⁵ OIG, High-Price Drugs Are Increasing Federal Payments for Medicare Part D Catastrophic Coverage 6 (2017).

significantly to the growth in payments during this phase of coverage.²⁶

Although the introduction and changing utilization patterns of new drugs and biologicals can contribute to a rise in Part D spending, increasing prices of existing drugs and biologicals also play a critical role. For example, of the 10 high-priced drugs responsible for nearly one-third of all spending in Part D catastrophic coverage in 2015, OIG found that 6 were not new to the market but had large increases in their average price per month, ranging from 29 percent to 145 percent.²⁷ The remaining four were new to the market.²⁸ OIG has also recently found that of the brand-name drugs reimbursed by Part D in every year from 2011 to 2015, 89 percent had some unit cost increase (on average 29 percent), and nearly half had an increase in unit cost of at least 50 percent (significantly greater than general inflation over this same time period).^{29 30}

Although the precise amounts are difficult to isolate, the Medicare program also incurs costs for drugs furnished under prospective payment (e.g., the inpatient prospective payment system) and those covered by Medicare Advantage plans under Part C. In 2016, gross spending on prescription drugs in retail and non-retail settings by CMS and its beneficiaries exceeded \$235 billion, more than half of total United States gross expenditures on prescription drugs of approximately \$450 billion.^{31 32}

In 2016, CMS and State Medicaid programs spent \$64 billion (\$29.1 billion net rebates) on drugs covered under Medicaid. For brand-name drugs, manufacturers must pay rebates to Medicaid equal to 23.1 percent of the average manufacturer price (AMP) or the AMP minus the “best price” provided to most other purchasers, whichever is greater. Manufacturers must also pay additional rebates to Medicaid if drug prices rise higher than general inflation. However, rebates, discounts, or other financial transactions paid by manufacturers to PBMs are excluded from AMP and best price, and the maximum rebate

(including the inflation penalty) is capped at 100 percent of the average manufacturer price. As a result, Medicaid is deprived of the lower costs or higher mandatory rebates that could result if rebates paid to PBMs were included in AMP or best price, and the inflation penalty no longer serves as an effective brake on list price increases for drugs already exceeding the 100 percent AMP cap.^{33 34} Because Medicaid is a much smaller drug market than Medicare Part D and commercial insurance coverage, it may be advantageous for manufacturers to increase list prices and pay rebates to PBMs in these markets.

Though proponents of the current system describe rebates as discounts that lower drug costs, HHS believes that rebates have proven to be ineffective at and counterproductive to putting downward pressure on drug prices. Indeed, rebates may be harming Federal health care programs by increasing list prices, preventing competition to lower drug prices, discouraging the use of lower-cost brand or generic drugs, and skewing the formulas used to determine pharmacy reimbursement or Medicaid rebates.

3. The Rebate System Is Not Transparent

In some or many instances, plan sponsors under Medicare Part D and Medicaid MCOs have limited information about the percentage of rebates passed on to them and the percentage retained by their PBMs. The terms of rebate agreements manufacturers negotiate with PBMs may be treated as highly proprietary and, in many instances, may be unavailable to the plans. For example, in a 2011 evaluation, OIG learned that some Part D plan sponsors had limited information about rebate contracts and rebated amounts negotiated by their PBMs.³⁵ To the extent still true, this lack of transparency could potentially impede the ability of parties to disclose, report, and otherwise account accurately for rebates where required by program rules (and potentially, under the discount safe harbor). This, in turn, creates a potential program integrity vulnerability because compliance with program rules may be more difficult to verify. We are interested in stakeholder

feedback on the issue of transparency and compliance with program rules, particularly as it relates to bundled rebates, price protection or rebate guarantees, and other information not readily apparent when rebates are reported.

4. Changing the Rebate Framework

Based on the problems described above, the Secretary is concerned that rebate arrangements are neither beneficial to health care programs and beneficiaries, nor are they innocuous. In the Secretary's view, moreover, the statutory exemption for discounts (42 U.S.C. 1320a-7b(b)(3)(A)) does not apply to most rebates paid by drug manufacturers to part D plans or to Medicaid managed care plans. To the extent those rebates are paid to or through PBMs to buy formulary position, such payments would not be protected by the discount statutory exemption. In accordance with the authority described above, this rule proposes to update the regulatory discount safe harbor at 42 CFR 1001.952(h) to exclude from the discount safe harbor certain types of remuneration offered by drug manufacturers to Part D plan sponsors and Medicaid MCOs that may pose a risk to certain Federal health care programs and beneficiaries.³⁶ At the same time, this rule proposes a new safe harbor that would protect discount arrangements that the Department has determined would be beneficial and present a low risk of fraud and abuse if structured in accordance with the safe harbor's conditions. This new safe harbor (which is one of two new safe harbors proposed in this rule) would protect certain price reductions offered by manufacturers to Part D plans and Medicaid managed care organizations that are reflected at the point of sale to the beneficiary.

By excluding rebates paid by manufacturers to plan sponsors under Medicare Part D and Medicaid MCOs from the discount safe harbor and creating a new safe harbor for point of sale price reductions, the Department believes that there may be an improved

²⁶ *Id.* at 7.

²⁷ *Id.* at 10.

²⁸ *Id.* at 9.

²⁹ OIG, *Increases in Reimbursement for Brand-Name Drugs in Part D*, *supra* note 16, at 6.

³⁰ MEDPAC, *The Medicare Prescription Drug Program (Part D): Status report*. Report to the Congress: Medicare Payment Policy, (Mar. 2018).

³¹ CMS' spending estimate is the sum of Part D gross drug costs, Part B spending on outpatient drugs, and Medicaid gross drug costs.

³² IQVIA Institute for Human Data Science, *Medicine Use and Spending in the U.S.: A Review of 2016 and Outlook to 2021*, May 2017.

³³ Horn and Dickson, *Modernizing and Strengthening Existing Laws to Control Drug Costs*. Health Affairs Blog. March 31, 2017. <https://www.healthaffairs.org/doi/10.1377/hblog20170331.059428/full>.

³⁴ Comments to the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs. Georgetown Health Policy Institute Center for Children and Families. June 29, 2018.

³⁵ OIG, *Concerns with Rebates in the Medicare Part D Program*, *supra* note 32, at 17.

³⁶ We recognize that the payments manufacturers retrospectively make to PBMs under rebate agreements would not constitute discounts or other reductions in price to the extent such payments are retained by the PBM and not passed through to any buyer. We do not intend to imply through the issuance of this proposed rule that such payments qualify for safe harbor protection under 42 CFR 1001.952(h). Notwithstanding, out of an abundance of caution and desire to offer bright line guidance regarding the treatment of retrospective payments to PBMs that they retain, we are proposing to specify that such payments (including payments that may be labeled as “rebates”) are not protected by the discount safe harbor.

alignment of incentives among these parties that may curb list price increases, reduce financial burdens on beneficiaries, lower or increase Federal expenditures, improve transparency, and reduce the likelihood that rebates would serve to inappropriately induce business payable by Medicare Part D and Medicaid MCOs. The Department is soliciting comment on whether this action would advance those goals. Specifically, the Department is interested in comments on the effect that the proposed revision to the discount safe harbor and the proposed establishment of a new safe harbor that would protect only point-of-sale reductions in price may have on (i) beneficiary out-of-pocket spending for existing prescription pharmaceutical products, (ii) manufacturers' setting of list prices for newly launched products, (iii) the Federal Government, and (iv) commercial markets.

Additionally, the current rebate framework may deter plans or their PBMs from placing lower cost, therapeutically equivalent drugs on their formularies or may incentivize these entities to give preferred formulary placement to a higher-cost drug that carries a higher associated rebate.³⁷ Therefore, the Department is soliciting comments on (i) the extent to which rebates deter plans or their PBMs from placing lower cost, therapeutically equivalent drugs on their formularies or incentivizes plans or their PBMs to give preferred formulary placement to a higher-cost drug that carries a higher associated rebate, and (ii) how these practices might change if the Department were to eliminate safe harbor protection for rebates and protect only point-of-sale discounts for prescription pharmaceutical products.

The goal is to better align protected discount arrangements with evolving understandings of beneficial industry practices. However, we understand that PBMs still would be in competition with other PBMs; likewise, manufacturers still would be in competition with other manufacturers. We seek comments on possible negative or positive effects on pricing or competition that could result from an increase in transparency under the proposed point-of-sale discount safe harbor.

³⁷ "Meet the Rebate, the New Villain of High Drug Prices." *New York Times*. July 27, 2018. "The size of the rebate depends on a range of factors, including how many drugs are used by the insurers' members, and how generously the product will be covered on a formulary, or list of covered medicines. Companies that offer bigger rebates are often rewarded with better access like smaller co-payments."

The Department recognizes that modifications to the discount safe harbor will affect beneficiary and government spending on Part D plan premiums and cost sharing. However, it is difficult to predict manufacturer and Part D plan behavior in response to this regulation. Because their responses to the regulation will directly affect benefit design, plan bids and, ultimately, beneficiary and government spending on Part D plan premiums and cost sharing, the Department engaged CMS's Office of the Actuary (OACT) and two independent actuarial firms with experience working with Part D plan bid preparation to assess the potential effects on both premiums and out-of-pocket expenses under various assumptions.³⁸ These analyses are discussed in greater detail in the Regulatory Impact Analysis, and we seek feedback on the various approaches to estimating the potential costs and benefits of this regulation.

B. Payments to PBMs

When PBMs contract to administer the pharmacy benefit for health plans, the PBMs are the health plans' agents. However, the contracting health plans may not always know the services their PBMs are providing to pharmaceutical manufacturers. Manufacturers often pay PBMs fees for certain services (e.g., utilization management, medical education, medication monitoring, data management, etc.), and these fees may be calculated as a percentage of the list price of a particular drug product. If service fees paid by manufacturers are tied to the list price of the prescription pharmaceutical product, based on sales volume, or far exceed the fair market value of the services performed, these fees could function as a disguised kickback. This proposed rule would create a new safe harbor that would provide a pathway, specific to PBMs, to protect remuneration in the form of flat fee service fees that would be protected if they meet specified criteria.

The Department believes the terms of the PBMs' agreements with the pharmaceutical manufacturers should be transparent to the health plans. Health plans may be better able to identify and protect themselves from conflicts of interest if they know with some specificity the fees manufacturers are paying PBMs and the services PBMs are rendering to the manufacturers. We solicit comments on any anticompetitive or other issues that may arise from providing health plans with

³⁸ These analyses were conducted by Milliman and Wakely Consulting Group. We will refer to them by firm name in later sections for clarity.

transparency into interactions between pharmaceutical manufacturers and PBMs.

II. Summary of the Major Provisions

This proposed rule would amend the discount safe harbor at 42 CFR 1001.952(h) by adding an explicit exception to the definition of "discount" such that certain price reductions on prescription pharmaceutical products from manufacturers to plan sponsors under Medicare Part D, and Medicaid MCOs would not be protected under the safe harbor. In addition, the proposed rule would add one new safe harbor to protect discounts between those same entities if such discounts are given at the point of sale and meet certain other criteria. Finally, this proposed rule would add a second new safe harbor specifically designed to protect certain fees pharmaceutical manufacturers pay to PBMs for services rendered to the manufacturers that relate to PBMs' arrangements to provide pharmacy benefit management services to health plans.

The proposed rule would not alter obligations under the statutory provisions for Medicaid prescription drug rebates under Section 1927 of the Social Security Act, including without limitation the provisions related to best price, the additional rebate amounts for certain drugs if the rate of increase in AMP and the increase in the consumer price index for all urban consumers (CPI-U), or provisions regarding supplemental rebates negotiated between states and manufacturers. Nor would this proposed rule alter the regulations and guidance to implement Section 1927 provisions, although the Department may issue separate guidance if this proposal is finalized to clarify the treatment of pharmacy chargebacks in calculation of AMP and Best Price. This proposed rule recognizes that rebates paid by manufacturers to Medicaid MCOs should be treated differently than supplemental rebates paid by manufacturers to states because of the differing risk posed under the Federal anti-kickback statute.

III. Background

A. Anti-Kickback Statute and Safe Harbors

Section 1128B(b) of the Act, the anti-kickback statute, provides for criminal penalties for whoever knowingly and willfully offers, pays, solicits, or receives remuneration to induce or reward the referral of business reimbursable under any of the Federal

health care programs, as defined in section 1128B(f) of the Act. The offense is classified as a felony and is punishable by fines of up to \$100,000 and imprisonment for up to 10 years. Violations of the anti-kickback statute may also result in the imposition of civil monetary penalties (CMPs) under section 1128A(a)(7) of the Act (42 U.S.C. 1320a-7a(a)(7)), program exclusion under section 1128(b)(7) of the Act (42 U.S.C. 1320a-7(b)(7)), and liability under the False Claims Act (31 U.S.C. 3729-33).

Congress's intent in placing the term "remuneration" in the statute in 1977 was to cover the transfer of anything of value in any form or manner whatsoever. The statute's language makes clear that illegal payments are prohibited beyond merely "bribes," "kickbacks," and "rebates," which were the three terms used in the original 1972 statute. The illegal payments are covered by the statute regardless of whether they are made directly or indirectly, overtly or covertly, in cash or in kind. In addition, prohibited conduct includes not only the payment of remuneration intended to induce or reward referrals of patients but also the payment of remuneration intended to induce or reward the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by any Federal health care program.

Because of the broad reach of the statute, concern was expressed that some relatively innocuous commercial arrangements were covered by the statute and, therefore, potentially subject to criminal prosecution.³⁹ In response, Congress enacted section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93, which specifically requires the development and promulgation of regulations, the so-called safe harbor provisions, that would specify various payment and business practices that would not be subject to sanctions under the anti-kickback statute, even though they may potentially be capable of inducing referrals of business for which payment may be made under a Federal health care program.

Section 205 of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, established section 1128D of the Act, which includes criteria for modifying and establishing safe harbors. Specifically, section 1128D(a)(2) of the Act provides

that, in modifying and establishing safe harbors, the Secretary may consider whether a specified payment practice may result in:

- An increase or decrease in access to health care services;
- an increase or decrease in the quality of health care services;
- an increase or decrease in patient freedom of choice among health care providers;
- an increase or decrease in competition among health care providers;
- an increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations;
- an increase or decrease in the cost to Federal health care programs;
- an increase or decrease in the potential overutilization of health care services;
- the existence or nonexistence of any potential financial benefit to a health care professional or provider, which benefit may vary depending on whether the health care professional or provider decides to order a health care item or service or arrange for a referral of health care items or services to a particular practitioner or provider; or
- any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs.⁴⁰

Since July 29, 1991, there have been a series of final regulations published in the **Federal Register** establishing safe harbors in various areas.⁴¹ These safe

⁴⁰ See also section 1102 of the Act (vesting the Secretary with the authority to make and publish rules and regulations, not inconsistent with the Act, as may be necessary to the efficient administration of his functions under the Act).

⁴¹ Medicare and State Health Care Programs: Fraud and Abuse; *OIG Anti-Kickback Provisions*, 56 FR 35952 (July 29, 1991); Medicare and State Health Care Programs: Fraud and Abuse; *Safe Harbors for Protecting Health Plans*, 61 FR 2122 (Jan. 25, 1996); Federal Health Care Programs: Fraud and Abuse; *Statutory Exception to the Anti-Kickback Statute for Shared Risk Arrangements*, 64 FR 63504 (Nov. 19, 1999); Medicare and State Health Care Programs: Fraud and Abuse; *Clarification of the Initial *OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute**, 64 FR 63518 (Nov. 19, 1999); 64 FR 63504 (Nov. 19, 1999); Medicare and State Health Care Programs: Fraud and Abuse; *Ambulance Replenishing Safe Harbor Under the Anti-Kickback Statute*, 66 FR 62979 (Dec. 4, 2001); Medicare and State Health Care Programs: Fraud and Abuse; *Safe Harbors for Certain Electronic Prescribing and Electronic Health Records Arrangements Under the Anti-Kickback Statute*, 71 FR 45109 (Aug. 8, 2006); Medicare and State Health Care Programs: Fraud and Abuse; *Safe Harbor for Federally Qualified Health Centers Arrangements Under the Anti-Kickback Statute*, 72 FR 56632 (Oct. 4, 2007); Medicare and State Health Care Programs: Fraud and Abuse; *Electronic Health Records Safe Harbor Under the Anti-Kickback Statute*, 78 FR

harbor provisions have been developed "to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial or innocuous arrangements."⁴²

Health care providers and others may voluntarily seek to comply with safe harbors so that they have the assurance that their business practices will not be subject to any anti-kickback enforcement action. In giving the Department the authority to protect certain arrangements and payment practices under the anti-kickback statute, Congress intended the safe harbor regulations to be updated periodically to reflect changing business practices and technologies in the health care industry.

B. The Discount Safe Harbor

1. Discount Safe Harbor

The discount safe harbor was created to align with the statutory exception's intent to encourage price competition that benefits the Medicare and Medicaid programs.⁴³

Section 1128B(b)(3)(E) of the Act protects from the anti-kickback statute "any payment practice specified by the Secretary in regulations promulgated pursuant to section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987." Using the authority granted under section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, in the January 23, 1989, **Federal Register**, *OIG* published a notice of proposed rulemaking that proposed various safe harbors, including a safe harbor for discounts that would apply "to individuals and entities, including providers, who solicit or receive price reductions, and to individuals and entities who offer or pay them."⁴⁴ Subject to certain modifications, *OIG* finalized the discount safe harbor, among others, in a final rule published on July 29, 1991.⁴⁵ This regulatory discount safe harbor was designed to

79202 (Dec. 27, 2013); and Medicare and State Health Care Programs: Fraud and Abuse; *Revisions to the Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements*, 81 FR 88368 (Dec. 7, 2016).

⁴² Medicare and State Health Care Programs: Fraud and Abuse; *OIG Anti-Kickback Provisions*, 56 FR at 35958.

⁴³ Medicare and Medicaid Programs: Fraud and Abuse *OIG Anti-Kickback Provisions*, 54 FR at 3092.

⁴⁴ Medicare and Medicaid Programs: Fraud and Abuse *OIG Anti-Kickback Provisions*, 54 FR 3088 (Jan. 23, 1989).

⁴⁵ Medicare and State Health Care Programs: Fraud and Abuse; *OIG Anti-Kickback Provisions*, 56 FR 35952 (July 29, 1991).

³⁹ See, e.g., Medicare and State Health Care Programs: Fraud and Abuse; *OIG Anti-Kickback Provisions*, 56 FR 35952 (July 29, 1991).

protect all discounts or reductions in price protected by Congress in the statutory exception, as well as additional discounting practices not included in the statutory exception that are not abusive.⁴⁶

In response to requests from stakeholders, in the July 21, 1994, **Federal Register**, OIG proposed a number of clarifications to the discount safe harbor. For instance, OIG proposed to divide the relevant parties into three groups (buyers, sellers, and offerors) in order to delineate the different obligations individuals or entities must meet to receive protection under the discount safe harbor.⁴⁷

OIG modified the proposed regulations in response to comments received and finalized the clarifications to the discount safe harbor, among others, in the final rule published in the November 19, 1999, **Federal Register**.⁴⁸ Specifically, OIG defined “rebate” to include “any discount the terms of which are fixed at the time of the sale of the good or service and disclosed to the buyer, but which is not received at the time of the sale of the good or service.” OIG recognized that a manufacturer may offer a discount in the form of a rebate to a buyer. In addition, OIG stated that the regulatory safe harbor both incorporates and enlarges upon the statutory exception.⁴⁹

Finally, in the October 20, 2000, **Federal Register**, OIG proposed several technical revisions to the discount safe harbor, including a revision that would expand the safe harbor to cover discounts for items or services for which payment may be made, in whole or in part, under Medicare, Medicaid, or other Federal health care programs.⁵⁰ OIG finalized this expanded scope of the discount safe harbor in the **Federal Register** published on March 18, 2002.⁵¹

Subsequent OIG guidance has emphasized that, “to qualify for the

discount exception, the discount must be in the form of a *reduction in the price* of the good or service based on an arms-length transaction.”⁵²

2. Treatment of “Rebates” Under the Discount Safe Harbor

Section 1128B of the statute explicitly identifies rebates, along with kickbacks and bribes, as remuneration. When OIG first proposed a regulation implementing the discount exemption, it closely followed the statutory language, limiting its application to reductions in the amount a seller charges in a specific transaction for a good or service to a buyer.⁵³ It specifically did not apply to remuneration in the form of things of value, such as rebates of cash, other free goods or services, redeemable coupons, or credit towards the future purchases of other goods or services.⁵⁴ At the time, OIG recognized that these forms of remuneration may not be legitimate “discounts” and could be subject to abuse.⁵⁵ In the July 29, 1991 final rule, OIG recognized that rebates can function like legitimate reductions in price, and defined discount to include protection for rebate checks, subject to the limitation that they only be applied to the same good or service that was purchased or provided, and must be fully and accurately reported.⁵⁶ In the July 21, 1994, **Federal Register**, OIG proposed to clarify the definition of the term “rebate” for purposes of the safe harbor.⁵⁷ OIG modified the proposed regulations in response to comments received and finalized the clarifications to the discount safe harbor, among others, in the final rule published in the November 19, 1999, **Federal Register**.⁵⁸ Specifically, OIG defined “rebate” to include “any discount the terms of which are fixed at the time of the sale

of the good or service and disclosed to the buyer, but which is not received at the time of the sale of the good or service.”⁵⁹ OIG recognized that a manufacturer may offer a discount in the form of a rebate to a buyer.⁶⁰

3. Further Developments: Establishment of the Medicare Prescription Drug Benefit and Drug Rebates to Medicaid Managed Care Organizations

Long after Congress passed the legislation creating the modern anti-kickback statute and discount exception, and OIG issued the discount safe harbor regulation, Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108–173, establishing a prescription drug benefit for Medicare Beneficiaries (Medicare Part D).

The standard Part D benefit structure established by the Medicare Modernization Act required beneficiaries to pay a monthly premium, annual deductible, and copayments or coinsurance for drugs purchased at pharmacies. The standard benefit also included a coverage gap (also known as the doughnut hole) during which beneficiaries were required to pay 100 percent of their drug costs until their out-of-pocket spending reached the catastrophic threshold. The Part D benefit has been modified by a number of statutory changes, including the Patient Protection and Affordable Care Act of 2010 and the Bipartisan Budget Act of 2018.

In 2019, applicable beneficiaries enrolled in standard coverage would pay a \$415 deductible, 25 percent of their gross drug costs up to the initial coverage limit of \$3,820 (an additional \$851.25), and 25 percent of their brand drug costs and 37 percent of generic drug costs until reaching the out-of-pocket threshold of \$5,100 (an estimated \$8,139.54 of total covered Part D spending). These thresholds, and the actuarial equivalence of alternative benefits designs, are determined annually based on gross Part D drug costs.

Applicable beneficiaries, defined as those enrollees of prescription drug plans who do not receive the Low-Income Subsidy, pay 5 percent of their gross drug costs after reaching the out-of-pocket limit and entering catastrophic coverage. Part D plan sponsors are responsible for 75 percent of the gross covered drug costs between the deductible and the initial coverage limit, 5 percent and 63 percent of gross brand and generic drug costs,

⁵² 2003 Compliance Program Guidance for Pharmaceutical Manufacturers, 68 FR 23731, 23735 (May 5, 2003) (emphasis in the original).

⁵³ Medicare and Medicaid Programs; Fraud and Abuse OIG Anti-Kickback Provisions, 54 FR at 3092.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Medicare and State Health Care Programs; Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR at 35978–35979.

⁵⁷ Medicare and State Health Care Programs; Fraud and Abuse; Clarification of the OIG Safe Harbor Anti-Kickback Provisions, 59 FR 37202 (July 21, 1994).

⁵⁸ Medicare and State Health Care Programs; Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute, 64 FR 63518 (Nov. 19, 1999). That final rule also confirmed that “the regulatory safe harbor expands upon the statutory [exception] by defining additional discounting practices not included in the statutory exception that are not abusive” *Id.* at 63528.

⁵⁹ *Id.* at 63527.

⁶⁰ *Id.* at 63528.

⁴⁶ 64 FR 63518, 63528 (Nov. 19, 1999).

⁴⁷ Medicare and State Health Care Programs; Fraud and Abuse; Clarification of the OIG Safe Harbor Anti-Kickback Provisions, 59 FR 37202 (July 21, 1994).

⁴⁸ Medicare and State Health Care Programs; Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute, 64 FR 63518 (Nov. 19, 1999). That final rule also confirmed that “the regulatory safe harbor expands upon the statutory [exception] by defining additional discounting practices not included in the statutory exception that are not abusive” *Id.* at 63528.

⁴⁹ 64 FR 63518, 63528 (Nov. 19, 1999).

⁵⁰ Medicare and State Health Care Programs; Fraud and Abuse; Revisions and Technical Corrections, 65 FR 63035, 63041 (Oct. 20, 2000).

⁵¹ Medicare and Federal Health Care Programs; Fraud and Abuse; Revisions and Technical Corrections, 67 FR 11928, 11934 (Mar. 18, 2002).

respectively, in the coverage gap, and 15 percent of the gross drug costs in the catastrophic phase of the benefit. The Federal Government pays 74.5 percent of the plan benefit costs,⁶¹ and 80 percent of the gross drug costs during catastrophic coverage. The government also provides premium subsidies and cost-sharing subsidies for low-income beneficiaries.

Part D plan sponsors are permitted to offer plans with alternative benefit designs that are actuarially equivalent to standard Part D coverage, but have different deductibles and cost-sharing requirements. In 2019, many Part D plan sponsors will offer an alternative benefit design. The weighted average total premium for all Part D plans is \$43.50 per month. Part D beneficiaries enrolled in the 10 largest Part D plans will have formularies with 5 tiers of cost-sharing, and pay between \$0 to \$5 copayments for preferred generic drugs, \$1 to \$13 copayments for generic drugs, \$25 to \$47 copayments for preferred brands, 32 percent to 50 percent coinsurance for non-preferred drugs, and 25 percent to 33 percent coinsurance for specialty drugs.

Like the statutory exception, the discount safe harbor and all revisions to such safe harbor were promulgated prior to the enactment of the Medicare prescription drug benefit and prior to the promulgation of comprehensive regulations governing Medicaid managed care delivery systems. Moreover, after the current version of the discount safe harbor was finalized, there were two statutory changes involving the intersection of drug pricing under the Medicaid Drug Rebate Program and Medicaid MCOs (including the availability of mandatory Medicaid rebates for drugs dispensed to individuals enrolled with a Medicaid MCO if the MCO is responsible for covering those drugs),⁶² and the Department recently finalized regulations to modernize the Medicaid managed care regulatory structure.⁶³

III. Provisions of the Proposed Rule

To address the Department's concerns with the current rebate system, the

⁶¹ On average, beneficiary premiums are 25.5 percent of the benefit costs, or the cost of a standard Part D plan, as determined by annual bids submitted by Part D plan sponsors.

⁶² Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108-173, sec. 1002; Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, sec. 2501(c).

⁶³ Medicaid and Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions to Third Party Liability, 81 FR 27498 (May 6, 2016).

Department proposes to eliminate safe harbor protection for manufacturer reductions in price on prescription pharmaceutical products to Medicare Part D plans operating under section 1860D-1 *et seq.* of the Act, and Medicaid MCOs, as defined under section 1903(m) of the Act. In conjunction with this amendment, the Department is proposing a new safe harbor that would protect manufacturer point-of-sale reductions in price on prescription pharmaceutical products to a plan sponsor under Medicare Part D, a Medicaid MCO, or a PBM acting under contract with either, that would be applied at the point of sale to benefit the beneficiary, the plan, and, by extension, the Government. Finally, the Department is proposing a new safe harbor to protect certain fixed service fees that pharmaceutical manufacturers pay to PBMs. We are interested in and solicit comments on how these proposals, individually and/or collectively, would align or conflict with program requirements and any legal requirements (*e.g.*, antitrust laws) that may apply to affected parties.

A. Amendment to the Discount Safe Harbor

The Department proposes to amend the existing discount safe harbor so that it would no longer protect price reductions from manufacturers to plan sponsors under Medicare Part D or Medicaid MCOs, either directly or through PBMs acting under contract with plan sponsors under Medicare Part D or Medicaid MCOs, in connection with the sale or purchase of prescription pharmaceutical products, unless the reduction in price is required by law. Given that the discount safe harbor applies to items payable under Medicare, Medicaid, or other Federal health care programs, we solicit comments on whether this amendment should be limited to prescription pharmaceutical products payable by Medicare Part D and Medicaid MCOs, or whether the amendment also should apply to prescription pharmaceutical products payable under other HHS programs (*e.g.*, Medicare Part B fee-for-service, a Medicaid managed care program operated using waiver authority under section 1915(b) of the Act).

For purposes of this amendment as well as the proposed new safe harbor, we propose to interpret the term "plan sponsor under Medicare Part D" to include the sponsor of a prescription drug plan (PDP) as well as a Medicare Advantage organization offering a Medicare Advantage prescription drug plan. These two categories of plans are

the predominant types of plans through which beneficiaries receive prescription drug coverage under Part D. We solicit comments on this definition and also whether we should adopt a broader definition that would include all entities considered to be "Part D plan sponsors" under 42 CFR 423.4 (*i.e.*, expand to also include PACE organizations offering a PACE plan including qualified prescription drug coverage and cost plans offering qualified prescription drug coverage).

We also note that nothing in this proposed rule changes the discount safe harbor's provision that excludes from protection price reductions offered to one payor but not to Medicare or Medicaid, particularly when such discounts serve as inducements for the purchase of federally reimbursable products. OIG has a long-standing concern about arrangements under which parties "carve out" referrals of Federal health care program beneficiaries or business generated by Federal health care programs from otherwise questionable financial arrangements. Such arrangements implicate, and may violate, the anti-kickback statute by disguising remuneration for Federal health care program business through the payment of amounts purportedly related to non-Federal health care program business. This concern would extend to certain pharmaceutical rebate arrangements. For example, if a manufacturer offered a rebate on a product to an insurer for its private pay plans conditioned (explicitly or implicitly) on the product's favorable formulary placement across all plans (including Part D plans), such a rebate could be remuneration that would implicate the anti-kickback statute and would not be protected by the current discount safe harbor or by the provisions of this proposed rulemaking.

While this amendment would exclude from protection all price reductions from manufacturers on prescription pharmaceutical products in connection with their sale to or purchase by plan sponsors under Medicare Part D, Medicaid MCOs, or PBMs acting under contract with plan sponsors under Medicare Part D or Medicaid MCOs, unless the reduction in price is required by law (*e.g.*, rebates under the Medicaid Drug Rebate Program), the Department is proposing a new safe harbor, with different criteria, that would protect certain point-of-sale discounts that the proposed amendment would carve out from the current discount safe harbor. For the policy and program integrity reasons articulated above, the changes reflected in this proposed rulemaking

are intended to exclude from discount safe harbor protection rebates from manufacturers to plan sponsors under Medicare Part D and Medicaid MCOs, whether negotiated by the plan or by a PBM or paid through a PBM to the plan or Medicaid MCO.

The Department intends for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to other entities, including, but not limited to, wholesalers, hospitals, physicians, pharmacies, and third-party payors in other Federal health care programs. We solicit comments regarding whether the proposed regulatory text amending the discount safe harbor (when read in conjunction with the proposed new safe harbor at 42 CFR 1001.952(cc)) excludes reductions in price not contemplated by the proposed amendment. In addition, we solicit comments on any additional or different regulatory text necessary to clarify that other types of discounts (e.g., volume or prompt payment discounts to wholesalers) that currently are protected by the discount safe harbor would remain protected if all safe harbor conditions are met. We also solicit comments regarding whether declining to protect rebates to plan sponsors under Medicare Part D and Medicaid MCOs under a safe harbor might affect beneficiary access to prescription pharmaceutical products either due to cost or formulary placement.

While the Department intends for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to entities other than plan sponsors under Medicare Part D, and Medicaid MCOs, the Department is concerned about the potential for unintended loopholes. For example, we are concerned that in some circumstances, such price reductions could be used to funnel remuneration to parties that otherwise would have been in the form of rebates where such rebates, under this proposed rule, would no longer qualify for safe harbor protection.

We also are aware that many states have negotiated supplemental rebate agreements with drug manufacturers, which the Department does not presently believe should be affected by this proposal. We are considering and solicit comments on the extent, if any, to which these supplemental rebates would be affected by this proposal. In addition, we solicit comments on other types of entities who receive price reductions from manufacturers for the same types of prescription pharmaceutical products that are also sold to or purchased by plan sponsors

under Medicare Part D, Medicaid MCOs, or pharmacy benefit managers acting under contract with either and whether price reduction arrangements with those entities may pose similar risks. We are considering and seek comments on safeguards that already may be in place or could be included in the discount safe harbor to protect beneficial price reductions (i.e., that benefit programs or beneficiaries) while at the same time preventing the potential abuses described above.

As part of this proposal, the Department is soliciting comments on a definition for “in connection with” in the discount safe harbor; such a definition would clarify the scope of those price reductions that would no longer be protected under the discount safe harbor because they relate to the purchase of pharmaceutical products ultimately sold to or purchased by a plan sponsor under Medicare Part D, a Medicaid MCO, or a pharmacy benefit manager acting under contract with either. As stated above, we are considering and also soliciting comments on whether additional or different regulatory text would be necessary to clarify that other types of discounts (e.g., volume or prompt payment discounts to wholesalers) that currently are protected by the discount safe harbor would remain protected if all safe harbor conditions are met.

The Department is exploring value-based arrangements and their use in the sale of prescription pharmaceutical products. The Department does not intend for this proposal to have any effect on existing protections for value-based arrangements between manufacturers and plan sponsors under Medicare Part D and Medicaid MCOs. We are interested in hearing from stakeholders about, and are soliciting comments on, the extent to which the proposed amendment and accompanying proposed safe harbor may affect any existing or future value-based arrangements. We request that any such comments specify how any currently protected arrangements or arrangements that might be protected under the proposed safe harbor are “value based.”

We are proposing that this amendment, if finalized, be effective on January 1, 2020. We are mindful that many entities may be using the current discount safe harbor to protect financial arrangements that no longer would meet the definition of “discount” under this proposed change. We are soliciting comments on whether the proposed effective date gives affected entities a sufficient transition period to restructure any arrangements that could

implicate the anti-kickback statute and no longer would be protected by a safe harbor.

Finally, we solicit comments on proposed definitions for the terms “manufacturer,” “wholesaler,” “distributor,” “pharmacy benefit manager” or “PBM,” and “prescription pharmaceutical product” for purposes of 42 CFR 1001.952(h). We solicit comments on the sufficiency of the proposed definitions to accurately describe these terms for use in this proposed rule.

B. New Safe Harbor for Certain Price Reductions on Prescription Pharmaceutical Products

The Department is proposing a new safe harbor (Point-of-Sale Reductions in Price for Prescription Pharmaceutical Products) that would protect point-of-sale price reductions offered by manufacturers on certain prescription pharmaceutical products that are payable under Medicare Part D or by Medicaid MCOs that meet certain criteria. The proposed effective date for the new safe harbor would be 60 days after publication of the final rule. The Department intends for this new safe harbor to protect reductions in price for prescription pharmaceutical products without regard to what phase of the benefit the beneficiary is in. We solicit comment on potential revisions to clarify how the safe harbor would apply during periods of 100 percent beneficiary cost sharing.

As we describe throughout this preamble, point-of-sale reductions in price pose less risk to Medicare Part D, Medicaid MCOs, and beneficiaries than the current rebate system for prescription pharmaceutical products. In that regard, we are soliciting comments on the extent to which the safe harbor, if finalized, would incentivize manufacturers to provide point-of-sale discounts. We are considering whether and, if so, how the proposed safe harbor conditions should be modified to encourage these point-of-sale price reductions without posing any undue risk to programs or patients. We will consider alternative suggestions as well.

We continue to believe that “discounts are distinct from across-the-board price reductions offered to all buyers where the inducement that is made is so diffuse that it does not appear intended to encourage a particular buyer to purchase or order a particular good or service payable under

Medicare or Medicaid.”⁶⁴ For example, if a manufacturer were to implement an across-the-board reduction in price for a prescription pharmaceutical product (e.g., a reduction in WAC), such a reduction in price would not need the protection of the discount safe harbor or the safe harbor proposed in this rulemaking.

Under the proposed new safe harbor, a manufacturer could offer a reduction in price on a particular prescription pharmaceutical product to a plan sponsor under Medicare Part D, to a Medicaid MCO, or through a PBM acting under contract with either if certain conditions are met. First, the reduction in price would have to be set in advance with the plan sponsor under Medicare Part D, a Medicaid MCO, or a PBM. We propose that “set in advance” would mean that the terms of the reduction in price would be fixed and disclosed in writing to the plan sponsor under Medicare Part D or the Medicaid MCO by the time of the initial purchase. We propose to interpret “the initial purchase” to mean the first purchase of the product at that reduced price by the plan sponsor or Medicaid MCO on behalf of an enrollee. Like the current discount safe harbor, we propose that this new safe harbor would exclude from protection price reductions offered to one payor but not to Medicare or Medicaid and solicit comments on whether the regulation captures this intent.

Second, the reduction in price could not involve a rebate, as defined in 42 CFR 1001.952(h), unless the full value of the reduction in price is provided to the dispensing pharmacy through a chargeback or a series of chargebacks, or the rebate is required by law. We propose to define a “chargeback” as a payment made directly or indirectly by a manufacturer to a dispensing pharmacy so that the total payment to the pharmacy for the prescription pharmaceutical product is at least equal to the price agreed upon in writing between the Plan Sponsor under Part D, the Medicaid MCO, or a PBM acting under contract with either, and the manufacturer of the prescription pharmaceutical product. For example, when a pharmacy dispenses a drug to a beneficiary that is reimbursed by a particular Part D plan or Medicaid MCO, the total payment to the pharmacy (i.e., cost-sharing from the beneficiary, payment from the Part D plan or Medicaid MCO, and any chargeback) will be at least equal to the

price agreed upon between the manufacturer of that drug and the Part D Plan or Medicaid MCO, or a PBM acting under contract with either. We solicit comments on this definition. Notably, the current rebate frameworks under which a manufacturer pays the plan sponsor under Medicare Part D or Medicaid MCO directly or through a PBM would not meet this criterion absent those chargebacks resulting in the dispensing pharmacy receiving the full value of the reduction in price.

Third, the reduction in price must be completely reflected in the price the pharmacy charges to the beneficiary at the point of sale. For example, if the discounted rate is set in advance, at the time of dispensing the pharmacy would have the necessary information to appropriately charge a beneficiary who owes coinsurance, even if the manufacturer ultimately tenders the dispensing pharmacy a payment through a chargeback to reflect this negotiated price with the payor.

The proposed safe harbor’s requirements are intended to exclude from its protection conduct that mimics rebates but are referenced in other ways in the contracts between a manufacturer and a PBM, a plan sponsor under Medicare Part D, or a Medicaid MCO. For example, fees that are based on a percentage of a prescription pharmaceutical product’s list price could be a disguised kickback and would not be protected by this proposed safe harbor unless the requirements created by this rule are met. We are soliciting comments on this approach and whether, and if so, how the regulatory text should be modified to best reflect this intent.

We recognize that some pharmacies and PBMs are related through ownership, and we solicit comments on any potential issues such ownership interests might create under this proposed safe harbor and how best to address them. We also recognize that some PBMs may argue that allowing the reduction in price to be processed at the point of sale may provide pharmacies sufficient data to reverse engineer the manufacturer’s or the PBM’s discount structure. We solicit comments on whether this is likely, and if so, how it might transpire, what impact it might have on competition, and how, if at all, this should be addressed in the proposed safe harbor.

For purposes of proposed 42 CFR 1001.952(cc) we propose to incorporate the definitions of the terms “manufacturer,” “pharmacy benefit manager” or “PBM,” “prescription pharmaceutical product,” “rebate,” and “Medicaid managed care organization”

or “Medicaid MCO” as they would be set forth in the proposed amendment to 42 CFR 1001.952(h). We also propose a definition of “chargeback.” We solicit comments on the sufficiency of the proposed definitions to accurately describe these terms for use in this proposed rule.

C. New Safe Harbor for Certain PBM Service Fees

The Department is proposing a new safe harbor (PBM Service Fees) that would protect fixed fees that manufacturers pay to PBMs for services rendered to the manufacturers that meet specified criteria. In some circumstances, services that PBMs provide to health plans and pharmaceutical manufacturers put PBMs in a position to recommend or arrange for the purchase of pharmaceutical manufacturers’ products. The Department recognizes the possibility that certain types of remuneration that manufacturers might pay to PBMs either would not implicate the anti-kickback statute or could be protected under another existing safe harbor. However, this proposed new safe harbor would provide a pathway, specific to PBMs, to protect remuneration in the form of flat fee service fees that would be low risk if they meet specified criteria.

This proposed safe harbor would protect payments pharmaceutical manufacturers make to PBMs for services the PBMs provide to the pharmaceutical manufacturers, for the manufacturers’ benefit, when those services relate in some way to the PBMs’ arrangements to provide pharmacy benefit management services to health plans. This safe harbor would protect only a pharmaceutical manufacturer’s payment for those services that a PBM furnishes to the pharmaceutical manufacturer, and not for any services that the PBM may be providing to a health plan. With respect to services that relate in some way to the PBM’s arrangements with health plans, we have in mind, by way of example, services rendered to manufacturers that depend on or use data gathered by PBMs from their health plan customers (whether claims or other types of data). For example, PBMs might provide services for pharmaceutical manufacturers to prevent duplicate discounts on 340B claims.⁶⁵ Such a service is for the benefit of the manufacturer but relies on certain

⁶⁴ Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR 35952, 35977 (July 29, 1991).

⁶⁵ Section 256b(a)(5)(A)(i) of Title 42 provides that manufacturers are not required to provide a discounted 340B price and a Medicaid drug rebate for the same drug.

information the PBM would have from its contracted health plans. We note, however, that nothing in this proposed safe harbor would preempt any contractual terms that a PBM has with a health plan that limits or delineates the PBM's use of the health plan's data.

We consider "pharmacy benefit management services" to be services such as contracting with a network of pharmacies; establishing payment levels for network pharmacies; negotiating rebate arrangements; developing and managing formularies, preferred drug lists, and prior authorization programs; performing drug utilization review; and operating disease management programs. We do not propose to create a definition for "pharmacy benefit management services" as these services could evolve over time. We solicit comments on this approach and whether other services should be considered "pharmacy benefit management services" for purposes of this safe harbor. We also solicit comments on our proposal to limit this safe harbor to the fees that pharmaceutical manufacturers pay to PBMs that relate to the PBM's arrangements to provide pharmacy benefit management services to health plans.

The first proposed condition of the safe harbor would require the PBM and the pharmaceutical manufacturer to have a written agreement that: (i) Covers all of the services the PBM provides to the manufacturer in connection with the PBM's arrangements with health plans for the term of the agreement, and (ii) specifies each of the services to be provided by the PBM and the compensation for such services.

Compliance with this first condition is necessary to demonstrate compliance with the second proposed condition. We solicit comments regarding whether the safe harbor should specify the format of any such agreement (*e.g.*, whether it would be sufficient for a PBM to have one agreement with a manufacturer that covers all of the services the PBM provides to that manufacturer, or whether separate agreements for services that relate to each health plan would be necessary).

The second proposed condition would specify that compensation paid to the PBM must: (i) Be consistent with fair market value in an arm's-length transaction; (ii) be a fixed payment, not based on a percentage of sales; and (iii) not be determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties, or between the manufacturer and the PBM's health plans, for which payment

may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs. The first sub-condition requires that the remuneration be consistent with fair market value in an arm's length transaction and we welcome comments on the requirement, including comments on avoiding any risks of gaming with respect to valuation or other conditions in this proposed safe harbor. The second sub-condition would permit flat fees, but not percentage-based fees, including fees based on a percentage of sales. Flat fees pose lower risk of abuse and conflicts of interest. For example, if a pharmaceutical manufacturer were to offer compensation to a PBM for its services based on a percentage of the price of the manufacturer's product, the PBM could be influenced to include higher-priced alternatives in favorable tiers on its formulary, which would increase the PBM's own profits but be less beneficial for the health plans for which the PBM is supposed to be acting as an agent. (We note that the current rebate framework, where we understand that PBMs generally seek payments (which the parties refer to as "rebates") from manufacturers in exchange for a favorable formulary placement, may be instructive with respect to the relative risks of payments based on sales versus fixed fees.) Therefore, we are proposing that the protected payments must be fixed fees, rather than fees that are based on a percentage of sales or other variable. We solicit comments on this approach and these concerns.

The third sub-condition would require that the fees not be determined in a manner that takes into account the volume or value of any referrals or other business generated. We solicit comments regarding this volume or value criterion. In particular, we solicit comments on any services arrangements between pharmaceutical manufacturers and PBMs that take into account the volume or value of referrals or business otherwise generated between the parties, or the manufacturer and the PBM's health plans, but otherwise would be low risk or appropriate. We are considering whether, and if so how, we could include criteria that would allow us to deem certain arrangements not to take into account the volume or value of any referrals or business otherwise generated between the parties so that they may be protected under this safe harbor if all other criteria are met.

Finally, the Department proposes that the PBM disclose in writing to each health plan with which it contracts at least annually, and to the Secretary upon request, the services it rendered to

each pharmaceutical manufacturer that are related to the PBM's arrangements with that health plan and the associated costs for such services. We are also considering, and solicit comments on, whether, and if so under what conditions, PBMs should also be required as an additional condition of safe harbor compliance to disclose the fee arrangements to the health plans. We propose that the PBMs be required to disclose the fee arrangements to the Secretary upon request. To promote transparency and minimize risks of fraud or abuse, we are also considering, and solicit comments on, requiring PBMs to disclose, in order to use the safe harbor, additional information about the fee arrangements to the Secretary upon request, including information about some or all of the following: Information about valuation and valuation methodology; information demonstrating that fee arrangements are not duplicative of other arrangements for which the PBM might receive duplicative payments ("double-dipping"); and information demonstrating that fee arrangements meet the "volume or value" criterion. The Department believes that PBMs are agents of the health plans with which they contract and that this transparency requirement is important to ensure that the PBM's arrangements with pharmaceutical manufacturers are not in tension with the services that the PBM provides to the health plans for which it is acting as an agent. We solicit comments on this transparency requirement. For example, we solicit comments on whether arrangements that PBMs have, or would seek to have, with pharmaceutical manufacturers could be attributed to services provided to particular health plans. We are also soliciting comments on any competitive concerns this transparency condition would raise and how we might address them in this rulemaking. Nothing in this proposal would affect the ability of the health plan and PBMs to negotiate different disclosure provisions in their contracts; however, safe harbor protection would only apply if the conditions of the safe harbor are fully met.

IV. Regulatory Impact Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis

(RIA) must be prepared for major rules with economically significant effects of \$100 million or more in any one year.

Executive Order 13771 (January 30, 2017) requires that the costs associated with significant new regulations “to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” The Department believes that this proposed rule is a significant regulatory action as defined by Executive Order 12866 that imposes costs, and therefore is considered a regulatory action under Executive Order 13771. The Department estimates that this rule generates \$56.2 million in annualized costs at a 7% discount rate, discounted relative to 2016, over a perpetual time horizon.

The Regulatory Flexibility Act and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, non-profit organizations, and government agencies. Based on subsequent analysis, the Secretary does not believe that this rule will have significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. The Secretary has determined that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately \$150 million. The proposed rule may have effects on states through its effects on the Medicaid Drug Rebate Program, under which rebates are shared between the Federal Government and the states based on the Federal Medical Assistance Percentage (FMAP) for each state, and through its effects on Medicaid managed care. We invite comments on these or other potential impacts.

The rule does not alter the statutory provisions for Medicaid prescription

drug rebates under Section 1927 of the Social Security Act that are calculated as percentages of AMP plus the difference between the rate of increase in AMP and the increase in the consumer price index for all urban consumers (CPI-U). It also does not alter Section 1927’s provisions for Medicaid rebates based on the Best Price available to other payers for innovator drugs or for supplemental rebates negotiated between states and manufacturers. Nor does the rule alter the regulations and guidance to implement Section 1927 provisions.

To the extent that the rule reduces Average Manufacturer Price (AMP), however, it will also reduce Medicaid prescription drug rebates calculated as percentages of AMP plus the difference between the rate of increase in AMP and the increase in the CPI-U. The Milliman analysis includes an extended example demonstrating that the loss of revenue from these rebates can exceed the savings from lower list prices.⁶⁶

The proposed rule would also change the safe harbor provision that currently protects rebates that PBMs negotiate on behalf of Medicaid MCOs while establishing a new safe harbor that allows point-of-sale price reductions under certain conditions. Finally, we seek comment regarding how these changes would influence bids submitted by Medicaid MCOs, including whether or not reducing rebate revenue for Medicaid managed care plans could result in states receiving bids with increased costs for Medicaid MCO contracts.

The Office of the Actuary estimates that the rule will result in estimated aggregate savings of \$4.0 billion for states over ten years, as follows.⁶⁷ The impact of the rule on Medicaid prescription drug rebates, MCO premiums, and prescription drug prices could result in net Federal Medicaid costs of \$1.7 billion between 2020 and 2029, and net state Medicaid costs of \$0.2 billion over the same period.⁶⁸ The Office of the Actuary also estimates that state governments will save \$4.3 billion between 2020 and 2029 through lower prescription drug prices for state

employees.⁶⁹ These estimates are at the national level; Medicaid costs, state employee savings, and the net of the two may vary among states.

We further note that the Veterans Health Administration, the Indian Health Service, tribes administering health programs under tribal self-governance, and other entities are eligible to purchase prescription drugs under the Federal Supply Schedule (FSS). FSS pricing is negotiated based on a unique commercial sales practices format, using commercial list pricing and most favored customer pricing as a base for negotiating, in most cases, up front discounts. In addition, the Veterans Health Administration, Department of Defense, Coast Guard, and the Public Health Service (including the Indian Health Service) are eligible to purchase drugs under the Federal Ceiling Price (FCP) Program. The Federal Ceiling Price is calculated as a percentage of non-Federal average manufacturer pricing (non-FAMP). Eligible programs can purchase drugs using the lesser of the FSS Price and FCP. Although it is difficult to determine the operation of the proposed rule on FSS users or entities entitled to FCPs, if the overall effect of lowering list pricing is achieved and that results in lower prices to commercial customers (and wholesalers) or pricing components of non-FAMP, it is possible VA may realize some additional savings. We solicit comment on effects on these stakeholders.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. Since this regulation does not impose any direct costs on State or local governments, preempt State law, or otherwise have federalism implications, the requirements of Executive Order 13132 are not applicable.

A. Need for Regulation

As described above, manufacturers paying rebates to PBMs may be a factor in list prices rising faster than inflation. This phenomenon may also be causing PBMs to favor higher-cost drugs with higher rebates over drugs with lower costs, and discouraging the adoption of lower-cost brand drugs and biosimilars. As a result, rebates may increase costs

⁶⁶ Milliman. “Impact of Potential Changes to the Treatment of Manufacturer and Pharmacy Rebates.” September 2018. The Milliman analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

⁶⁷ CMS Office of the Actuary. “Proposed Safe Harbor Regulation.” August 2018. The OACT analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

⁶⁸ CMS Office of the Actuary. “Proposed Safe Harbor Regulation.” August 2018. The OACT analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

⁶⁹ CMS Office of the Actuary. “Proposed Safe Harbor Regulation.” August 2018. The OACT analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

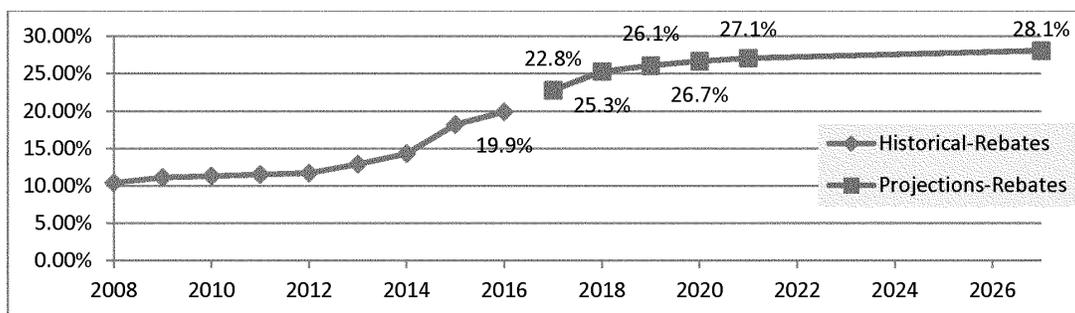
for consumers, because their out-of-pocket costs during the deductible, coinsurance, and coverage gap phases of their benefits are based on the list price. Rebates may also increase costs for the government, which pays a portion of the premium, cost-sharing, and reinsurance payments associated with the use of highly-rebated drugs instead of less-costly alternatives).

Prescription drug spending can be measured based on WAC price (also referred to as list price or invoice price) and the so-called “net price” (which accounts for all price concessions).⁷⁰ According to the IQVIA Institute for

Human Data Science (a private research organization affiliated with the human data science and consulting firm IQVIA) that uses proprietary data from IQVIA), the difference between total US invoice spending (the amount paid by distributors) and net spending (which accounts for all price concessions) across all distribution channels has increased from approximately \$74 billion in 2013 to \$130 billion 2017 for retail drugs. The IQVIA Institute found a similar growth in the difference between invoice and net spending for the total US retail market.⁷¹

Department analysis shows that within Medicare there has been a similar trend of growing differences between list and net prices. Manufacturer rebates grew from about 10 percent of gross prescription drug costs in 2008 to about 20 percent in 2016, and are projected to reach 28 percent in 2027 under current policy (Figure 1). Reinsurance spending and gross drug costs, after rising in tandem with premiums in the early years of the Part D benefit, are now growing much faster than premiums.

Figure 1: Manufacturer Rebates as a Percent of Gross Drug Costs, 2008-2027 (Projected)



Source: 2018 Medicare Trustees Report, Table IV.B8

B. Background on Costs, Benefits, and Transfers

This proposed rule seeks to eliminate rebates so that manufacturers will have an incentive to lower list prices and PBMs will have more incentive to negotiate greater discounts from manufacturers. The goal of this policy is to lower out-of-pocket costs for consumers and reduce government drug spending in Federal health care programs.

The full magnitude of these savings is difficult to quantify, and the Office of Management and Budget has specific definitions of costs, benefits, and transfers. As such, a brief summary of potential effects of this rule is provided here. More information about these effects may be found in the respective costs, benefits, and transfers sections.

Notably, the Department intends for this proposal to result in manufacturers lowering their list prices, and replacing rebates with discounts. One way to

quantify this impact is to simply replace all manufacturer rebates paid to PBMs with discounts paid to consumers, and estimate the effect of this transfer on stakeholders. However, this approach does not consider the range of strategic behavior changes stakeholders may make in response to this rule, including the extent to which manufacturers lower list prices or retain a portion of current rebate spending. PBMs change benefit designs or obtain additional price concessions, and the impact on consumer utilization of lower-cost drugs. The section below describes the current system and the potential system that could result from finalizing this rule, based on current Medicare Part D spending and a range of potential behavioral changes, including the manufacturer pricing changes and PBM negotiation practices described above.

Today, prescription drug manufacturers prospectively set the Wholesale Acquisition Cost, or list

price, of the drugs they sell to wholesalers and other large purchasers. Manufacturers also retrospectively make payments to pharmacy benefit managers (PBMs) or other customers who meet certain volume-based or market-share criteria. The difference between the list price of a drug and the rebate amount is referred to in industry parlance as the “net price.” Since the passage of the Anti-Kickback Statute and the establishment of the various safe harbors, the list prices of branded prescription drugs, and the rebates paid by manufacturers to pharmacy benefit managers, have grown substantially. The phenomenon of list prices rising faster than “net prices” is referred to as the “gross to net bubble.”

Research suggests that the approval of a new drug can lead to higher list prices for existing drugs in the therapeutic class. PBMs may favor drugs with higher rebates over drugs with lower costs, or otherwise discourage the

⁷⁰ “Net price” is industry jargon. Each PBM or plan sponsor may treat payments and price

concessions differently. Thus the “net price” of a

drug is more difficult to define than the Wholesale Acquisition Cost set by the manufacturer.

adoption of lower-cost brand or generic drugs and biosimilars. As a result, rebates may increase costs for consumers (who experience out-of-pocket costs more closely related to the list price than the rebated amount during the deductible, coinsurance, and coverage gap phases of their benefits) and the government (who pays a portion of the premium, cost-sharing, and reinsurance payments associated with the use of higher-rebated drugs instead of less-costly alternatives). This rule seeks to correct the incentives that have created the widening gaps between gross and net prescription drug costs and between gross prescription drug costs and Part D premiums.

This proposed rule would remove safe harbor protection for rebates received by PBMs from manufacturers in connection with Medicare Part D and Medicaid MCOs, and create two new safe harbors protecting certain discounts by manufacturers and protecting certain flat fees paid by manufacturers to a PBM for services the PBM renders to the manufacturer. To the extent that this rule would result in manufacturers reducing the list price of drugs, this rule would impact all cash flows throughout the system.

The intent of this rule is to eliminate rebates from manufacturers to PBMs, and replace them with discounts provided to beneficiaries at the point of sale. This change would also impact the price that many patients pay for prescription drugs. As part of their health insurance coverage, many consumers pay some cost sharing for the use of health care services. For many plans, consumers first pay a deductible. This typically means that the consumer pays the full cost of services until the deductible is met. After the consumer has met the deductible, cost sharing often takes the form of coinsurance, in which consumers pay a percentage of the cost of the covered health care service or product, or copayments, in which consumers pay a fixed amount for a covered health care service or product. A recent IQVIA report found that in 2017 more than 55 percent of commercially-insured consumer spending on branded medicines was filled under coinsurance or before the deductible is met.⁷² For most health care services, consumer deductibles and coinsurance are based on the prices health insurers negotiate with their network providers. However, for prescription drugs, often the price the plan ultimately pays is based on rebates

that are paid after the point of sale to the consumer, whereas the consumers' deductible and coinsurance payments are based on the list price.

With a reduced price charged by the pharmacy, patients with coinsurance or deductible plans will likely experience reductions in cost-sharing for rebated brand-name at the point of sale. Patients with fixed co-payments may not see changes in their cost-sharing at the point of sale outside of the deductible, coverage gap, or catastrophic phases of their benefits. These effects will accrue to some beneficiaries through lower out-of-pocket costs and to all beneficiaries through more transparent pricing. If this rule closes the gap between list and net prices and leads to additional price concessions, the benefit of lower premiums and out-of-pocket costs could accrue to all beneficiaries with individual out-of-pocket savings varying by beneficiary prescription drug utilization. If this rule closes the gap between list and net prices but leads to fewer price concessions, all beneficiaries could experience higher premiums with only some experiencing lower out-of-pocket costs. The potential impact of these distributional changes is described in the transfers section of this regulatory impact analysis.

Consumers also select health insurance plans based on their understanding of relevant plan characteristics, including premiums, cost sharing, coverage, and in-network providers. Research shows that consumers often do not understand their health insurance plans and would better understand a simpler plan.⁷³ Research specific to Medicare Part D suggests beneficiaries place a greater weight on premium than out-of-pocket cost, are most likely to choose the plan with the lowest premium.⁷⁴ Oftentimes they select the plan with the lowest premiums when plans with higher premiums and more comprehensive coverage were actuarially favorable.⁷⁵ However, consumers in poorer health or with higher drug costs are more likely to anticipate their future drug spending and choose a plan that places them at less financial risk. Also, as stated earlier, a beneficiary paying 20% coinsurance on a drug with a \$100 WAC and 30% rebate effectively pays 28% of

the plan's cost after accounting for payments made by the manufacturer to the PBM. Thus, the publication of premiums and cost-sharing amounts that more accurately reflect the discounted price of a prescription drug could help align consumer understanding of health insurance benefits with reality and help consumers to choose the health insurance plans that best meet their needs. These effects are described in the benefits section.

The Federal Government pays a significant portion of the premium for every Medicare Part D beneficiary, and subsidizes the cost sharing of beneficiaries eligible for the Part D low-income subsidy. If this rule increases premiums, Federal spending on premium subsidies will also increase, potentially outweighing estimated Federal savings associated with this proposal. These potential effects are described in the transfers section of this regulatory impact analysis.

Lastly, stakeholders involved in the manufacture, sale, distribution, and dispensing of prescription drugs, as well as those who provide prescription drug coverage, will need to review this policy and determine how it affects them. They may also need to make changes to existing business practices, update systems, or implement new documentation and recordkeeping requirements. These effects are described in the costs section of this regulatory impact analysis. We seek comment on the impacts identified and any other impacts.

C. Affected Entities

This proposed rule would affect the operations of entities that are involved in the distribution and reimbursement of prescription drugs to Medicaid beneficiaries and Medicare Part D prescription drug benefit enrollees. According to the US Census⁷⁶ and other sources,⁷⁷ there were 67,753 community pharmacies (including 19,500 pharmacy and drug store firms and 21,909 small business community pharmacies), 1,775 pharmaceutical and medicine manufacturing firms, and 880 direct health and medical insurance carrier firms operating in the US in 2015. In 2018, there are 44 Pharmacy Benefit Managers (PBMs) listed in the Pharmacy Benefit Management

⁷³ Loewenstein G et al. Consumers misunderstanding of health insurance. *Journal of Health Economics*. 32(2013) 850–862.

⁷⁴ Abaluck and Gruber. Evolving Choice Inconsistencies in Choice of Prescription Drug Insurance. *Am Econ Rev*. 2016 Aug; 106(8): 2145–2184.

⁷⁵ Heiss, Leive, McFadden and Winter. Plan Selection in Medicare Part D: Evidence From Administrative Data. *J Health Econ*. 2013 Dec; 32(6): 1325–1344.

⁷⁶ <https://www.census.gov/data/tables/2015/econ/subs/2015-susb-annual.html>.

⁷⁷ Qato, Zenk, Wilder, et al. *PLoS One*. 2017 Aug 16;12(8).

⁷² Consumer Affordability Part One: The Implication of Changing Benefit-Designs and High Cost sharing.

Institute⁷⁸ directory. Organizations are required to pay a fee if they choose to register, and therefore we estimate that participation in the directory is incomplete and that the total number of PBMs operating in the U.S. is approximately 60.

This rule also affects the operation of 56 Medicaid agencies, including all states, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the US Virgin Islands.

Finally, the proposed rule if finalized would affect Medicare prescription drug enrollees. CMS reports there were 44,491,003 Medicare prescription drug enrollees in December 2018.⁷⁹ CMS reports there were 80,184,501 beneficiaries in Medicaid in 2016, 65,005,748 of which were enrolled in any type of managed care plan. However, these beneficiaries are less likely to be significantly affected, given Medicaid's low beneficiary cost-sharing requirements. Throughout, we use these numbers as estimates of affected entities in relevant categories, and we request comments on these assumptions.

The Department estimates the hourly wages of individuals affected by this proposed rule using the May 2016 National Occupational Employment and Wage Estimates provided by the US Bureau of Labor Statistics.⁸⁰ We note that, throughout, estimates are presented in 2016 dollars. We use the wages of Medical and Health Services Managers as a proxy for management staff, the wages of Lawyers as a proxy for legal staff, and the wages of Network and Computer Systems Administrators as a proxy for information technology (IT) staff throughout this analysis. To value the time of Medicare prescription drug benefit enrollees, we take the average wage across all occupations in the US. We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate. Estimated hourly rates for all relevant categories are included below. We seek public comment on these assumptions.

TABLE 1—HOURLY WAGES⁸¹

Medical and Health Services Managers	\$52.58
Lawyers	67.25

⁷⁸ https://www.pbmi.com/PBMI/Directory/Pharmacy_Benefit_Manager_Directory.aspx, accessed 7/13/2018.

⁷⁹ <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html>.

⁸⁰ https://www.bls.gov/oes/2016/may/oes_nat.htm.

TABLE 1—HOURLY WAGES⁸¹—
Continued

Network and Computer Systems Administrators	40.63
Medicare Prescription Drug Benefit Enrollees	23.86

D. Costs

In order to comply with the regulatory changes proposed in this proposed rule, affected businesses and Medicaid agencies would first need to review the rule. The Department estimates that this would require an average of 2 hours for affected businesses to review, divided evenly between managers and lawyers, in the first year following publication of the final rule. As a result, using wage information provided in Table 1, this implies costs of \$5.3 million in the first year following publication of a final rule after adjusting for overhead and benefits. We seek public comment on these assumptions.

After reviewing the rule, businesses and Medicaid agencies would need to review their policies in the context of these new requirements, and determine how to respond. For some affected businesses, this may mean substantially changing their pricing models, and engaging in lengthy negotiations with other businesses. For others, much more modest changes are likely needed. The Department estimates that this would result in affected businesses spending an average of 20 hours reviewing their policies and determining how to respond, divided evenly between lawyers and managers, in the first year following publication of the final rule. In subsequent years, the Department estimates this would result in affected businesses spending an average of 10 hours implementing policy changes, with 20% of time spent by lawyers and 80% of time spent by managers. As a result, using wage information provided in Table 1, the Department estimates costs of \$53.5 million in the first year and \$24.8 million in years two through five following publication of the final rule after adjusting for overhead and benefits. We seek public comment on these assumptions.

The Department is proposing that this amendment, if finalized, be effective on January 1, 2020, and is soliciting comments on whether the proposed effective date gives affected entities a sufficient transition period for any necessary restructuring of arrangements. Plan sponsor and manufacturer negotiations for the 2020 benefit year could be influenced by the release of

⁸¹ https://www.bls.gov/oes/2016/may/oes_nat.htm.

this proposal, and bids could be submitted without knowledge of whether or not the proposal will be finalized with a January 1, 2020 effective date. Parties who wish to enjoy protection under a new safe harbor may need to restructure their contractual arrangements, and the change in law itself would trigger contractual obligations to terminate or amend existing contracts. These changes could affect the assumptions underlying plan sponsors' bids. As a result, we estimate the cost of 218 Part D parent organizations of Part D plan sponsors updating their bids with new information to be \$5.45 million in the first year this rule is finalized.

This rule imposes documentation and reporting requirements on PBMs. In particular, PBMs and pharmaceutical manufacturer must have a written agreement that specifies their contractual arrangements and interactions with health plans, and PBMs must disclose their services rendered and compensation associated with transactions with pharmaceutical manufacturers related to interactions between the PBM and the health plan. In addition, PBMs may be required to disclose this information to the Secretary upon request. We believe that these written agreements already exist as a matter of standard business practice, as they need to be in place in order to enforce contractual arrangements between these entities. As a result, we believe that the documentation requirement merely codifies standard practice, and therefore imposes no marginal costs on affected entities. We believe that the disclosure requirements will not require PBMs to generate new information or retain additional records related to their interactions with pharmaceutical manufacturers or health plans. However, we believe that the disclosure requirements will result in additional disclosure to health plans and potentially the Secretary. We estimate that each PBM will provide this information an additional 50 times each year. We estimate that these disclosures will require an average of 4 hours, with 50% of time spent by managers, 25% of time spent by attorneys, and 25% of time spent by IT staff. As a result, using wage information provided in Table 1, the Department estimates costs of \$1.28 million in each year following publication of the final rule after adjusting for overhead and benefits. We request comments on these assumptions.

We expect that this rule will also lead PBMs, pharmacies, and health insurance providers to update their IT

systems for processing claims and payments. For these entities, the Department estimates that this will require an average of five hours per year over the first five years following publication of the final rule to make these changes. Using wage information provided in Table 1, we estimate this will cost \$10.8 million in each of the first five years following publication of a final rule after adjusting for overhead and benefits. We seek public comment on these assumptions.

Medicare prescription drug benefit enrollees will also spend time responding to the rule. In particular, the Department believes that this rule will result in changes to the characteristics of Medicare prescription drug plans. Once enrollees become aware that changes have been made, we believe they will review available plans to determine the plan which best suits their needs. The Department expects that Medicare enrollees will become aware of these changes gradually over time. In particular, the Department expects that 20% of enrollees will become aware of these changes in each of the five years following publication of the final rule, and that responding to these changes will require an average of thirty minutes per enrollee. As a result, using wage information provided in Table 1, we estimate costs of \$209 million in each of the first five years following publication of a final rule after adjusting for overhead and benefits. We seek public comment on these assumptions.

This rule may lead to shifts in the composition of affected industries by affecting the extent to which entities vertically integrate, and the rate at which entities of various sizes (particularly small entities) enter and exit the market. Vertical integration is a strategy where a firm acquires business operations in a different sector of the supply chain and reimbursement system. Entities are affected by this rule to the extent that their business models depend on using rebates, and rebates are streamlined regardless of where they are paid if a company is vertically integrated. As a result, this rule may affect incentives for vertical integration for affected entities. For example, PBMs, plan sponsors, and pharmacies may want to vertically integrate as a result of this rule. At the same time, the potential loss of retained rebate revenue by PBMs may cause existing vertically-integrated businesses to consider new organizational structures. These changes, in turn, may generate costs and benefits.

E. Benefits

It is difficult to accurately quantify the benefits of this proposed rule due to the complexity and uncertainty of stakeholder response. As such, the Department has qualitatively described two potential benefits of the proposed rule, and we request comment on the methodology and data sources that could be used to quantify these benefits.

First, if this rule is finalized, the Department anticipates the enhanced transparency of premiums, out-of-pocket costs and improved formulary designs will help beneficiaries make more actuarially favorable decisions, because the new discounts negotiated by PBMs would be passed on to beneficiaries at the point of sale for those enrolled in health plans electing to use the proposed new safe harbor protecting certain point-of-sale reductions in price on prescription pharmaceutical products.

Second, with reduced out-of-pocket payments, patient adherence and persistence with prescription drug regimens may improve. Patients abandoned 21 percent of all prescriptions for branded drugs processed by pharmacies in the United States in the fourth quarter of 2017,⁸² and copayment or coinsurance amounts can be a predictor of abandonment.⁸³ While there may be a variety of reasons patients may not pick up a medication, one factor that may impact patient decision-making is the out-of-pocket cost of a prescription. One study suggested that for chronic myeloid leukemia, patients using tyrosine kinase inhibitors were 42% more likely to be non-adherent (which may include delaying the purchase of, never purchasing, or switching their prescription to a less optimal choice) if they were in the higher copayment group compared to the lower copayment group.⁸⁴ The intent of this proposal is to lower the out-of-pocket costs for prescription drugs for some Medicare prescription drug enrollees. The pricing decisions of drug companies, and negotiations between manufacturers and PBMs, will determine how plan sponsors make formulary decisions that determine whether or not beneficiaries pay more or less in out-of-pocket costs.

⁸² IQVIA Institute for Human Data Science, *Medicine Use and Spending in the U.S.: A Review of 2017 and Outlook to 2022*, April 2018, p. 31.

⁸³ William H. Shrank et al., *The Epidemiology of Prescriptions Abandoned at the Pharmacy* 153 *Annals Internal Med.* 633 (2010).

⁸⁴ Stacie B. Dusetzina et al. "Cost Sharing and Adherence to Tyrosine Kinase Inhibitors for Patients With Chronic Myeloid Leukemia." 32:4 *Journal of Clinical Oncology*. February 2014.

Furthermore, lower out-of-pocket costs may lead to fewer enrollees abandoning prescription drugs. This could result in beneficiaries filling more prescriptions, and thus increasing spending, as prescriptions that were once unaffordable are now attainable. It could also lead to lower total costs-of-care, if increased adherence led to improved health outcomes. The Department is unable to estimate the extent to which this proposal would reduce abandonment across all drug markets or the resulting health benefits of higher adherence of prescription drugs. We request comment on the methodology and data sources that could be used to estimate such impacts.

In addition, the reduction in abandonment could benefit pharmacies by reducing costs related to storage and tracking of abandoned prescriptions. We request comment on the methodology or data sources that could be used to estimate such impacts. Further, we request comment on any other benefits of this rule and the data sources that could be used to estimate such benefits.

F. Transfers

The provisions of this proposed rule are specifically aimed at incentives related to pharmaceutical list prices as set by manufacturers, increases in these prices by manufacturers, rebates paid by manufacturers to PBMs acting on behalf of Part D plan sponsors and Medicaid MCOs, and the misalignment of incentives caused by concurrently increasing list prices and rebates. A significant, though difficult to quantify, potential transfer resulting from this rule if finalized would be the reduction of list prices and/or a reduction in the annualized increases thereof. Retrospective rebate-based contractual arrangements between manufacturers and PBMs and health insurers may be renegotiated to match these regulations' new conditions. Manufacturers may reset their pricing strategies to better match net pricing trends and strategies. Changes in list prices could flow throughout the entire pharmaceutical supply chain and reimbursement system.

If manufacturers reduced their current list prices to an amount equal or similar to their current net prices, there would be less impact on premiums. If manufacturers did not reduce their list price, or adopted pricing processes that led to higher net prices, beneficiary and Federal spending on premiums and cost sharing could increase beyond the increase attributable to simply eliminating rebates. We seek feedback from stakeholders about the impact of

this regulation on list and net prices, and the magnitude of these changes.

If Part D plans changed their benefit structures (e.g., increased formulary controls, greater use of generic drugs), and sought to prevent or ameliorate premium increases, they may be able to obtain additional price concessions from manufacturers. If list price reductions and increased price concessions led to lower net prices and gross drug costs in Part D plans, beneficiary and Federal spending on premiums and cost sharing could decrease. If Part D plans were unable to achieve additional price concessions, and net prices increased, beneficiary and Federal spending on premiums and cost sharing could increase. We seek feedback from Part D plans and others about the impact of this regulation on list and net prices, and the magnitude of these changes.

Under the Part D program, plan sponsors pay network pharmacies a negotiated price for a covered Part D drug that is intended to cover a pharmacy's acquisition cost (termed the negotiated price at section 1860D–2(d) of the Act), plus a dispensing fee. Currently, pharmacies are not a part of the financial flow related to rebates that are paid after the point of sale, nor do beneficiaries receive any out-of-pocket benefit from these rebates. This means that beneficiaries, whose cost sharing for Part D covered drugs is calculated as coinsurance, or a percentage of the price of the drug dispensed, are charged a percentage of the price paid to pharmacies (or the full price prior to meeting their deductible), which does not include the rebates plans receive through PBMs from manufacturers. Removing the existing safe harbor protection for retrospectively-paid rebates that are not reflected in the prices paid at the point of sale may, if the proposal is finalized and if list prices decrease as a result, reduce beneficiary out-of-pocket spending for Part D covered drugs. If the proposal is finalized but list prices do not decrease, beneficiaries could see an increase in premiums without the benefit of decreased cost-sharing.

Below, this section discusses the potential specific effects within Part D on premiums, benefit design thresholds, and Federal outlays for the portions of the benefit subsidized by the Medicare Part D program.

The Department's Medicare Part D analysis is based on the CMS Office of the Actuary's work commissioned specifically for this rulemaking⁸⁵ and

two commissioned actuarial analyses independent of the CMS Office of the Actuary.⁸⁶ The Office of the Actuary 'directs the actuarial program for CMS and directs the development of and methodologies for macroeconomic analysis of health care financing issues.' The two external actuarial firms were chosen based on their commercial experience assisting plan sponsors with their plan bids.

There are significant differences in the assumptions the respective actuaries used to estimate stakeholder behavior. The Office of the Actuary predicts that while some current rebates will be retained by manufacturers, future price increases will be smaller and fewer. Per the Office of the Actuary's assumption, rather than reducing list prices and offering discounts to achieve current net prices, the expected behavior is to reduce future price increases so that post-rule net prices converge over time to meet the trend on pre-rule net price forecasts. As such, the Office of the Actuary predicts that the Federal Government would increase spending on premium subsidies for Medicare beneficiaries, and that consumers and private businesses would experience decreased overall spending.

Because drug manufacturers pay a portion of the drug costs incurred by beneficiaries in the Part D coverage gap, their expenses would be reduced in relation to the reduction of beneficiary spending in the coverage gap. The Milliman non-behavioral analysis estimates gross drug costs would decrease by \$679.7 billion and coverage gap discount payments would decrease by \$20.6 billion over the same period, representing a \$659.1 billion decrease in gross manufacturer revenue. The same analysis also shows that drug spending net of all discounts and rebates would increase more than \$20 billion over 10 years; Federal spending would increase by \$34.8 billion, and beneficiary spending would decrease by \$14.5 billion.⁸⁷ We seek feedback on these

analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

⁸⁶ Wakely Consulting Group. "Estimate of the Impact of Eliminating Rebates for Reduced List Prices at Point-of Sale on Beneficiaries." August 2018. The Wakely analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

Available at XXX. And Milliman. "Impact of Potential Changes to the Treatment of Manufacturer and Pharmacy Rebates." September 2018. The Milliman analysis is posted as supplementary material in the docket for this rule at [regulations.gov](https://www.regulations.gov).

⁸⁷ Milliman. "Impact of Potential Changes to the Treatment of Manufacturer and Pharmacy Rebates." September 2018. The Milliman analysis is posted as supplementary material in the docket for this rule

estimates, and are interested in assessing the full economic effects of this proposed rulemaking. We invite comment on the structure of and sources for such an analysis.

In addition to the actuarial analysis described above, the economic analysis of this rule is also informed by stakeholder comments and meetings in response to the drug pricing Blueprint.⁸⁸ We invite comment on additional sources the Department could consider related to the economic impacts on the Part D program, and stakeholders to specifically comment on the most likely strategic behavior changes in response to this rule.

All three of these analyses contemplate and quantify the behavioral changes by plans in the form of changes to benefit offerings, or by manufacturers in the form of changes to pricing processes, but differed in their assumptions. All three assessed pharmaceutical manufacturers' unique opportunity to adjust their overall pricing and rebate strategy, but differed in the assumed amount of rebates that would be retained by manufacturers, if any, and the effect on list and net prices.

The OACT analysis assumed manufacturers would retain 15 percent of the existing Medicare Part D rebates, that 75 percent of the remaining rebates would be applied as discounts to beneficiaries, and that manufacturers would apply the remaining 25 percent to lower list prices. OACT based this assumption on the belief that consumer discounts provide less return on investment to drug manufacturers than rebates and that resetting the rebate system would allow manufacturers to recapture forgone revenue streams such as those that occurred from the changes in the Coverage Gap Discount Program included in the Bipartisan Budget Act of 2018. OACT's assumption would lead to higher net prices in Medicare Part D at the beginning of time period analyzed, while the reduced price increase trend would lead to post-rule net prices eventually converging to pre-rule net price forecasts. Each of the analyses took varying approaches to the treatment of discounts and acknowledge uncertainty around this assumption. Wakely's analysis assumed that all existing manufacturer rebates would be passed along as either list price reductions or discounted prices at the point of sale. The Milliman baseline assumption was that manufacturers

at [regulations.gov](https://www.regulations.gov). Appendix A1, Scenario 1A, page 1.

⁸⁸ Comments are available for viewing at <https://www.regulations.gov/document?D=CMS-2018-0075-0001>.

⁸⁵ CMS Office of the Actuary. "Proposed Safe Harbor Regulation." August 2018. The OACT

would reduce list prices to their current net prices, which would lead to no changes in net prices.

Milliman provided six additional scenarios based on a range of strategic behavior changes by stakeholders, including increased formulary controls, increased price concessions, reduced price concessions in Part D to offset list price decreases in other markets, decreased brand unit cost trend, and increased utilization and decreased brand unit cost trend. These scenarios are intended to bookend the baseline analysis by showing a range of possible scenarios, given the uncertainty inherent in such a policy change. Tables 2A, 2B, 4A, and 4B later in this section present the main assumptions and findings of the analyses we discuss.

Only one analysis contemplated, but did not seek to quantify, the behavioral change of beneficiaries choosing lower-cost plans, switching from PDPs to MA-PDs, or in the form of increased persistence and adherence caused by induced demand due to decreased out-of-pocket costs. We invite comment on sources the Department could consider to more fully illustrate the effects of reduced purchase prices for drugs.

We note that all the actuaries who submitted analyses developed different results based on differing, yet plausible, assumptions. The sheer size of the Medicare Part D program makes these results sensitive to small differences in assumptions, particularly over a ten year period. As such, there are often good reasons for small differences in assumptions that are neither right nor wrong, but may be reasonable within a plausible range of outcomes. The different assumptions made include the initial values used for the direct subsidy and base beneficiary premium, the pattern of future costs, the granularity with which growth rates or future effects are applied uniformly or based

on product type. The actuarial analyses used to prepare this impact analysis are posted as supplementary material in the docket for this proposal at regulations.gov.

Given that all stakeholders involved in the manufacture, sale, dispensing and coverage of prescription drugs have their own actuarial models and financial estimates, we invite comment on additional sources the Department could consider related to the economic impacts on the Part D program, and encourage stakeholders to specifically comment on the most likely strategic behavior changes in response to this rule.

Effect on Beneficiary Spending

This rule will likely impact beneficiary spending on Part D premium subsidies, low-income cost-sharing, and reinsurance. It is difficult to quantify the impact on beneficiary spending without knowing manufacturer and Part D plan behavior in response to this regulation. As noted above, the Department is presenting three actuarial analyses (six total scenarios) conducted under various behavioral assumptions.

The projected decrease in beneficiary spending on premiums and cost-sharing in 2020 is \$1.0 to 1.4 billion. The projected decrease in beneficiary spending on premiums and cost-sharing from 2020–2029 is \$14.5 billion to \$25.2 billion. Individuals who qualify for the Low Income Subsidy (LIS) pay low or no premiums to enroll in the Part D benefit and have their cost sharing obligations under each benefit phase reduced significantly (called the Low Income Cost Sharing Subsidy or LICS). We expect a smaller effect among these enrollees (about 30% of total Part D enrollees) than among those not receiving the LIS and LICS.

All three actuarial reports support the conclusion that non-LIS Medicare beneficiaries enrolled in, and actively

utilizing, plans with coinsurance-based cost-sharing structures for covered outpatient drugs for which their respective plan has negotiated a rebate, will likely see lower out-of-pocket cost sharing at the pharmacy counter as a result of this regulatory change.

The Office of the Actuary, Wakely and five of the six Milliman scenarios considered by the Department suggest total beneficiary cost sharing would decrease and premiums would increase, and that the decrease in total beneficiary cost-sharing would offset the total increase in premiums across all beneficiaries, regardless of assumptions regarding whether or not manufacturers retained rebates or applied a percentage of them as list price reduction, or PBMs and plan sponsors changed formularies or obtained additional price concessions. However, more beneficiaries would pay more for premiums than they would save in cost sharing, suggesting that out-of-pocket impacts are likely to vary by individual and the greatest benefit of these transfers accrues to sicker beneficiaries (e.g., those with more drug spending and/or those using high-cost drugs).

However, it is important to note that the effect of this rule on individual beneficiaries depends on whether they use medications, and whether the manufacturers of the drugs in their regimen are paying rebates.

Analyses that contemplated increased price concessions or benefit design changes predicted beneficiaries having lower premiums and out of pocket costs overall. Tables 2A and 2B describe the net beneficiary impact predicted by each analysis and assumption. (Scenarios 5, 6, and 7 in the Milliman analysis are available online rather than reproduced here, since they are not referenced further in our write-up.) We seek feedback on these estimates and the assumptions.

TABLE 2.A.—BENEFICIARY IMPACTS, PER MEMBER PER MONTH, NON-LOW INCOME SUBSIDY ENROLLEES, CY 2020

	OACT	Milliman, Scenario 1	Milliman, Scenario 2	Milliman, Scenario 3	Milliman, Scenario 4	Wakely
Modeled Assumptions	<ul style="list-style-type: none"> 15% of current Part D rebates retained by manufacturer. 75% of remaining amount applied to per-sponsor/PBM negotiated discounts. 25% of remainder applied as reduction to list price. No beneficiary or plan behavioral changes are assumed. 	<ul style="list-style-type: none"> 100% of current Part D rebates are converted into list price concessions (agnostic on list price reductions versus up front discounts). 	<ul style="list-style-type: none"> 100% of current rebates are converted into list price concessions. Part D plans exert greater formulary control. 	<ul style="list-style-type: none"> More than 100% of rebates are converted into list price concessions (same agnosticism on how applied). Part D plans exert greater formulary control. 	<ul style="list-style-type: none"> 20% of current Part D rebates are retained by manufacturers (same agnosticism on how applied). 80% of current Part D rebates are converted to price concessions (list price or discounts). 	<ul style="list-style-type: none"> 100% of current manufacturer rebates are converted into reductions in drug costs at the point of sale. No beneficiary or plan behavioral changes are assumed.

TABLE 2.A.—BENEFICIARY IMPACTS, PER MEMBER PER MONTH, NON-LOW INCOME SUBSIDY ENROLLEES, CY 2020—Continued

	OACT	Milliman, Scenario 1	Milliman, Scenario 2	Milliman, Scenario 3	Milliman, Scenario 4	Wakely
Impact on Beneficiary Premium.	+\$5.64, (+19%) ⁸⁹	+\$3.15, (+14%) ⁹⁰	+\$2.70, (+12%)	+\$2.77, (+12%)	+\$5.11, (+22%)	+\$3.73, (+8%). ⁹¹
Impact on Beneficiary Cost sharing.	−\$8.01, (−14%)	−\$4.85, (−11%)	−\$5.44, (−13%)	−\$5.22, (−12%)	−\$3.86, (−9%)	−\$5.75, (−10%).
Total	−\$2.37, (−3%)	−\$1.70, (−3%)	−\$2.74, (−4%)	−\$2.44, (−4%)	+\$1.25, (+2%)	−\$2.02, (−2%).

TABLE 2.B.—BENEFICIARY IMPACTS, PER MEMBER PER MONTH, NON-LOW INCOME SUBSIDY ENROLLEES, CY 2020–CY 2029

	OACT	Milliman, Scenario 1	Milliman, Scenario 2	Milliman, Scenario 3	Milliman, Scenario 4	Wakely
Premium ⁹²	+25%	+\$4.03, +13%	+\$1.27, +4%	+\$0.61, +2%	+\$6.84, +21%	N/A.
Cost sharing	−18%	−\$6.23, −12%	−\$9.85, −19%	−\$9.68, −19%	−\$4.97, −10%	N/A.
Total	−4%	−3%	−18%	−11%	+2%	N/A.

Premiums

All analyses that assumed no behavioral changes that would reduce net prices below current net prices saw Part D premiums increase in 2020 and beyond. The increase in 2020 Part D premiums ranged from \$3.20 per beneficiary per month to \$5.64 per beneficiary per month (PBPM).

The Milliman analyses that contemplated behavioral changes that increased price concessions beyond current levels and/or greater formulary controls predicted a significant decrease in premiums compared to the baseline scenarios presented in Table 3 of the Milliman analysis. (That is, premiums would increase 2 to 8% by 2029 rather than 13 to 25% without such

assumptions.) We seek feedback on these estimates and the assumptions.

Out of Pocket Spending

Absent behavioral changes leading to lower list and net prices, two groups of beneficiaries would benefit most from this rule: (1) Beneficiaries that are prescribed and dispensed high cost drugs and (2) beneficiaries with total drug spending into the coverage gap. The range of total decreased beneficiary cost-sharing in 2020 was −\$8.01 PBPM to −\$4.85 PBPM.

However, reductions in cost-sharing would only accrue to beneficiaries using drugs for which manufacturers are currently paying rebates. For example, a beneficiary taking a brand name drug in

a competitive class may see his or her coinsurance-based cost sharing for the drug reduced significantly, if behavioral changes in response to this policy result in rebates largely being converted to point of sale discounts. By contrast, a beneficiary using high cost drugs in protected classes is less likely to benefit from a reduced pharmacy purchase price, because manufacturers generally offer low or no rebates to plans for these drugs, since drugs in protected classes must be included on Part D plan formularies.

The analysis by the Office of the Actuary estimated the annual changes in benefit parameters as a result of this rule. See Table 3 below.

TABLE 3—PART D STANDARD BENEFIT DESIGN PARAMETERS WITH AND WITHOUT THIS PROPOSED RULEMAKING

Year	2020	2021	2022	2023	. . .	2029
Baseline:						
Deductible	\$435	\$460	\$490	\$520	.....	\$725
Initial Coverage Limit	4,010	4,250	4,520	4,800	.....	6,690
Catastrophic Limit	6,350	6,750	7,150	7,600	.....	10,600
Total Drug Costs at TrOOP Limit ⁹³	9,296	9,874	10,470	11,126	.....	15,515
Under Proposed Rule:						
Deductible	435	405	395	420	.....	580
Initial Coverage Limit	4,010	3,740	3,630	3,840	.....	5,310
Catastrophic Limit	6,350	5,950	5,750	6,100	.....	8,400
Total Drug Costs at TrOOP Limit	9,296	8,699	8,416	8,919	.....	12,297
Difference (Percent):						
Deductible	0%	−12.0%	−19.4%	−19.2%	.....	−20.0%
Initial Coverage Limit	0%	−12.0%	−19.7%	−20.0%	.....	−20.6%
Catastrophic Limit	0%	−11.9%	−19.6%	−19.7%	.....	−20.8%
Total Drug Costs at TrOOP Limit	0%	−11.9%	−19.6%	−19.8%	.....	−20.7%

⁸⁹ Calculated against actual paid premium, not basic premium, calculated as \$29.22 for non-LIS enrollees absent this proposal.

⁹⁰ For this and the next two columns, calculated against actual paid premium.

⁹¹ Calculated against basic premium, calculated as \$47.02 for 2020 absent this proposal.

⁹² See footnotes above regarding actual paid versus basic premium.

⁹³ This limit varies by beneficiary, according to the mix of brand and generic drugs taken. As presented here, this figure is calculated assuming that only brand name drugs are dispensed, which represents the lowest possible estimate for this threshold.

Under the CMS Actuary’s analysis, the majority of beneficiaries would see an increase in their total out-of-pocket payments and premium costs; reductions in total cost sharing will exceed total premium increases. The minority of beneficiaries who utilized drugs with significant manufacturer rebates would experience a substantial decrease in costs, causing average beneficiary cost across the program to decline.

Medicare beneficiaries with lower levels of drug spending are expected to benefit by way of a lowered deductible. Following the first year of this new environment, and into the second year as well, the Part D benefit design thresholds are projected to change to the benefit of lower-cost beneficiaries, providing lower out-of-pocket payments for these beneficiaries. Because the Part D benefit design’s parameters are calculated annually to account for aggregate growth in Part D spending, and because the estimated potential effects of this regulation would be to reduce aggregate spend levels to more closely match net spending level trends, the applicable deductible would decrease for plan year 2021. Beneficiaries whose spending is above the current deductible amount but lower than the coverage gap would benefit from a reduced deductible.

The CMS Actuary also finds that while the deductible and initial coverage limit would decrease, the patient out-of-pocket spending threshold to enter catastrophic coverage would increase significantly in year 2 as the full effects of reduced purchase prices are incorporated. The out-of-pocket threshold is set in statute and updated annually by aggregate Part D program growth. Because overall beneficiary spending levels would now match the net price of drugs rather than

their list prices, progress toward the out-of-pocket limit would be slowed, though total dollars paid by beneficiaries would not change aside from statutory and annual updates.

Milliman’s analysis did not incorporate changes to the Part D benefit thresholds, and these actuaries based their break-even analyses on the 2019 threshold amounts. Their analysis projects that the distribution of changes is far from uniform, and that the impact of the change is concentrated around the non-LIS beneficiaries who account for about 70% of the benefit. The break-even point would be \$3.20 per-member per month in cost-sharing reductions. Beneficiaries with cost-sharing reductions above that point would save money, and those with cost-sharing reductions below that figure would spend more on premiums than they saved in cost-sharing. Their analysis also projects about 7% of non-LIS beneficiaries do not use any medication, and therefore would see premium costs exceeding reductions in cost sharing (\$0 reductions in cost-sharing). Up to 30% of non-LIS beneficiaries have drug costs such that they could directly benefit from the changes in the point-of-sale costs by enough to make up for the average increase in premium. The remaining 63% of beneficiaries may or may not have their out-of-pocket costs reduced enough to offset any potential premium increase, depending on the mix of brand and generic drugs used. All else constant, these members generally do not have enough cost sharing savings to fully offset the increase in premium. However, they may benefit from changes to copayments made by plan sponsors to maintain the minimum required actuarial value of 25%.

Taken together, the actuarial analyses project reductions in total cost sharing

will exceed total premium increases; however, impact on beneficiaries will vary greatly with some beneficiaries seeing savings while others experience increases in out-of-pocket spending. We invite comment on the impact of the changes in premiums and cost sharing on beneficiaries with different levels of drug spending.

Effect on Federal Government Spending

This rule will impact Federal spending on Part D direct premium subsidies, reinsurance, low-income cost-sharing subsidies, and low-income premium subsidies.

If there were no behavioral changes by manufacturers and Part D plans (e.g., drug prices and benefit designs were held constant), all three actuarial analyses previously described predicted increased Federal spending. The projected increase in 2020 Federal spending ranged from \$2.8 billion to \$13.5 billion. The projected increase in Federal spending from 2020–2029 ranged from \$34.8 billion to \$196.1 billion.

The Milliman analyses that contemplated behavior changes that would lower net prices from current levels predicted Federal spending from 2020–2029 could decrease by \$78.9 billion if Part D plan sponsors increased formulary controls, decrease by \$99.6 billion if Part D plan sponsors increased formulary controls and obtained additional price concessions, but increase by \$139.9 billion if manufacturers reduced price concessions in Part D to offset list price decreases in other markets.

Tables 4A and 4B describe the impact on Federal spending predicted by each analysis and assumption. We seek feedback on these estimates and the assumptions.

TABLE 4.A.—GOVERNMENT SPENDING IMPACTS, CY 2020
[\$billions]

	OACT	Milliman, Scenario 1	Milliman, Scenario 2	Milliman, Scenario 3	Milliman, Scenario 4	Wakely
Modeled Assumptions	<ul style="list-style-type: none"> 15% of current Part D rebates retained by manufacturer. 75% of remaining amount applied to per-sponsor/PBM negotiated discounts. 25% of remainder applied as reduction to list price. No beneficiary or plan behavioral changes are assumed. 	<ul style="list-style-type: none"> 100% of current Part D rebates are converted into list price concessions (agnostic on list price reductions versus up front discounts). 	<ul style="list-style-type: none"> 100% of current rebates are converted into list price concessions. Part D plans exert greater formulary control. 	<ul style="list-style-type: none"> More than 100% of rebates are converted into list price concessions (same agnosticism on how applied). Part D plans exert greater formulary control. 	<ul style="list-style-type: none"> 20% of current Part D rebates are retained by manufacturers (same agnosticism on how applied). 80% of current Part D rebates are converted to price concessions (list price or discounts). 	<ul style="list-style-type: none"> 100% of current Part D rebates converted to up front discounts No beneficiary or plan behavioral changes are assumed.

TABLE 4.A.—GOVERNMENT SPENDING IMPACTS, CY 2020—Continued
[\$billions]

	OACT	Milliman, Scenario 1	Milliman, Scenario 2	Milliman, Scenario 3	Milliman, Scenario 4	Wakely
Direct subsidy	+\$20.1, (+128%)	+\$15.1, (+149%)	+\$14.5, (+144%)	+\$14.8, (+146%)	+\$15.6, (+154%)	Not avail., (+146% ⁹⁴).
Low income premium subsidy.	+\$0.9, (+20%)	+\$0.8, (+14%)	+\$0.7, (+12%)	+\$0.7, (12%)	+\$1.4, (+22%)	Not avail., (+8%).
Low income cost shar- ing subsidy.	-\$1.8, (-6%)	-\$5.8, (-18%)	-\$6.2, (-20%)	-\$6.1, (-20%)	-\$4.4, (-14%)	Not avail., (-12%).
Reinsurance	-\$5.9, (-12%)	-\$7.3, (-16%)	-\$7.9, (-17%)	-\$8.0, (-17%)	-\$3.0, (-6%)	Not avail., (-14%).
Total	+\$13.4, (+14%)	+\$2.8, (+3%)	+\$1.1, (+1%)	+\$1.5, (+1%)	+\$9.5, (+10%)	Not avail., +3%.

TABLE 4.B.—GOVERNMENT SPENDING IMPACTS, CY 2020 THROUGH 2029
[\$billions]

	OACT	Milliman, Scenario 1	Milliman, Scenario 2	Milliman, Scenario 3	Milliman, Scenario 4	Wakely
Direct subsidy	+\$258.7, (+119%)	+\$215.4, (+193%)	+\$174.7, (+157%)	+\$180.3, (+162%)	+\$221.1, (+199%)	Not avail.
Low income premium subsidy.	+\$15.4, (+24%)	+\$12.0, (+13%)	+\$3.8, (+4%)	+\$1.9, (+2%)	+\$20.5, (+21%)	
Low income cost shar- ing subsidy.	-\$57.7, (-15%)	-\$89.5, (-20%)	-\$118.3, (-26%)	-\$118.5, (-26%)	-\$71.4, (-16%)	
Reinsurance	-\$20.3, (-3%)	-\$103.1, (-13%)	-\$139.1, (-18%)	-\$163.2, (-18%)	-\$30.2, (-4%)	
Total	+\$196.1, (+14%)	+\$34.8, (+2%)	-78.8, (-5%)	-\$99.6, (-7%)	+\$139.9, (+10%)	N/A.

Direct Premium Subsidy Spending

The Medicare program provides a direct subsidy to Part D plans of 74.5% of expected costs. Medicare program payments for direct subsidies will increase by an estimated \$14.1 to \$20.1 billion (128% to 154%) in 2020 and \$174.7 to \$258.7 billion (119% to 199%) from 2020–2029. The proposed change would require plans to smooth the effects of negotiated discounts across the entire benefit, rather than concentrate them on the initial coverage limit as is current practice. As noted above, premiums paid by beneficiaries are predicted to increase overall in analyses without behavioral changes that would reduce net prices below current levels.

In the Milliman analysis, the two scenarios that contemplated behavior changes that would reduce net prices compared to current levels predicted that Federal spending on direct premium subsidies from 2020–2029 could increase less compared to a scenario with no behavior change. In these scenarios, Part D plan sponsors increased formulary controls and/or obtained additional price concessions. Payments for direct premium subsidies would be higher than under the scenario with no behavior change, if manufacturers reduced price concessions in Part D to offset list price decreases in other markets (as described in the OACT analysis and Milliman scenario 4). See Table 4B for magnitude and percent changes.

⁹⁴ Calculated as percent change in per member per month payments for each category.

Reinsurance Spending

Transforming rebates into upfront discounts may result in fewer beneficiaries reaching catastrophic coverage. This benefits the government because the government bears the majority of the cost (80%) for beneficiaries who reach catastrophic levels of drug spending. As such, all analyses suggest Medicare payments for reinsurance will decrease by an estimated \$3.0 to \$7.9 billion (6 to 17%) in 2020 and 3 to 18% from 2020–2029. In the catastrophic coverage phase, Medicare makes reconciliation payments to Part D plans for 80% of gross drug costs incurred once the beneficiary reaches the out-of-pocket threshold. As discussed above, the effect of this proposed rule would be to reduce the effective purchase price of drugs, which in turn would require more prescriptions before a beneficiary would enter the catastrophic phase. If fewer beneficiaries enter this benefit phase, and the prices of the drugs they receive in this benefit phase are reduced, the Medicare Program would experience lower reinsurance payments to Part D plans.

Milliman's scenarios that contemplated behavior changes predicted Federal spending on reinsurance from 2020–2029 could decrease by \$139.1 billion if Part D plan sponsors increased formulary controls, decrease by \$163.2 billion if Part D plan sponsors increased formulary controls and obtained additional price concessions, and decrease by only \$30.2 billion if manufacturers reduced price

concessions in Part D to offset list price decreases in other markets.

Low Income Subsidy Spending

Medicare payments for Low Income Subsidy enrollees will on net decrease by an estimated \$0.9 to \$5.5 billion in 2020 and \$42.3 to \$114.5 billion from 2020–2029. Generally LIS enrollees will not see the same out-of-pocket savings that non-LIS enrollees will, because they are assessed cost sharing based almost exclusively on copayments. However, payments for the Low Income Cost Sharing Subsidy (LICS) will decrease for the same reasons that Medicare payments for reinsurance will decrease. Under the provisions of LICS, the Medicare program makes payments to plans to cover the difference between the LIS enrollee's copayment and the otherwise applicable coinsurance. As prices are reduced to account for discounts rather than applied to the plan liability exclusively, Medicare payments for these amounts will decrease. These savings are estimated to be \$57.5 to \$118.3 billion over ten years.

Analyses that contemplated behavior changes predicted Federal spending on low-income cost sharing subsidies from 2020–2029 could decrease by \$118 billion if Part D plan sponsors increased formulary controls, decrease by \$119 billion if Part D plan sponsors increased formulary controls and obtained additional price concessions, and decrease by \$71 billion if manufacturers reduced price concessions in Part D to offset list price decreases in other markets.

Other Stakeholder Impacts

Based on the provisions of this proposed rulemaking, the actuarial estimates we received estimated that drug manufacturers will see revenues, as measured by changes in gross drug costs and Coverage Gap Discount Program payments, decrease beginning in CY2020 and each year thereafter. However, when drug costs net of all discounts and rebates are considered, the actuarial analyses results converged in finding net increases in total drug spending. In terms of dollar effects, Milliman’s analysis identifies a reduction in gross revenues of \$38 billion in CY2020 and \$588 billion through the ten year budget window. However, Milliman’s analysis also estimated an increase in government costs of \$34.8 billion over ten years, with beneficiary costs decreasing by \$14.5 billion, resulting in an increase in Part D drug spending net of all discounts and rebates of more than \$20 billion over 10 years.⁹⁵ These changes in revenue will predominantly affect brand name drugs more so than generic drugs. Since 2011, brand name drug manufacturers have been required to provide a discount applied at the point of sale to beneficiaries whose claims occur during the coverage gap. Since the intent of this proposed rulemaking is to reduce the negotiated prices paid by plans to pharmacies by incorporating up front discounts into them, both the frequency of beneficiaries entering the coverage gap, and the length of the coverage gap itself, are potentially reduced by the rule’s effects. We seek feedback on this analysis and potential impacts.

Likewise, this rule will affect the way pharmacies are reimbursed. If list prices come down, pharmacies will experience lower acquisition costs, and their combined reimbursement from plan sponsors and beneficiaries will be reduced by the amount of discount provided by manufacturers to beneficiaries of each particular plan sponsor. The use of chargebacks to make pharmacies whole for the difference between acquisition cost, plan payment,

and beneficiary out-of-pocket payment is described earlier in this rule. The actuarial analyses we commissioned were not designed to evaluate the effects on the pharmacy supply chain by moving from a system where reimbursement rates were divorced from actual negotiated prices after accounting for rebates. We invite comments on how we might structure such an analysis, along with the effects on these and other stakeholders. We also seek comment on the ability of wholesalers to facilitate chargebacks to pharmacies in a timely fashion, replacing PBMs rebates with manufacturer discounts routed through wholesalers, and other concerns related to disrupting the relationship between pharmacies and PBMs.

Summary of Part D Impacts

This proposed rule, if finalized, would significantly redirect the dollars flowing through the Part D program. Several of the positive and negative transfers are imperfect offsets of one another. For example, the analyses commissioned for this proposed rule estimated that the amount saved by reducing cost-sharing exceeds the cost of increasing premiums for beneficiaries overall. However, more beneficiaries would pay more for premiums than they would save in cost sharing, suggesting that out-of-pocket impacts are likely to vary by individual and the greatest benefit of these transfers accrues to sicker beneficiaries (e.g., those with more drug spending and/or those using high-cost drugs).

It is difficult to predict the full extent of the transfers created by this proposed rule in the absence of information about strategic behavior changes by manufacturers and Part D plan sponsors in response to this rule. Without behavioral changes, enrolled beneficiaries may see premiums increase in 2020 by \$3.15 PBPM to \$3.73 PBPM (14 to 19%) but average cost-sharing under their benefits will decline by –\$8.01 PBPM to –\$5.75 PBPM (11 to 14%).⁹⁶ Premium and cost-sharing estimates were calculated on a different basis by each firm. The Office of the Actuary estimated actual

beneficiary paid amounts for all enrollees on average. Milliman estimated beneficiary payments based upon the basic benchmark amounts. We present the range across these calculation types.

In the absence of the stakeholder behavior changes described often in this section, government payments to plans for direct subsidies, subsidies for low income enrollees’ premiums and cost sharing will likely increase and be partially offset by reduced payments to plans for reinsurance, increasing overall by 2 to 14% in the absence of behavior change.

If manufacturer and plan behavior caused net prices to decrease in response to this rule, enrolled beneficiaries may see premiums increase 12% (\$3.15 PBPM) and average cost-sharing under their benefits may decline by 13% (–\$4.85 PBPM) in 2020. Total government payments to plans would increase 1–3%, as the net result of increased payments for direct subsidies (144–149%) and low income premium subsidies (12–14%) and decreased payments for low income cost sharing (–18 to –20%) and reinsurance (–16 to –17%).

If manufacturer and plan behavior caused Part D net prices to increase in response to this rule, enrolled beneficiaries will see published premiums increase 8 to 22% (\$5.11 to \$5.64) and average cost-sharing under their benefits will decline by 9 to 14% (–\$5.22 to –\$8.01). Government payments to plans for direct subsidies and subsidies for low income enrollees’ premiums and cost sharing will increase and reinsurance payments will also decrease.

The goal of this policy is to lower out-of-pocket costs for consumers and reduce government drug spending in Federal health care programs. We seek feedback from stakeholders about the impact of this regulation on list and net prices, the magnitude of these changes, and the ability of this regulation to meet these goals.

G. Accounting Statement

Category	Benefits (\$Millions)
Improved information for consumers regarding the characteristics of their health insurance plans supporting more actuarially favorable plan choices.	Not Quantified.
Lower prescription abandonment rates leading to better medication adherence	Not Quantified.

⁹⁵ Milliman. “Impact of Potential Changes to the Treatment of Manufacturer and Pharmacy Rebates.” Appendix A1, Scenario 1A, page 1. September 2018. The Milliman analysis is posted as supplementary material in the docket for this rule at regulations.gov.

⁹⁶ Wakely Consulting Group. “Estimate of the Impact of Eliminating Rebates for Reduced List Prices at Point-of Sale on Beneficiaries.” August 2018. The Wakely analysis is posted as supplementary material in the docket for this rule at regulations.gov.

And Milliman. “Impact of Potential Changes to the Treatment of Manufacturer and Pharmacy Rebates.” Scenario 1. September 2018. The Milliman analysis is posted as supplementary material in the docket for this rule at regulations.gov.

Category	Benefits (\$Millions)
Lower prescription abandonment rates leading to decreased storage and restocking costs for pharmacies	Not Quantified.

Category	Costs (\$Millions)	Timeframe
Manufacturers, PBMs, and plan sponsors reading and understanding the rule	5.3	First year.
Changes to business practices for manufacturers, PBMs, and plan sponsors	53.5; 24.8	First year; years two through five.
Cost of plan sponsors updating contracts and bids	5.45	First year.
Cost of annual disclosures from PBMs to health plans	1.28	Each year.
Costs to PBMs, pharmacies, and health insurance providers to update their IT systems for claims processing and payments.	10.8	In each of the first five years.
Beneficiaries comparing new Part D plan features and benefits	209	In each of the first five years.

Category	Transfers (\$Billions) CY 2020–2029
Decreased Medicare beneficiary spending	– 25.2 to – 59.5.
Decreased employee premium and OOP spending	– 11.7.
Decreased beneficiary premium and cost-sharing spending	– 14.5 to – 25.2.
Changes in Federal spending	– 99.6 to 196.1.
Decreased State spending (OACT only)	– 4.0.
Decreased manufacturer coverage gap discount payments	17 to 39.8.

H. Regulatory Alternatives

The first option is no action. This means that there would be no change in the safe harbor regulations. None of the costs or benefits of the rule would be realized and Medicare drug plan enrollees will continue to pay deductibles and coinsurance based on the list prices for prescription drugs.

As a second option, the compliance date could be delayed by one year from January 1, 2020 to January 1, 2021. This would lower transition costs by giving affected entities additional time to respond to the rule and institute necessary changes into contracts and claim software updates, and to integrate these changes into their scheduled updates. However, this also means that benefits and costs would be delayed by a year.

A third option contemplated by the Department, unrelated to safe harbor rulemaking, would require sponsors to incorporate into the point of sale price for a covered drug a specified minimum percentage of the average rebates expected to be received for the therapeutic class of drugs to which that covered drug belongs. This option, described in an RFI contained in the 2019 Part C & D policy and technical NPRM, would require sponsors to report the point of sale price for a covered drug as the lowest possible reimbursement that a network pharmacy could receive for that drug, inclusive of all pharmacy price rebates and concessions.

I. Regulatory Flexibility Analysis

As discussed above, the RFA requires agencies that issue a regulation to analyze options for regulatory relief of small entities if a proposed rule has a significant impact on a substantial number of small entities. HHS considers a rule to have a significant economic impact on a substantial number of small entities if at least 5 percent of small entities experience an impact of more than 3 percent of revenue. The Department calculates the costs of the proposed changes per affected business over 2020–2024. The estimated average costs of the rule per business peak in 2020 at approximately \$3,200, and are approximately \$1,600 in subsequent years. The Department notes that relatively large entities are likely to experience proportionally higher costs. The U.S. Small Business Administration establishes size standards that define a small entity. For entities with standards based on revenue, they range from \$17.5 million to \$38.5 million in 2017. Since the estimated average costs of the proposed rule are a small fraction of these thresholds, the Department anticipates that the proposed rule would not have a significant economic impact on a substantial number of small entities. We seek public comment on this determination, and the rule’s impact on small entities.

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, we are required to solicit public comments, and receive

final OMB approval, on any information collection requirements set forth in rulemaking. This rule imposes documentation and disclosure requirements on PBMs. Specifically, for one of the new safe harbors, PBMs and pharmaceutical manufacturer must have a written agreement that specifies their contractual arrangements and interactions with health plans, and PBMs must disclose their services rendered and compensation associated with transactions with pharmaceutical manufacturers related to interactions between the PBM and the health plan. In addition, PBMs may be required to disclose this information to the Secretary upon request.

We believe that the documentation requirements necessary to enjoy safe harbor protection do not qualify as an added paperwork burden, because the requirements deviate minimally, if at all, from the information PBMs and manufacturers would routinely collect in their normal course of business. We believe it is usual and customary for PBMs and manufacturers to memorialize contracts and other similar agreements in writing. Ensuring that such writings are comprehensive and that the actual business activities are accurately reflected by documentation are standard prudent business practices. However, we recognize that the disclosure of this information to plans, and potentially to the Secretary, is not a routine business practice. We have included estimates of disclosure related burden in the Regulatory Impact Statement and seek feedback on these

estimates. We request comments on this proposed collection of information in accordance with the Paperwork Reduction Act.

List of Subjects in 42 CFR Part 1001

Administrative practice and procedure, Fraud, Grant programs—health, Health facilities, Health professions, Maternal and child health, Medicaid, Medicare, Social Security.

For the reasons set forth in the preamble, the Office of the Inspector General, Department of Health and Human Services proposes to amend 42 CFR part 1001 as set forth below:

PART 1001—[AMENDED]

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 42 U.S.C. 1302; 1320a–7; 1320a–7b; 1395u(j); 1395u(k); 1395w–104(e)(6), 1395y(d); 1395y(e); 1395cc(b)(2)(D), (E), and (F); 1395hh; 1842(j)(1)(D)(iv), 1842(k)(1), and sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note).

■ 2. Section 1001.952 is amended by revising paragraphs (h)(5)(vi) and (vii) and adding paragraphs (h)(5)(viii), (h)(6) through (10), (cc), and (dd) to read as follows:

§ 1001.952 Exceptions.

* * * * *

(h) * * *

(5) * * *

(vi) Services provided in accordance with a personal or management services contract;

(vii) Other remuneration, in cash or in kind, not explicitly described in this paragraph (h)(5); or

(viii) A reduction in price or other remuneration from a manufacturer in connection with the sale or purchase of a prescription pharmaceutical product to a plan sponsor under Medicare Part D, a Medicaid Managed Care Organization as defined in section 1903(m) of the Act, or to a pharmacy benefit manager acting under contract with a plan sponsor under Medicare Part D, or Medicaid Managed Care Organization, unless it is a price reduction or rebate that is required by law.

(6) For purposes of this paragraph (h), the term *manufacturer* carries the meaning ascribed to it in Social Security Act section 1927(k)(5).

(7) For purposes of this paragraph (h), the terms *wholesaler* and *distributor* are used interchangeably and carry the same meaning as the term “wholesaler” defined in Social Security Act section 1927(k)(11).

(8) For purposes of this paragraph (h), the term *pharmacy benefit manager* or *PBM* means any entity that provides pharmacy benefits management on behalf of a health benefits plan that manages prescription drug coverage.

(9) For purposes of this paragraph (h), a *prescription pharmaceutical product* is either a drug or a biological as those terms are defined in Social Security Act section 1927(k)(2)(A), (B), and (C).

(10) For purposes of this paragraph (h), the term *Medicaid Managed Care Organization* or *Medicaid MCO* carries the meaning ascribed to it in section 1903(m) of the Social Security Act.

* * * * *

(cc) *Point-of-sale reductions in price for prescription pharmaceutical products.* (1) As used in section 1128B of the Act, “remuneration” does not include a reduction in the price charged by a manufacturer for a prescription pharmaceutical product that is payable, in whole or in part, by a plan sponsor under Medicare Part D or a Medicaid Managed Care Organization, provided the manufacturer meets the following conditions with regard to that reduction in price:

(i) The reduced price must be set in advance with a plan sponsor under Medicare Part D, a Medicaid MCO, or the PBM acting under contract with either;

(ii) The sale does not involve a rebate unless the full value of the reduction in price is provided to the dispensing pharmacy through a chargeback or series of chargebacks, or is required by law; and

(iii) The reduction in price must be completely applied to the price of the prescription pharmaceutical product charged to the beneficiary at the point of sale.

(2)(i) For purposes of this paragraph (cc), the terms *manufacturer*, *pharmacy benefit manager* or *PBM*, *prescription pharmaceutical product*, *rebate*, and *Medicaid managed care organization* or *Medicaid MCO* have the meanings ascribed to them in paragraph (h) of this section.

(ii) For purposes of this paragraph (cc), a *chargeback* is a payment made directly or indirectly by a manufacturer to a dispensing pharmacy so that the total payment to the pharmacy for the prescription pharmaceutical product is at least equal to the price agreed upon in writing between the Plan Sponsor under Part D, the Medicaid MCO, or a PBM acting under contract with either, and the manufacturer of the prescription pharmaceutical product.

(dd) *PBM service fees.* As used in section 1128B of the Act, “remuneration” does not include any payment by a pharmaceutical manufacturer to a pharmacy benefit manager (PBM) for services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to one or more health plans as long as the following conditions are met:

(1) The PBM must have a written agreement with the pharmaceutical manufacturer that covers all of the services the PBM provides to the manufacturer in connection with the PBM’s arrangements with health plans for the term of the agreement and specifies each of the services to be provided by the PBM and the compensation associated with such services.

(2) The compensation paid to the PBM must:

(i) Be consistent with fair market value in an arm’s-length transaction;

(ii) Be a fixed payment, not based on a percentage of sales; and

(iii) Not be determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties, or between the manufacturer and the PBM’s health plans, for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs.

(3) The PBM must disclose in writing to each health plan with which it contracts at least annually, and to the Secretary upon request, the services rendered to each pharmaceutical manufacturer related to the PBM’s arrangements to furnish pharmacy benefit management services to the health plan.

(4) For purposes of safe harbor in this paragraph (dd), the terms *manufacturer*, *pharmacy benefit manager* or *PBM*, and *prescription pharmaceutical product* have the meanings ascribed to them in paragraph (h) of this section, and *health plan* has the meaning ascribed to it in paragraph (l) of this section.

Dated: January 25, 2019.

Alex M. Azar II,
Secretary.

Dated: January 18, 2019.

Daniel R. Levinson,
Inspector General.

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Part III

Federal Deposit Insurance Corporation

12 CFR Part 337

Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions; Proposed Rule

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 337

RIN 3064-AE94

Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Advance notice of proposed rulemaking and request for comment.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is undertaking a comprehensive review of the regulatory approach to brokered deposits and the interest rate caps applicable to banks that are less than well capitalized. Since the statutory brokered deposit restrictions were put in place in 1989, and amended in 1991, the financial services industry has seen significant changes in technology, business models, and products. In addition, changes to the economic environment have raised a number of issues relating to the interest rate restrictions. A key part of the FDIC's review is to seek public comment through this Advance Notice of Proposed Rulemaking (ANPR) on the impact of these changes. The FDIC will carefully consider comments received in response to this ANPR in determining what actions may be warranted.

DATES: Comments must be received by the FDIC no later than May 7, 2019.

ADDRESSES: You may submit comments on the notice of proposed rulemaking using any of the following methods:

- *Agency Website:* <http://www.fdic.gov/regulations/laws/federal/>. Follow the instructions for submitting comments on the agency website.

- *Email:* comments@fdic.gov. Include RIN 3064-AE94 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 Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street NW Building (located on F Street) on business days between 7 a.m. and 5 p.m.

- *Public Inspection:* All comments received, including any personal information provided, will be posted generally without change to <http://www.fdic.gov/regulations/laws/federal/>.

FOR FURTHER INFORMATION CONTACT: Legal Division—Thomas Hearn, Counsel, (202) 898-6967; thohearn@fdic.gov; Vivek V. Khare, Counsel, (202)

898-6847, vkhare@fdic.gov; Division of Risk Management Supervision—Thomas F. Lyons, Chief, Policy and Program Development, (202) 898-6850, tlyons@fdic.gov; Judy Gross, Senior Policy Analyst, (202) 898-7047, jugross@fdic.gov; Division of Insurance and Research—Ashley Mihalik, Chief, Banking and Regulatory Policy, (202) 898-3793, amihalik@fdic.gov.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The policy objective of this ANPR is to obtain input from the public as the FDIC comprehensively reviews its brokered deposit and interest rate regulations in light of significant changes in technology, business models, the economic environment, and products since the regulations were adopted. The FDIC is inviting comment on all aspects of the brokered deposit and interest rate regulations.

To facilitate comment, the remainder of this ANPR has been structured in the following manner: (I) Brokered Deposits and Interest Rate Restrictions, addressing (A) Current Law and Regulations, (B) History and Research, (C) Brokered Deposit Issues, (D) Interest Rate Issues; (II) Requests for Comment; and Appendices with additional background and descriptive statistics.

II. Brokered Deposits and Interest Rate Restrictions

Brokered and high-rate deposits became a concern among bank regulators and Congress before any statutory restrictions were put in place. This concern arose because: (1) Such deposits could facilitate a bank's rapid growth in risky assets without adequate controls; (2) once problems arose, a problem bank could use such deposits to fund additional risky assets to attempt to "grow out" of its problems, a strategy that ultimately increased the losses to the deposit insurance fund when the institution failed; and (3) brokered and high-rate deposits were sometimes volatile because deposit brokers (on behalf of customers), or the customers themselves, were often drawn to high rates and were prone to leave the bank when they found a better rate or they became aware of problems at the bank.

Before proceeding further, it should be noted that, historically, most institutions that use brokered and higher-rate deposits have done so in a prudent manner and appropriately measure, monitor, and control risks associated with brokered deposits. Moreover, well-capitalized institutions are not subject to restrictions on accepting brokered deposits or setting

interest rates. Nonetheless, the FDIC also recognizes that institutions sometimes are concerned that the use of brokered deposits can have other regulatory consequences, such as implications for deposit insurance pricing in certain circumstances, or may be viewed negatively by investors or other stakeholders.

A. Current Law and Regulations

Section 29 of the Federal Deposit Insurance Act (FDI Act), titled "Brokered Deposits," was originally added to the FDI Act by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The law originally restricted troubled institutions (not meeting their minimum capital requirements at the time) from (1) accepting deposits from a deposit broker without a waiver and (2) soliciting deposits by offering rates of interest on deposits that were significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions (or "IDIs") having the same type of charter in such depository institution's normal market area.¹

Two years later, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), which added the Prompt Corrective Action (PCA) capital regime to the FDI Act and also amended the threshold for the brokered deposit and interest rate restrictions from a troubled institution to a bank falling below the "well capitalized" PCA level. At the same time, the FDIC was authorized to waive the brokered deposit restrictions for a bank that is adequately capitalized upon a finding that the acceptance of such deposits does not constitute an unsafe or unsound practice with respect to the institution.² FDICIA did not authorize the FDIC to waive the brokered deposit restrictions for less than adequately capitalized institutions. Most recently, earlier this year, Section 29 of the FDI Act was amended as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act, to except a capped amount of certain reciprocal deposits from treatment as brokered deposits.³

¹ See Public Law 101-73, August 9, 1989, 103 Stat. 183.

² See Public Law 102-242, December 19, 1991, 105 Stat. 2236.

³ The statute was amended 1994 as part of the Riegle Community Development and Regulatory Improvement Act of 1994. The changes were generally technical to ensure that the interest rate restrictions under Section 29(g)(3) were consistent with the PCA framework, among other things. See Public Law 103-325, September 23, 1994, 108 Stat. 2160.

Section 337.6 of the FDIC's Rules and Regulations implements and closely tracks the statutory text of Section 29, particularly with respect to the definition of "deposit broker" and its exceptions.⁴ Section 29 of the FDI Act does not directly define a "brokered deposit," rather, it defines a "deposit broker" for purposes of the restrictions.⁵ Thus, the meaning of the term "brokered deposit" turns upon the definition of "deposit broker."

Section 29 and the FDIC's implementing regulation define the term "deposit broker" to include:

(1) Any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and

(2) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

This definition is subject to the following nine statutory exceptions:

(1) An insured depository institution, with respect to funds placed with that depository institution;

(2) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;⁶

(3) A trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(4) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(5) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;

(6) The trustee of a testamentary account;

(7) The trustee of an irrevocable trust (other than one described in paragraph (1)(B)), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(8) A trustee or custodian of a pension or profit sharing plan qualified under section 401(d) or 430(a) of the Internal Revenue Code of 1986; or

(9) An agent or nominee whose primary purpose is not the placement of funds with depository institutions.

As listed above, the statute includes nine exceptions to the definition of "deposit broker." The FDIC's regulations include the following tenth exception: "An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution program ("MWODI")."⁷

In addition to restricting the acceptance of brokered deposits by less than well-capitalized IDIs, Section 29 of the FDI Act also prohibits such IDIs from paying rates that significantly exceed their normal market area or the national rate as established by the FDIC by regulation. This provision was intended to prohibit "the solicitation of deposits by in-house salaried employees through so-called money-desk operations."⁸ More specifically, the provision addressed a concern that emerged during various legislative hearings that brokered deposit restrictions could easily be circumvented by in-house solicitation of high-rates.⁹ In implementing this legislative restriction, from 1989 to 2009, the FDIC pegged the national rate to comparable Treasury rates in its regulation. However, the national rate calculation was changed in 2009, pursuant to a notice-and-comment rulemaking, when yields on Treasuries fell dramatically during the crisis, compressing the rate caps. The FDIC moved to a simple average of rates paid by all banks and branches that offer a specific product. This national rate data is provided to the FDIC by a data-

gathering company and is published weekly on the FDIC's website. The history of the interest rate restrictions and its associated issues are discussed more fully in Section D.

B. History and Research

As described in the FDIC's 1997 study of the banking and thrift crises of the 1980s and early 1990s, brokered CDs became increasingly used as funding sources, first by money center banks and then by regional and smaller institutions.¹⁰ Even as early as the 1970s, the FDIC noted concerns about brokered deposits, as stated in the FDIC's Division of Bank Supervision Manual—"The use of brokered deposits has been responsible for abuses in banking and has contributed to some bank failures, with consequent losses to the larger depositors, other creditors, and shareholders."¹¹

However, the potential abuses associated with brokered deposits received relatively little attention until the failure of Penn Square Bank in 1982. This failure resulted in the largest bank payout of insured deposits in the history of the FDIC up until that time.¹² Brokered deposits allowed the bank to grow rapidly from \$30 million in assets in 1977 to \$436 million in assets when it failed in 1982, with much of the growth in high risk loans to small oil and gas producers.¹³ In response to the rising use of brokered deposits and data suggesting negative consequences, in April 1984 the FDIC and the Federal Home Loan Bank Board (FHLBB) adopted a joint final rule restricting pass through deposit insurance for deposits obtained through a deposit broker.¹⁴ The agencies indicated that data showed that institutions used brokered deposits to pursue rapid growth in risky real estate-related lending without adequate controls and to increase risky lending after problems arose. In January 1985, the Court of Appeals for the District of Columbia Circuit ruled that the FDI Act did not permit the FDIC to eliminate pass-through deposit insurance for deposit brokers.¹⁵

⁴ See 12 CFR 337.6. The FDIC issued two rulemakings related to the interest rate restrictions under this section. A discussion of those rulemakings, and the interest rate restrictions, is provided in Section (II)(B) of this ANPR.

⁵ See 12 U.S.C. 1831f.

⁶ The term "employee" is defined as "any employee (A) who is employed exclusively by the insured depository institution; (B) whose compensation is primarily in the form of salary; (C) who does not share such employee's compensation with a deposit broker; and (D) whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual."

⁷ See 12 CFR 337.6(a)(5)(j). The exception was adopted by the FDIC shortly after FDICIA was enacted in 1991, and the FDIC indicated in the preamble for the final rule that implemented the FDICIA revisions to section 29 that those revisions were not intended to apply to deposits placed by insured depository institutions assisting government departments and agencies in administration of MWODI deposit programs. See 57 FR 23933, 23040 (1992).

⁸ See H.R. Conf. Rep. No. 101-222, 101st Cong., 1st Sess. 402 (1989).

⁹ See "Problems of the Federal Savings and Loan Insurance Corporation: Hearings Before the Committee on Banking, Housing, and Urban Affairs of the United States Senate," (part II) 101st Cong., 1st Sess. 230-231 (1989).

¹⁰ *History of the Eighties—Lessons for the Future*, p. 119, Federal Deposit Insurance Corporation December 1997 <https://www.fdic.gov/bank/historical/history/>.

¹¹ FDIC, "Division of Bank Supervision Manual," Section L, page 3, November 1, 1973.

¹² *History of the Eighties—Lessons for the Future*, p. 119, Federal Deposit Insurance Corporation December 1997 <https://www.fdic.gov/bank/historical/history/>.

¹³ See *id.*; see also, *Belly Up: The Collapse of the Penn Square Bank* (1985), Chapter 9, Phillip L. Zweig.

¹⁴ See 49 FR 13003 (April 2, 1984).

¹⁵ *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985).

While the case was pending, and after the decision, Congressional hearings regarding brokered deposits were held between 1984 and 1988 and, in 1989, as noted earlier, as part of FIRREA. Pursuant to these hearings, Congress imposed restrictions on brokered deposits for institutions that did not meet their minimum capital requirements and later tied the restrictions to the PCA framework in 1991 through FDICIA. Congress also imposed rate restrictions on institutions that were less than well capitalized out of concern that institutions would be able to circumvent brokered deposit restrictions by merely advertising or otherwise offering very high rates. Since enactment of Section 29, the FDIC has continued to study the role of brokered deposits in the performance of banks, their impact on safety and soundness, and the loss they impose on the Deposit Insurance Fund (DIF) when a bank fails.

Brokered Deposit Usage and Relevant Data

From the 1960s up until 2000, brokered retail CDs and wholesale CDs

were the main type of brokered deposits used in the banking system. Starting in the 1980s deposit listing services began generating deposits for IDIs by advertising CD rates on behalf of institutions. Beginning in 1999, broker-dealers first started to offer brokerage customers an automatic sweep of their customers' idle funds to IDIs.

Beginning in 2003, a network was established through which banks could place customer funds in time deposits at other banks and receive time deposits in an equal amount of funds in return, such deposits being referred to as "reciprocal deposits." Similar services evolved for money market deposit accounts (MMDAs).

As of September 30, 2018, insured depository institutions held \$986 billion in brokered deposits, which amounted to 8.0 percent of the \$12.3 trillion in industry domestic deposits. These brokered deposits were held by 2,221 insured depository institutions, representing 40.6 percent of the 5,477 total number of insured depository institutions.

Although 2,221 institutions held brokered deposits as of September 30, 2018, a significant portion of these deposits are concentrated in a small number of institutions. One hundred institutions held 89.4 percent, or \$881 billion, of the \$986 billion brokered deposits in the banking system, with five institutions accounting for 39.4 percent, or \$389 billion, of all brokered deposits. The remaining 2,121 institutions using brokered deposits account for the remaining \$104 billion in brokered deposits.

Consistent with this concentration, among the 2,221 institutions holding brokered deposits as of September 30, 2018, the median holding was 4.7 percent of total domestic deposits, but 6 institutions held brokered deposits in excess of 90 percent of total domestic deposits; 25 institutions held brokered deposits between 50 percent and 90 percent of total domestic deposits; and 79 institutions held brokered deposits between 25 percent and 50 percent of total domestic deposits.

BROKERED DEPOSITS HELD BY INSURED DEPOSITORY INSTITUTIONS AS OF SEPTEMBER 30, 2018¹⁶

Asset size group	Total number of banks	Number of banks with brokered deposits	Total brokered deposits (billions)	Share of total brokered deposits (%)	Total domestic deposits	Share of total domestic deposits (%)
Under \$1 Billion	4,704	1,656	\$31.92	3.2	\$988.05	8.0
\$1–10 Billion	635	439	90.16	9.1	1,349.56	11.0
\$10–50 Billion	97	89	171.87	17.4	1,605.40	13.0
Over \$50 Billion	41	37	691.78	70.2	8,378.84	68.0
All Banks	5,477	2,221	985.73	.....	12,321.84	.....

The largest concentrations of brokered deposits can be characterized as 3 types of deposits: (1) Master Certificates of Deposits; (2) sweep deposits that are viewed as brokered; and (3) reciprocal deposits. Listing service deposits are also discussed below, but typically, are not reported as brokered.

Master Certificate of Deposits

Information about brokered deposits that the FDIC collects from banks through the Call Report does not reflect certain elements of the structure of the brokered deposit market. However, industry participants have informed the FDIC that a sizable portion of reported brokered deposits are wholesale Master Certificate of Deposits. These instruments are held on the books of the

issuing bank in the name of a subsidiary of Depository Trust Corporation (DTC) as custodian for deposit brokers who are often broker dealers. These broker dealers, in turn, issue retail CDs, typically in denominations of \$1,000, under the Master Certificate of Deposit to their retail clients.

The retail customers' ownership interests in the brokered retail CDs are reflected on the books of the deposit broker that issued them. These Master Certificates of Deposits are reported by banks on Call Report Schedule RC–E, Memoranda Item 1.c as deposits of \$250,000 or less even though issued in the name of DTC for more than \$250,000 to reflect the substance of the retail CDs issued under them. The FDIC, however, has no Call Report information about what portion of reported brokered deposits of \$250,000 or less are Master Certificates of Deposits as described above. In the event of a failure, the

deposit broker maintains records of the retail CDs held by its customers, and these records would be submitted to the FDIC in order to make payments on deposit insurance to the retail CD holders.

Sweep Deposits

Third parties (including investment companies acting on behalf their clients) that sweep client funds into deposit accounts at IDIs are deposit brokers. As a result, the sweep deposits placed by these third parties are brokered deposits unless the third party meets one of the exceptions to the definition of "deposit broker". In 2005, FDIC staff issued an advisory opinion that took the view that a brokerage firm placing idle client funds into deposit accounts at its affiliate IDI, under certain circumstances, meets the "primary

¹⁶ Descriptive statistics detailing the historical holdings of brokered deposits by bank size and PCA capital classification status can be found in Appendix 1.

purpose” exception.¹⁷ Thus, the deposits placed on behalf of their clients would not be brokered deposits.

As of September 30, 2018, 28 insured depository institutions have indicated to the FDIC that they receive funds swept from an affiliated broker dealer under conditions that FDIC staff have indicated would support the affiliate being viewed as meeting the “primary purpose” exception to the “deposit broker” definition. Each of these insured depository institutions provides monthly reports to the FDIC of the monthly average of the swept funds as of month end. As of September 30, 2018, these 28 insured depository institutions reported \$724 billion as the average amount of funds swept from the institutions’ affiliated broker dealers for September 2018.

Thus, as of September 30, 2018, the reported brokered deposits of \$986 billion, which includes brokered CDs and broker dealer sweeps to unaffiliated insured depository institutions, when combined with the average monthly balance of funds that broker dealers sweep to affiliated institutions for September of \$724 billion result in a combined amount of \$1.710 trillion, which represents 14 percent of the \$12.3 trillion in industry domestic deposits for that date.

Reciprocal Deposits

Reciprocal deposit arrangements are based upon a network of IDIs that place funds at other participating banks in order for depositors to receive insurance coverage for the entire amount of their deposits. Because reciprocal arrangements can be complex, and involve numerous banks, they are often managed by a third-party sponsor. As a result, all deposits placed through this arrangement have historically been viewed as brokered deposits.

On May 24, 2018, the Economic Growth, Regulatory Reform, and Consumer Protection Act took effect, allowing certain banks to except a limited amount of reciprocal deposits (as defined by the Act) from brokered deposits. Under the reciprocal deposit exception, well-capitalized and well-rated institutions are not required to treat such reciprocal deposits as brokered deposits up to the lesser of 20 percent of its total liabilities, or \$5 billion. Institutions that are not both well capitalized and well rated may also exclude reciprocal deposits from their brokered deposits under certain circumstances.

The immediate result of this Act has significantly reduced the percentage of

reciprocal deposits that are classified as brokered deposits. As of March 30, 2018, the last reporting quarter before the Act took effect, reciprocal deposits of \$48.5 billion were reported. As of June 30, 2018, the first quarter end after the Act took effect, brokered reciprocal deposits had fallen to \$17.1 billion. As of September 30, 2018, brokered reciprocal deposits had fallen to \$13.7 billion. For banks with assets less than \$1 billion, their percentage of reciprocal deposits as a percent of brokered deposits declined from 33.7 percent on March 31, 2018, to 15.4 percent on June 30, 2018 and, 11.5 percent on September 30, 2018.

Listing Service Deposits

Deposits whose placement at insured depository institutions are facilitated, in a passive manner, by deposit listing services have not been reported as brokered deposits. However, since 2011, such deposits have been reported on banks’ Call Reports. As of September 30, 2018, insured depository institutions reported holding \$69.6 billion in listing service deposits that are not reported as brokered deposits, which amounted to 0.6 percent of industry domestic deposits. One quarter of insured depository institutions held non-brokered listing service deposits as of September 30, 2018.

As of September 30, 2018, 22 institutions were not well capitalized for PCA purposes. Of these institutions, 13 institutions held non-brokered listing service deposits, for which the ratio of non-brokered listing service deposits to domestic deposits was 3.6 percent, while the ratio for the 1,356 well-rated institutions holding such deposits was 2.9 percent. Among insured depository institutions with non-brokered listing service deposits, the share of non-brokered listing service deposits to domestic deposits has declined from a median of 4.6 percent on September 30, 2011 to 2.9 percent as of September 30, 2018.

FDIC Studies That Discuss Brokered Deposits

In the wake of the recent financial crisis, the Dodd-Frank Act directed the FDIC to conduct a study of core and brokered deposits, which the FDIC completed in July 2011. Recently the FDIC updated its analysis with data through the end of 2017. The results of that analysis confirm the previous findings of the 2011 study and can be found in Appendix 2.

The research provided in the study shows that higher brokered deposit use is associated with higher probability of bank failure and higher insurance fund

loss rates. Banks with higher levels of brokered deposits are also, in general, more costly to the DIF when they fail. The study also found that, on average, brokered deposits are correlated with higher levels of asset growth, higher levels of nonperforming loans, and a lower proportion of core deposit funding. FDIC’s study also describes the three characteristics of brokered deposits that have posed risk to the DIF:

1. Rapid growth—the extent to which deposits can be gathered quickly and used imprudently to expand risky assets or investments.

2. Volatility—the extent to which deposits might flee if the institution becomes troubled or the customer finds a more appealing interest rate or terms elsewhere. Volatility tends to be also be mitigated somewhat by deposit insurance, as insured depositors have less incentive to flee a problem situation.

3. Franchise Value—the extent to which deposits will be attractive to the purchasers of failed banks, and therefore not contribute to losses to the DIF.

In December 2017, the FDIC published *Crisis and Response: An FDIC History, 2008–2013*.¹⁸ The history shows that failures and downgrades were highly correlated with reliance on brokered deposits and other wholesale funding sources.¹⁹ Generally speaking, failures were more concentrated among banks that made relatively greater use of brokered deposits and other wholesale funding sources.

The history noted that, although the use of brokered deposits and other wholesale funding sources within a sound liquidity management program is not in itself a risky practice, significant reliance on wholesale funds may reflect a decision that an institution has made to grow its business more aggressively. On the liability side, the history indicated that if the institution comes under stress, wholesale counterparties may be more apt to withdraw funding or demand additional collateral.

In addition to these publications, the following reports prepared by the Inspectors General of the federal banking agencies have detailed how brokered deposits were sometimes used by failed banks in the most recent crisis. These reports include the following:

- *Safety and Soundness: Analysis of Bank Failures Reviewed by the*

¹⁸ Federal Deposit Insurance Corp., *Crisis and Response: An FDIC History, 2008–2013* (2017), available at: <https://www.fdic.gov/bank/historical/crisis/crisis-complete.pdf>.

¹⁹ In addition to brokered deposits, wholesale funding includes federal funds purchased, securities sold under repurchase agreements, and other borrowed money.

¹⁷ See FDIC Advisory Opinion No. 05–02 (2005).

Department of the Treasury Office of Inspector General, OIG-16-052, August 15, 2016

- *Summary Analysis of Failed Bank Reviews*, Board of Governors of the Federal Reserve System, Office of Inspector General, September 2011
- *Follow Up Audit of FDIC Supervision Program Enhancements*, FDIC Office of Inspector General, Report No. MLR-11-010, December 2011

In these reports, brokered deposits were most commonly cited as a contributor to problems at troubled and failed institutions, largely by allowing institutions with concentrations in poorly underwritten and administered commercial real estate loans, including acquisition, construction, and development loans (ADC) or other risky assets, to grow rapidly. Institutions that failed were typically subject to the brokered deposit restrictions and interest rate restrictions before failure because their capital levels deteriorated to below well capitalized. However, for those institutions that failed and still had brokered deposits at the time of failure, either the acquirer did not want the brokered deposits or did not pay a premium for them, either of which increases the cost to the DIF.

Brokered Deposits in Bank Failures 2007-2017

The FDIC and the DIF were significantly affected by the previous financial crisis between 2007 and 2017. During this time, excluding Washington Mutual, 530 banks failed and were placed in FDIC receivership and, as of December 31, 2017, the estimated loss to the DIF for these institutions is \$74.4 billion.

Based upon regulatory reporting data, 47 institutions that failed relied heavily on brokered deposits and caused losses to the DIF that triggered material loss reviews. These 47 institutions held total assets representing 13 percent of the \$703.9 billion in aggregate total assets of the 530 failed institutions, but accounted for \$28.4 billion in estimated losses to the DIF, representing 38 percent of the \$74.4 billion in all DIF estimated losses for that same period.²⁰

For example, the largest of these 47 institutions was IndyMac Bank, F.S.B., which failed on July 11, 2008. As of December 31, 2017, the estimated loss to the DIF for IndyMac, is \$12.3 billion, representing 40 percent of IndyMac's \$30.7 billion in total assets at failure and approximately 16.5 percent of the total \$74.4 billion in estimated losses to

the DIF from bank failures between 2007 and 2017. In its last Thrift Financial Report ("TFR") filed prior to failure, as of March 30, 2008, IndyMac reported brokered deposits of \$5.5 billion, which represented 28.98 percent of the institution's \$18.9 billion in total deposits.²¹ In its TFR filed for the 4th quarter of 2005, approximately 12 quarters before the institution failed, IndyMac reported \$1.4 billion in brokered deposits, representing 18.4 percent of its then \$7.4 billion in total deposits. This data suggests that IndyMac accelerated its use of brokered deposits as its problems mounted.²²

Another, more pronounced, example is ANB Financial National Association (ANB Financial), which failed on May 9, 2008. As of November 26, 2018, the estimated loss to the DIF for ANB Financial is \$1.029 billion, representing 54 percent of the institution's \$1.89 billion in total assets at failure. In its Call Report filed prior to failure, *i.e.*, as of March 30, 2008, ANB Financial reported brokered deposits of \$1.578 billion, which represented 86.96 percent of the institution's \$1.815 billion in total deposits. In the Call Report filed for the 4th quarter of 2005, approximately 12 quarters before the institution failed, ANB Financial reported \$256.8 million in brokered deposits, representing 50.46 percent of its then \$508 million in total deposits.²³ The brokered deposits remaining at failure for both IndyMac and ANB's brokered deposits were master CDs issued in the name of DTC as sub-custodian for deposit brokers, which were the primary source for the remaining brokered deposits at failure for most of the other 34 institutions referenced above.

Brokered Deposits and Assessments

The FDIC has amended its assessment regulations to address the risks to the DIF associated with brokered deposits. For small banks (generally, IDIs with less than \$10 billion in total assets), brokered deposits can increase a bank's

assessment rate if the bank's ratio of brokered deposits to total assets exceeds 10 percent.²⁴ The brokered deposit ratio is one of several financial measures used to determine assessment rates for small banks. For new small banks in Risk Categories II, III and IV, and large and highly complex institutions that are not well capitalized, or that are not CAMELS composite 1- or 2-rated, brokered deposits can increase a bank's assessment rate through the brokered deposit adjustment.²⁵ Under the adjustment, a bank's assessment will increase if its ratio of brokered deposits to domestic deposits is greater than 10 percent.

C. Brokered Deposit Issues

As noted above, Section 29 does not explicitly define the term "brokered deposit." Restrictions on brokered deposits are tied to the statutory definition of "deposit broker" that Congress adopted in 1989 as part of the legislative response to the bank and thrift crisis. That definition includes dealers in the brokered CD market, and broker dealers that sweep customer funds to unaffiliated insured depository institutions which, when combined, represent over 90% of reported brokered deposits according to industry sources as discussed more fully above. Therefore, based on those same sources, the interpretive issues tend to relate to a small segment of reported brokered deposits.

Determining what constitutes a deposit broker, and thus a brokered deposit, is very fact-specific and requires a close review of the arrangement, the documents governing the arrangement, and the third party's remuneration, among other things. Given the wide, and evolving, variety of third-party arrangements, FDIC staff review them on a case-by-case basis, applying the statutory provisions to the facts and circumstances presented. Staff interpretations are typically documented in Advisory Opinions.²⁶ In addition, on June 30, 2016, the FDIC issued, after soliciting comment, an updated set of Frequently Asked Questions,²⁷ that compiles information

²⁴ For banks that are well capitalized and well rated, reciprocal deposits that are treated as brokered deposits are deducted from brokered deposits for purposes of the brokered deposit ratio. See 12 CFR 327.16(a).

²⁵ See 12 CFR 327.16(e)(3).

²⁶ FDIC Staff Advisory Opinions are available at: <https://www.fdic.gov/regulations/laws/rules/index.html>.

²⁷ See *Identifying, Accepting, and Reporting Brokered Deposits: Frequently Asked Questions* (rev. Jul 14, 2016). An initial set of Frequently Asked Questions was issued in January 2015, but without notice and comment at that time.

²⁰ The estimated loss data is as of November 26, 2018, available at: <https://www5.fdic.gov/hsob/hsobRpt.asp>.

²¹ Of the \$5.4 billion in brokered deposits that IndyMac reported on its Call Report for March 31, 2008, 98.42 percent were in brokered certificates of deposits documented as master certificates of deposits issued in the name of CEDE & Co, a subsidiary of DTC, as sub-custodian for deposit brokers.

²² See *Safety and Soundness: Material Loss Review of IndyMac Bank, FSB*, United States Department of Treasury, Office of Inspector General, February 26, 2009 <https://www.treasury.gov/about/organizational-structure/ig/Documents/oig09032.pdf>.

²³ See *Safety and Soundness: Material Loss Review of ANB Financial National Association*, United States Department of Treasury, Office of Inspector General, November 28, 2008 <https://www.treasury.gov/about/organizational-structure/ig/Documents/oig09013.pdf>.

about the law, regulation, and FDIC staff interpretations in a single online location.

The FDIC continues to receive inquiries, and in recent years, FDIC staff has been asked about the application of the “deposit broker” definition, and its statutory and regulatory exceptions, to new types of third parties that are involved in placing or facilitating the placement of third-party funds at IDIs. Many of these questions relate to advancements in technology, and new business practices and products that IDIs might utilize to offer services to customers and also to gather deposits. The inherent challenge often is to distinguish between third party service providers to the IDI and third parties that are engaged in the business of placing or facilitating the placement of deposits, albeit using updated technology.

Generally, in determining whether deposits placed through these new deposit placement arrangements are brokered, staff has looked to precedents involving the definition of “deposit broker” and has attempted to consistently apply that analysis to these new products. If a third party is placing funds on behalf of itself, the funds are not brokered. If a third party is in the business of either (1) placing funds, or (2) facilitating the placement of funds—of another third-party (such as its customers)—then it meets the definition of “deposit broker” and the deposits are brokered, unless an exception applies.

Below is a discussion of a few of the most typical issues for which questions have arisen, organized in the context of the definitions and exceptions.

The FDI Act defines “deposit broker” to mean:

(A) any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties;²⁸ and

²⁸ The second phrase in FDI Act section 29(g)(1)(A) provides that a “deposit broker” includes, “any person engaged in . . . the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties.” This clause appears to reference the practice involving master certificates of deposits issued to deposit brokers who, in turn, issue retail CDs in denominations of \$1,000 to their retail customers. Industry participants have previously informed the FDIC that the practice of issuing master certificates of deposit from which smaller retail CDs are issued dates back to the early 1980s. 12 U.S.C. 1831f(g)(1)(A).

In a 1983 advanced notice of proposed rulemaking that preceded the 1984 final rule, the

(B) an agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.”²⁹

1. Engaged in the Business of Placing Deposits or Facilitating the Placement of Deposits

The first phrase of FDI Act section 29(g)(1)(A), defines a deposit broker as, “any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions.”³⁰ In evaluating whether certain third parties comport with the statutory definition of “deposit broker,” and being “engaged in the business of placing deposits, or facilitating the placement of deposits,” staff at the FDIC reviews every arrangement on a case-by-case basis considering the following factors:

- Whether the third party receives fees from the insured depository institution that are based (in whole or in part) on the amount of deposits or the number of deposit accounts.
- Whether the fees can be justified as compensation for administrative

FDIC and FHLBB described the underlying market practice:

CD Participations. Some brokers engage in the practice of “participating certificates of deposit to their customers. Under this arrangement a broker-dealer purchases a certificate of deposit issued by an insured institution and sells interests in it to customers. Upon sale of the participations in the deposit to its customer, the broker so informs the issuing institution and requests that the deposits be registered in its own name as nominee for others. The broker’s records, in turn, reflect the ownership interest of each customer in the deposit. A CD participation program results in a “flow-through” of insurance coverage to each owner of the deposit. The ownership interest of each participant in the deposit is added to the individually owned deposits held by the participant at the same institution and the total is insured to a maximum of \$100,000, provided the proper recordkeeping requirements are maintained.

48 FR 50339 (November 1, 1983).

²⁹ 12 U.S.C. 1831f(g)(1); 12 CFR 337.6(a)(5)(i). As stated above, section 29(g)(1)(B) provides that “deposit broker” includes: “An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.” The preamble to the 1984 FDIC/FHLBB final rule, provided background as to what this language was intended to address:

Certificates of deposit held in trust for bondholders under “loans-to-lenders” or industrial development bond (“IDB”) programs are covered by the final rule. These programs entail a transaction where the proceeds of an IDB issuance are placed with an insured institution, in exchange for a certificate of deposit, to fund a designated project. Because of the trust arrangement involved, under the Agencies’ current insurance coverage rules each bondholder owns an insured interest in the deposit up to \$100,000 and the deposit, therefore, may be fully insured by either the FDIC or the FSLIC.

49 FR 13003, 13010 (April 2, 1984).

³⁰ 12 U.S.C. 1831f(g)(1)(A).

services (such as recordkeeping) or other work performed by the third party for the insured depository institution (as opposed to compensation for bringing deposits to the insured depository institution).

- Whether the third party’s deposit placement activities, if any, is directed at the general public as opposed to being directed at members (or “affinity groups”) or clients.

- Whether there is a formal or contractual agreement between the insured depository institution and the third party (e.g., referring or marketing entity) to place or steer deposits to certain insured depository institutions.

- Whether the third party is given access to the depositor’s account, or will continue to be involved in the relationship between the depositor and the insured depository institution.

2. Exclusions From the “Deposit Broker” Definition

The statutory “deposit broker” definition excludes the following:

(A) An insured depository institution, with respect to funds placed with that depository institution;

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust (other than one described in paragraph (1)(B)), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of Title 26; or

(I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions.³¹

In 1992, the FDIC incorporated in its regulations the list of statutory exceptions to the “deposit broker”

³¹ 12 U.S.C. 1831f(g)(2).

definition and added as an additional exception, “an insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution.”³²

(a) IDI Exception

The statute provides an exception for an IDI with respect to funds placed with that IDI. Staff notes that based on the plain language of the statute, staff has consistently applied this exception strictly to the IDI itself and not to separately incorporated legal entities such as subsidiaries or other affiliates. One challenging issue relates to wholly-owned subsidiaries that place deposits under an exclusive relationship with the parent IDI. With regard to wholly-owned subsidiaries, for some purposes the subsidiary is treated as part of the parent IDI (e.g., certain financial reporting); whereas for other purposes—such as under the Bank Merger Act and for receivership purposes—they are treated separately.

(b) Employee Exception

Section 29(g)(2)(B) of the FDI Act provides that “deposit broker” does not include “an employee of an insured depository institution, with respect to funds placed with the employing depository institution” (employee exception). The employee exception recognizes that banks are corporate entities that operate through the natural persons they employ.

To address concerns that the employee exception could be used to evade the deposit broker definition, the term “employee” is defined for purposes of section 29, as any employee:

1. Who is employed exclusively by the insured depository institution;
2. Whose compensation is primarily in the form of a salary;
3. Who does not share such employee’s compensation with a deposit broker;
4. Whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual.³³

Particularly after the passage of the Gramm-Leach-Bliley Act and the permissibility of additional relationships among affiliated entities, FDIC staff has dealt with an increase in questions about IDI employees who also

have some form of contractual relationship with a third party, usually an affiliate of the IDI. In addition, FDIC staff has informally addressed questions related to the use of premises that are shared by the IDI and an affiliate.

(c) Pension or Other Employee Benefit Plans

Section 29(g)(2)(D) and (E) exclude from the deposit broker definition, trustees of pension and other employee benefit plans with respect to funds in the plan, and administrators or investment advisors provided that the person is performing managerial functions with respect to the plan.³⁴ Section 29(g)(2)(H) excludes a trustee or custodian of a pension or profit-sharing plan under sections 401(d) or 403(a) of the Internal Revenue Code.³⁵

Individual retirement accounts (IRAs) are retirement accounts set up outside of a pension plan or employee benefit plan and thus are not expressly covered by these exceptions. Certain non-retirement savings plans are also granted tax-favored status under the Internal Revenue Code, such as 529 savings plans for higher education tuition and health savings accounts but are not expressly covered by the exception. If a bank’s trust department serves as the trustee or custodian of such plans, and the trust has not been established for the primary purpose of placing funds with IDIs, the plans’ deposits would not be treated as brokered deposits because of the exception for trust departments. FDIC staff has received a number of questions about this exception.

(d) Primary Purpose Exception

The primary purpose exception applies to “an agent or nominee whose primary purpose is not the placement of funds with depository institutions.”³⁶ In particular, the primary purpose exception applies to a third party when that third party is acting as agent/nominee for the depositor. Staff’s evaluation of a third party’s primary purpose in placing deposits has been in the context of that particular agent/principal relationship.

In interpreting what it means for a third-party agent to act pursuant to a “primary purpose,” staff has generally analyzed whether placing—or facilitating the placement—of deposits of its customers/clients when acting as agent for those customers/clients, is for a substantial purpose other than to provide (1) deposit insurance, or (2) a deposit-placement service. In analyzing

this principle, staff has considered whether the deposit-placement activity is incidental to some other purpose.

In determining whether a deposit-placement activity is incidental to some other purpose, staff reviews the reason or intent of the third party when acting as agent or nominee in placing the deposits, as well as other factors which might indicate whether the third party agent is incentivized to place deposits at the IDI. Factors that staff has considered include the existence and structure of fee arrangements and of any programmatic relationship between the third party and the insured depository institution.

- Fees:
 - Whether the entity placing deposits receives fees from the insured depository institution that are based (directly or indirectly) on the amount of deposits or the number of deposit accounts opened.
 - Whether the fees can be justified as compensation for recordkeeping or other work performed by the third party for the IDI (as opposed to compensation for bringing deposits to the IDI).
- Programmatic relationship:
 - Whether there is a formal or contractual agreement between IDIs and the placing/referring entity to place or steer deposits to certain IDIs.

Importantly, when interpreting the applicability of the primary purpose exception, staff analyzes the deposit placement arrangement, including the underlying agreements, between the third party agent, the depositor, and the IDI to determine the primary purpose of the agent. The exception applies to agents or nominees, which by definition, act on behalf of principals. When acting in that capacity, the third party agent/nominee is limited to the principal’s goals and objectives. Staff does not solely rely upon the business purpose of the third party involved. Staff has not considered the size of the third party or the amount or percentage of revenue that the deposit-placement activity generates.

Primary Purpose Exception for Affiliated Sweeps

Beginning in 1999, the FDIC became aware of broker dealers offering their brokerage customers an automatic sweep program by which customers’ idle funds were swept to affiliated insured depository institutions.

In 2005, the FDIC’s General Counsel issued a staff opinion indicating FDIC staff view that, when certain conditions are observed, the primary purpose of a broker dealer in sweeping customer funds into deposit accounts at its affiliated IDI is to facilitate the

³² 12 CFR 337.6(a)(5)(ii)(f). As provided earlier, the FDIC added this exception in response to comments submitted in response to a 1992 notice of proposed regulation.

³³ 12 U.S.C. 1831f(g)(4).

³⁴ 12 U.S.C. 1831f(g)(2)(D) and (E).

³⁵ 12 U.S.C. 1831f(g)(2)(H).

³⁶ 12 U.S.C. 1831f(g)(2)(I).

customers' purchase and sale of securities. Among the conditions are that funds are not swept to a time deposit account and do not exceed 10 percent of the total assets handled by the affiliated broker dealer. The insured depository institution is permitted to pay fees to the affiliated broker dealer but the fees must be flat fees (*i.e.*, per account or per customer fees) representing payment for recordkeeping or administrative services and not for the placement of deposits. The fee arrangements must satisfy Section 23B of the Federal Reserve Act.³⁷

(e) Other Issues

Deposit Listing Services. Deposit listing services come in different forms, but all connect those seeking to place a deposit with those seeking a deposit by listing the deposit rates of IDIs. Depositors use listing services to find the best rate available for a given deposit type and, in the case of a CD, a term. Since the statute was first enacted, staff has distinguished between a company that compiles information about interest rates in passive manner versus a deposit broker that is in the business of placing or facilitating the placement of deposits. A particular company can advertise itself as a listing service as well as meet the definition of a "deposit broker." In recognition of this possibility, staff at the FDIC developed criteria for analyzing whether a "listing service" acts as a "deposit broker."³⁸

In 2004 FDIC staff provided criteria to assist the industry in analyzing whether a deposit listing services would be viewed as a deposit broker. In particular, staff advisory opinions indicate that a listing service is not viewed as a deposit broker if it meets the following criteria:

(1) The person or entity providing the listing service is compensated solely by means of subscription fees (*i.e.*, the fees paid by subscribers as payment for their opportunity to see the rates gathered by the listing service) and/or listing fees (*i.e.*, the fees paid by depository institutions as payment for their opportunity to list or "post" their rates). The listing service does not require a depository institution to pay for other services offered by the listing service or its affiliates as a condition precedent to being listed;

(2) The fees paid by depository institutions are flat fees: They are not calculated on the basis of the number or dollar amount of deposits accepted by

the depository institution as a result of the listing or "posting" of the depository institution's rates;

(3) In exchange for these fees, the listing service performs no services except: (A) The gathering and transmission of information concerning the availability of deposits; and/or (B) the transmission of messages between depositors and depository institutions (including purchase orders and trade confirmations). In publishing or displaying information about depository institutions, the listing service must not attempt to steer funds toward particular institutions (except that the listing service may rank institutions according to interest rates and also may exclude institutions that do not pay the listing fee). Similarly, in any communications with depositors or potential depositors, the listing service must not attempt to steer funds toward particular institutions; and

(4) The listing service is not involved in placing deposits. Any funds to be invested in deposit accounts are remitted directly by the depositor to the insured depository institution and not, directly or indirectly, by or through the listing service.³⁹

In 2004, when staff last provided its views on listing services, listing services had already evolved into internet exchange platforms with automated order entry and confirmation services. At the time, however, listing service sites did not provide any advice to prospective depositors, and there was only a flat subscription fee paid by both the banks and those seeking to view the posted rates. Today, the FDIC has observed that certain listing service websites provide additional services. For example, based upon information gathered from bankers interested in participating in listing services, the FDIC notes that some listing services appear to:

- Offer advice to banks on liability and funds management and regulatory compliance screening for subscribing banks.

- Send customer information (on behalf of the prospective depositors) directly to the banks that are listing rates.

- Charge a fee to banks based upon the asset size of the bank, rather than a flat subscription fee.

- Post rates of "featured" or "preferred" vendors at the very top of its rate board.

The FDIC notes the ambiguity over how these new listing service features could be applied in light of the 2004 criteria. The features above seem to

indicate that some listing services are no longer acting in a passive capacity but are instead steering deposits to particular institutions or are otherwise providing services that meet the definition of "deposit broker."

Accounting or related software products that contemplate the bank using the same software. Some companies provide accounting and other administrative support via software services to clients. These companies, on behalf of their clients, place deposits at either one or a group of preferred banks. Because the companies place deposits at IDIs, the software companies meet the definition of "deposit broker" (unless they meet one of the exceptions). The primary purpose exception applies to an agent or nominee whose primary purpose is not the placement of funds with depository institutions. Banks who receive deposits from software companies argue that the primary purpose of the software companies is to provide accounting services (*e.g.*, bankruptcy management) and the placement of deposits is incidental to this purpose. In analyzing whether a particular arrangement meets the primary purpose arrangement, as noted above, staff currently reviews whether the placement (of third party funds) is for a substantial purpose other than to provide (1) deposit insurance, or (2) a deposit-placement service. In previous cases that staff reviewed relating to accounting software products, staff has not distinguished between providing integrated accounting software and providing access to a deposit account that offers core banking functions (such as daily cash management). Moreover, in the previous arrangements that staff has reviewed, there is typically a contractual volume based fee being paid by the bank to the software company based upon the volume of deposits being placed. As a result, staff has viewed that the software companies are incentivized to place funds of prospective depositors at preferred banks because of the fees that the placement generates.

Prepaid cards. Some companies operate general purpose prepaid card programs, in which prepaid cards are sold to members of the public through the assistance of a prepaid card company or a program manager. After collecting funds from the cardholders, sometimes at retail stores or directly from the card company, funds are placed into a custodial deposit account at an insured depository institution (sometimes with "pass-through" deposit insurance coverage). The funds may be accessed by the cardholders through the

³⁷ See 12 U.S.C. 371c-1.

³⁸ See generally, FDIC Staff Adv. Op. Nos. 90-24 (June 12, 1990); 92-50 (July 24, 1992); 02-04 (November 13, 2002).

³⁹ See FDIC Staff Advisory Opinion 04-04.

use of their cards. In regard to this scenario, staff at the FDIC has taken the position that the prepaid card company or the program manager likely qualifies as a “deposit broker” because it is a third party that is in the business of facilitating the placement of customer deposits at an insured depository institution. Some have argued that a particular prepaid card arrangement is covered by the “primary purpose exception”—specifically, that the “primary purpose” of a prepaid card company (in establishing deposit accounts at an insured depository institution) is not to provide the cardholders with a deposit-placement service, but to enable the cardholders to make purchases through the interbank payment system. Staff at the FDIC has not distinguished between (1) acting with the purpose of placing deposits for other parties, and (2) acting with the purpose of enabling other parties to use deposits to make purchases. When funds are placed into demand deposit accounts (as in the case of custodial accounts used by prepaid card companies), the deposits will be available for withdrawals or transfers or spending. Thus, prepaid card companies have not been viewed as meeting the “primary purpose” exception.

Software applications for personal use that involve funds being placed at an insured depository institution. Some applications provide customers the opportunity to link their existing bank accounts (and other accounts, such as credit cards, and 401k)—with software applications—in an effort to provide efficiencies in budgeting, bill-paying, and opening up a new deposit account. In some cases, the application aggregates customer information based upon available account balances and spending patterns and provides that information to depository institutions to assist in targeting certain customers with financial products. Once the customer is targeted with a financial product, the customer may be transferred to the bank to open up the deposit account or the application may assist in transferring customer information to the bank for purposes of establishing the deposit account. The software provider may receive compensation from the financial institution based upon the referral. FDIC staff has received inquiries about whether various arrangements between software applications and IDIs should be viewed as brokered.

D. Interest Rate Restrictions

As noted earlier, the purpose of Section 29 generally is to limit the

acceptance or solicitation of certain deposits by insured depository institutions that are not well capitalized. This purpose is promoted through two means: (1) The prohibition against the acceptance of brokered deposits by depository institutions that are less than well capitalized (as described above); and (2) certain restrictions on the interest rates that may be paid by such institutions. In enacting section 29, Congress added the interest rate restrictions to prevent institutions from avoiding the prohibition against the acceptance of brokered deposits by soliciting deposits internally through “money desk operations.” Congress viewed the gathering of deposits by weaker institutions through either third-party brokers or “money desk operations” as potentially an unsafe or unsound practice.⁴⁰ The FDIC has simplified the application of these restrictions through two rulemakings.

Under Section 29, well-capitalized institutions can pay any rate of interest on any deposit. However, the statute imposes different interest rate restrictions on different categories of insured depository institutions that are less than well capitalized. These categories are (1) adequately-capitalized institutions with waivers to accept brokered deposits (including reciprocal deposits excluded from being considered brokered deposits);⁴¹ (2) adequately-capitalized institutions without waivers to accept brokered deposits;⁴² and (3) undercapitalized institutions.⁴³ The statutory restrictions for each category are described in detail below.

Adequately-capitalized institutions with waivers to accept brokered deposits. Institutions in this category may not pay a rate of interest on deposits that “significantly exceeds” the following: “(1) The rate paid on deposits of similar maturity in such institution’s normal market area for deposits accepted in the institution’s normal market area; or (2) the national rate paid on deposits of comparable maturity, as established by the [FDIC], for deposits accepted outside the institution’s normal market area.”⁴⁴

Adequately capitalized institutions without waivers to accept brokered deposits. In this category, institutions may not offer rates that “are significantly higher than the prevailing rates of interest on deposits offered by

other insured depository institutions in such depository institution’s normal market area.”⁴⁵ For institutions in this category, the statute restricts interest rates in an indirect manner. Rather than simply setting forth an interest rate restriction for adequately capitalized institutions without waivers, as noted previously, the statute defines the term “deposit broker” to include “any insured depository institution that is not well capitalized . . . which engages, directly or indirectly, in the solicitation of deposits by offering rates of interest which are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions in such depository institution’s normal market area.”⁴⁶ In other words, the depository institution itself is a “deposit broker” if it offers rates significantly higher than the prevailing rates in its own “normal market area.” Without a waiver, the institution cannot accept deposits from a “deposit broker.” Thus, the institution cannot accept these deposits from itself. In this indirect manner, the statute prohibits institutions in this category from offering rates significantly higher than the prevailing rates in the institution’s “normal market area.”

Undercapitalized institutions. In this category, institutions may not offer rates “that are significantly higher than the prevailing rates of interest on insured deposits (1) in such institution’s normal market areas; or (2) in the market area in which such deposits would otherwise be accepted.”⁴⁷

Rulemakings Related to Section 29’s Interest Rate Restrictions

The FDIC has implemented the interest rate restrictions under section 29 of the FDI Act through two rulemakings.⁴⁸ Although the statute, as noted above, sets forth a basic framework, it does not provide certain key details, such as definitions for the terms—“national rate,” “significantly exceeds,” “significantly higher,” and “market area.” As a result, in 1992, the FDIC defined these key terms before updating the “national rate” and clarifying the rate restrictions again in 2009.

“Significantly Exceeds.” Through Section 337.6, the FDIC has provided that a rate of interest “significantly exceeds” another rate, or is “significantly higher” than another rate, if the first rate exceeds the second rate

⁴⁰ See H.R. Conf. Rep. No. 101–222 at 402–403 (1989), reprinted in 1989 U.S.C.C.A.N. 432, 441–42.

⁴¹ 12 U.S.C. 1831f(e).

⁴² 12 U.S.C. 1831f(g)(3).

⁴³ 12 U.S.C. 1831f(h).

⁴⁴ 12 U.S.C. 1831f(e).

⁴⁵ 12 U.S.C. 1831f(g)(3).

⁴⁶ *Id.*

⁴⁷ 12 U.S.C. 1831f(h).

⁴⁸ See 57 FR 23933 (1992); 74 FR 26516 (2009).

by more than 75 basis points.⁴⁹ In adopting this standard, the FDIC offered the following explanation: “Based upon the FDIC’s experience with the brokered deposit prohibitions to date, it is believed that this number will allow insured depository institutions subject to the interest rate ceilings . . . to compete for funds within markets, and yet constrain their ability to attract funds by paying rates significantly higher than prevailing rates.”⁵⁰ This interpretation of the statute has remained unchanged since the 1992 rulemaking.

“Market Area.” In Section 337.6, prior to the adoption of the 2009 final rule, the term “market area” was defined as follows: “A market area is any readily defined geographical area in which the rates offered by an one insured depository institution soliciting deposits in that area may affect the rates offered by other insured depository institutions in the same area.”⁵¹ At the time, the FDIC reasoned that the market area will be determined on a case-by-case basis, based on the evident or likely impact of a depository institution’s solicitation of deposits in a particular area, taking into account the means and media used and volume and sources of deposits resulting from such solicitation.⁵²

The “National Rate.” In Section 337.6, as part of the 1992 rulemaking, the “national rate” was defined as follows: “(1) 120 percent of the current yield on similar maturity U.S. Treasury obligations; or (2) In the case of any deposit at least half of which is uninsured, 130 percent of such applicable yield.”⁵³ In defining the “national rate” in this manner, the FDIC understood that the spread between Treasury securities and depository institution deposits can fluctuate substantially over time but relied upon the fact that such a definition is “objective and simple to administer.”⁵⁴ By using percentages (120 percent or 130 percent of the yield on U.S. Treasury obligations) instead of a fixed number of basis points, the FDIC hoped to “allow for greater flexibility should the spread to Treasury securities widen in a rising interest rate environment.” In deciding not to rely on published deposit rates, the FDIC offered the

following explanation: “The FDIC believes this approach would not be timely because data on market rates must be available on a substantially current basis to achieve the intended purpose of this provision and permit institutions to avoid violations. At this time, the FDIC has determined not to tie the national rate to a private publication. The FDIC has not been able to establish that such published rates sufficiently cover the markets for deposits of different sizes and maturities.”⁵⁵

2009 Rulemaking on the Interest Rate Restrictions

For many years, the 1992 definition of “national rate” functioned well because rates on Treasury obligations tracked closely with rates on deposits. By 2009, however, the rates on certain Treasury obligations were low compared to deposit rates. Consequently, the “national rate” as defined in the FDIC’s regulations became artificially low. By setting a low rate, the FDIC’s regulations required some insured depository institutions to offer unreasonably low rates on some deposits, thereby restricting access even to market-rate funding.

As part of the 2009 rulemaking, the FDIC addressed two issues that developed after the 1992 rulemaking: (1) The obsolescence of the FDIC’s 1992 definition of the “national rate”; and (2) the difficulty experienced by insured depository institutions and examiners in determining prevailing rates in its “market areas.”

In response to the first problem, the FDIC redefined the “national rate” as “a simple average of rates paid by all insured depository institutions and branches for which data are available.” As noted in the 2009 rulemaking, the updated “national rate” methodology represented an objective average and the exclusion of certain branches or offices was viewed by the FDIC, at the time, as contrary to providing a meaningful restriction on insured depository institutions that are not well capitalized.⁵⁶

In response to the second problem, the FDIC created a presumption that the prevailing rate in any market would be the national rate (as defined above). An

insured depository institution could rebut this presumption by presenting evidence to the FDIC that the prevailing rate in a particular market is higher than the national rate. If the FDIC agreed with this evidence, the institution would be permitted to pay as much as 75 basis points above the local prevailing rate. In evaluating this evidence, the FDIC may use segmented market rate information (for example, evidence by State, county or MSA). Also, the FDIC may consider evidence as to the rates offered by credit unions but only if the insured depository institution competes directly with the credit unions in the particular market. Finally, the FDIC may consider evidence that the rates on certain deposit products differ from the rates on other products. For example, in a particular market, the rates on NOW accounts might differ from the rates on MMDAs. NOW accounts might be distinguished from MMDAs because the two types of accounts are subject to different legal requirements.⁵⁷

Ultimately, the 2009 rulemaking simplified the approach of applying the rate restrictions and, importantly, has provided community banking institutions, that may not compete in the national deposit marketplace (*e.g.*, listing services), the ability to offer competitive deposit rates in its local market area.

Additional Interest Rate Issues

Since the FDIC’s adoption of the 2009 rulemaking, federal funds rates stayed at historically low levels and only recently have begun to rise. In addition, institutions also have created new products that do not fit into the posted national rates and rate caps.

Calculation of rates. Since the crisis that began in 2008, the “national rate” has been relatively low due to the low interest rate environment. Moreover, because the national rate is an average for all banks and branches, the largest banks with large numbers of branches have had a disproportional effect on average interest rates. Even as other interest rates have begun to rise, the average has stayed low as the largest banks have been slow to increase interest rates on deposits.

⁴⁹ See 12 CFR 337.6(b)(2)(ii), (b)(3)(ii) and (b)(4). See also, 55 FR 39135 (1990) (FDIC’s final rule that took the view that “significantly exceeds” means more than 50 basis points. At the time, this was believed to be a reasonable compromise between the need to permit troubled institutions to compete on a reasonable basis in their market area and yet

prevent such institutions from bidding excessively for an increased share of market-area deposits by paying excessive rates).

⁵⁰ 57 FR at 23939.

⁵¹ See 57 FR 23933 (1992) and 74 FR 26516 (2009).

⁵² *Id.*

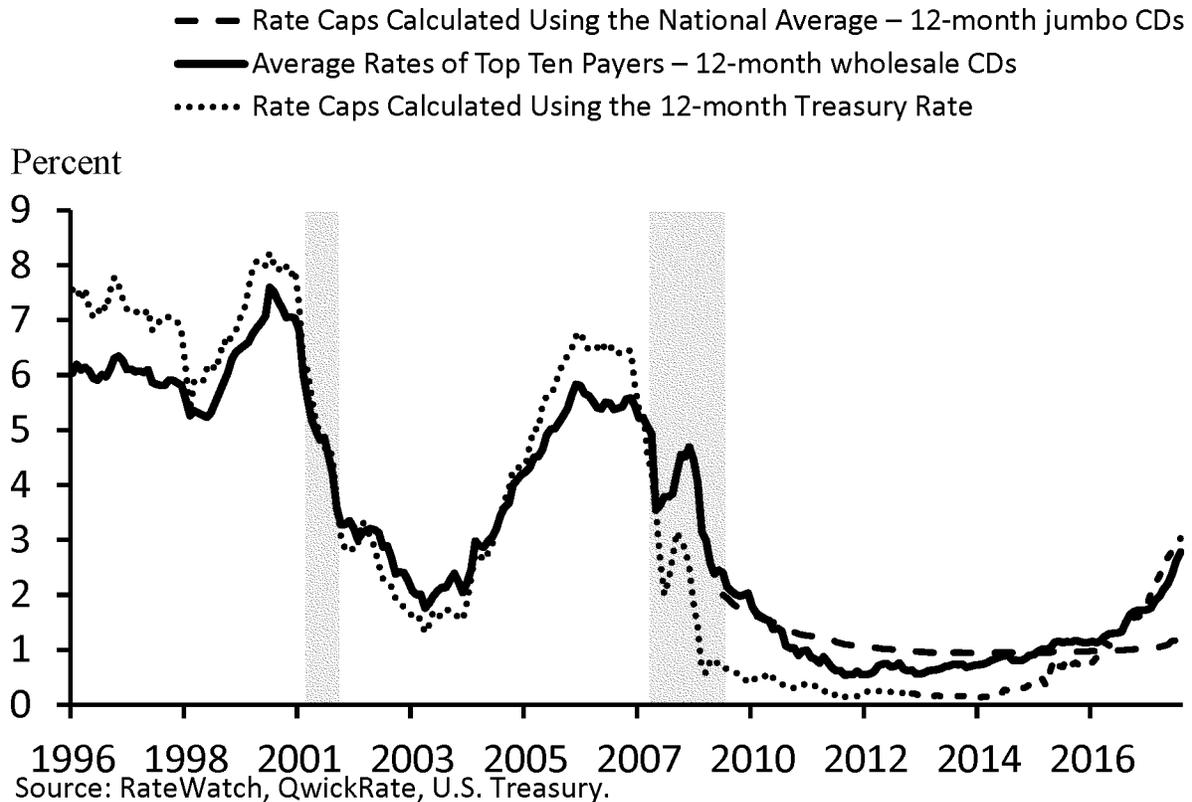
⁵³ 12 CFR 337.6(b)(2)(ii)(B).

⁵⁴ 57 FR 23933, 23938 (June 5, 1992).

⁵⁵ *Id.* at 23939.

⁵⁶ See 74 FR 26516 (2009).

⁵⁷ 12 CFR 337.6(f).



New products. The FDIC has recently seen an increase in promotional deposit products and products with special features. These products and promotions are generally not compatible with the standard products included in the FDIC's published weekly national rate caps. An example of a product with a special feature is one that provides a one-time cash payment for opening up a deposit account or provides airline miles or other bonuses with specific deposit products. Such deposit products may have common maturities (or be demand accounts) and as a result they may be included as part of the "national rate" calculation without acknowledgement of the up-front payment or other bonus received in place of interest paid on the deposit.

Special features. Some institutions are also offering deposit products with special features that may raise questions about how the rate cap should apply. Below are examples of three types of deposit products with special features:

- Step up rates. Certain deposit products have variable rate features that allow the interest rate to increase before the deposit matures. With these products, particularly time deposits with longer maturities, the institution could fall to less than well capitalized during the term of the deposit. As a result, and as the FDIC has seen in the past, an institution could pay a rate that

exceeds the interest rate restrictions after the downgrade.

- Atypical maturities. Unusual maturity periods (for example, 13 or 15 months instead of 12 or 18 months) make it difficult to compare with either national rates or prevailing local rates.
- Exceptionally long maturities for time deposits combined with penalty-free early withdrawal. In some cases, institutions have structured deposit products with exceptionally long maturities in order to extrapolate exceptionally high interest rates for the deposits coupled with withdrawal rights that are significantly shorter than the term of the deposit maturity (e.g., 7 day penalty period on a 5 year certificate of deposit).

III. Request for Comments

The FDIC seeks comment on all aspects of its regulatory approach to brokered deposits and interest rate restrictions, and in particular the following:

- Are there ways the FDIC can improve its implementation of Section 29 of the FDI Act while continuing to protect the safety and soundness of the banking system? If so, how?

Brokered Deposits

- Are there types of deposits that are currently considered brokered that should not be considered brokered? If so, please explain why.

- Are there types of deposits that are currently not considered brokered that should be considered brokered? If so, please explain why.

- Are there specific changes that have occurred in the financial services industry since the brokered deposits regulation was adopted that the FDIC should be cognizant of as it reviews the regulation? If so, please explain.

- Do institutions currently have sufficient clarity regarding who is or is not a deposit broker and what is or is not a brokered deposit? Are there ways the FDIC can provide additional clarity through updates to the brokered deposits regulation, consistent with the statute and the policy considerations described above?

- Are there areas where changes might be warranted but could not be effectuated under the current statute? Are there any statutory changes that warrant consideration from Congress?

- Should the FDIC make changes to the Call Report instructions so that the agency can gather more granular information about types of brokered deposits?

- In general, the FDIC welcomes any additional data or market information related to brokered deposits, particularly related to those types of brokered deposits that are not specifically reported by institutions in their Call Reports (e.g., Master Certificates of Deposits held in the name

of DTC and deposits placed through unaffiliated sweep programs).

Interest Rate Restrictions

- Are there alternatives that the FDIC should consider in addressing Section 29’s interest rate restrictions for less than well capitalized institutions?
- Should the methodology used to calculate the “national rate” be changed? If so, how?
- Should there remain a presumption that the prevailing rate in any “market area” is the national rate? If not, how should the FDIC define the “normal market area”?
- Should the amount of the rate cap, currently 75 basis points over either the national rate or the prevailing market rate, be revised? If so, how?
- How should deposits with promotional or special features be treated with respect to the national rate or the prevailing market rate?
- How should the rates offered by internet-based or electronic commerce-based institutions be calculated?

Appendix 1

Descriptive Statistics on Core and Brokered Deposits

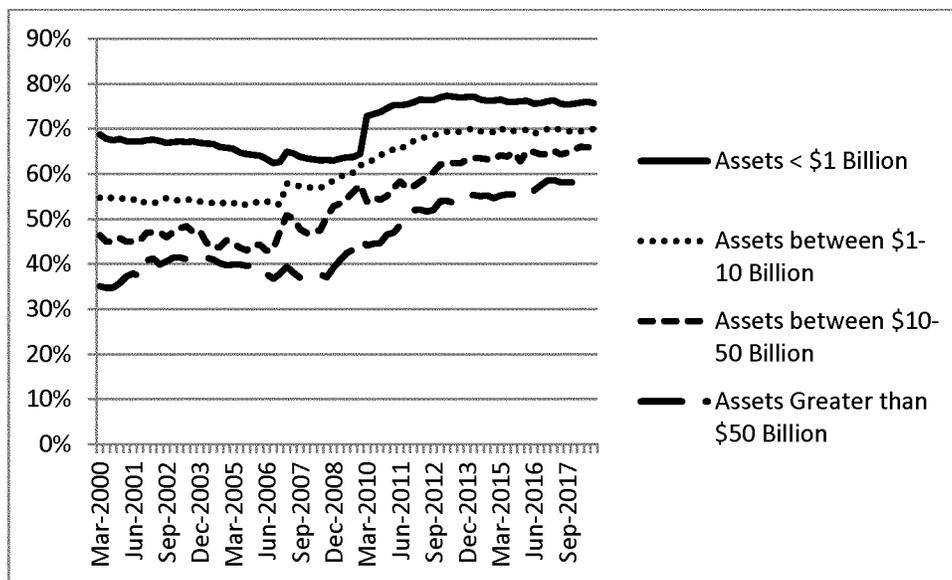
Core Deposits

Core deposits are not defined by statute. Rather, they are defined for analytical and examination purposes in the Uniform Bank Performance Report (UBPR). Through 2010, the Federal Financial Institutions Examination Council (FFIEC) defined “core deposits” to include all demand and savings deposits, including money market deposit, NOW and ATS accounts, other savings deposits, and time deposits in amounts under \$100,000.⁵⁸ Under this definition, core deposits were equivalent to total domestic deposits less time deposits over \$100,000 and included insured brokered deposits. As of March 31, 2011, the definition was revised to reflect the permanent increase to FDIC deposit insurance coverage from \$100,000 to \$250,000 and to exclude insured brokered deposits from core deposits. This revision defines core deposits as the sum of demand deposits, all NOW and ATS accounts, MMDAs,

other savings deposits and time deposits under \$250,000, minus all brokered deposits under \$250,000. For periods before March 2011, the definition was revised to the sum of demand deposits, all NOW and ATS accounts, MMDAs, other savings deposits and time deposits under \$100,000, minus all brokered deposits under \$100,000.

Historically, reliance on core deposits has varied by bank size. Banks with less than \$1 billion in total assets generally have had the heaviest reliance on core deposits, and banks with \$50 billion or more in total assets have had the least reliance on core deposits. Since 2010, the ratio of core deposits to total assets has changed less for smaller banks than it has for larger banks. At year-end 2010, core deposits equaled 75 percent of total assets at banks with less than \$1 billion in assets, but only 47 percent for banks with \$50 billion or more in total assets. By the third quarter of 2018, core deposits equaled 76 percent of total assets at banks with less than \$1 billion in assets and 58 percent of at banks with \$50 billion or more in total assets (See Chart 1.)

Chart 1⁵⁹
 “Core” Deposits as a Percentage of Total Assets, 1st Qtr 2000 – 3rd Qtr 2018



Through mid-year 2009, almost all core deposits at community banks were estimated to be insured, but, at the end of third quarter 2009, when banks began

reporting insured deposits at the then temporary insurance limit of \$250,000, estimated insured deposits were greater than core deposits. Estimated insured

deposits represented a smaller share of core deposits at the largest banks, as a result of their holdings of large uninsured demand deposits. At

⁵⁸ An automatic transfer service account is a deposit or account of an individual or sole proprietorship on which the depository bank has reserved the right to require at least seven days’ written notice prior to withdrawal or transfer of any funds in the account and from which, pursuant to

written agreement arranged in advance between the reporting bank and the depositor, withdrawals may be made automatically through payment to the depository bank itself or through transfer of credit to a demand deposit or other account in order to cover checks or drafts drawn upon the bank or to

maintain a specified balance in, or to make periodic transfers to, such other accounts.

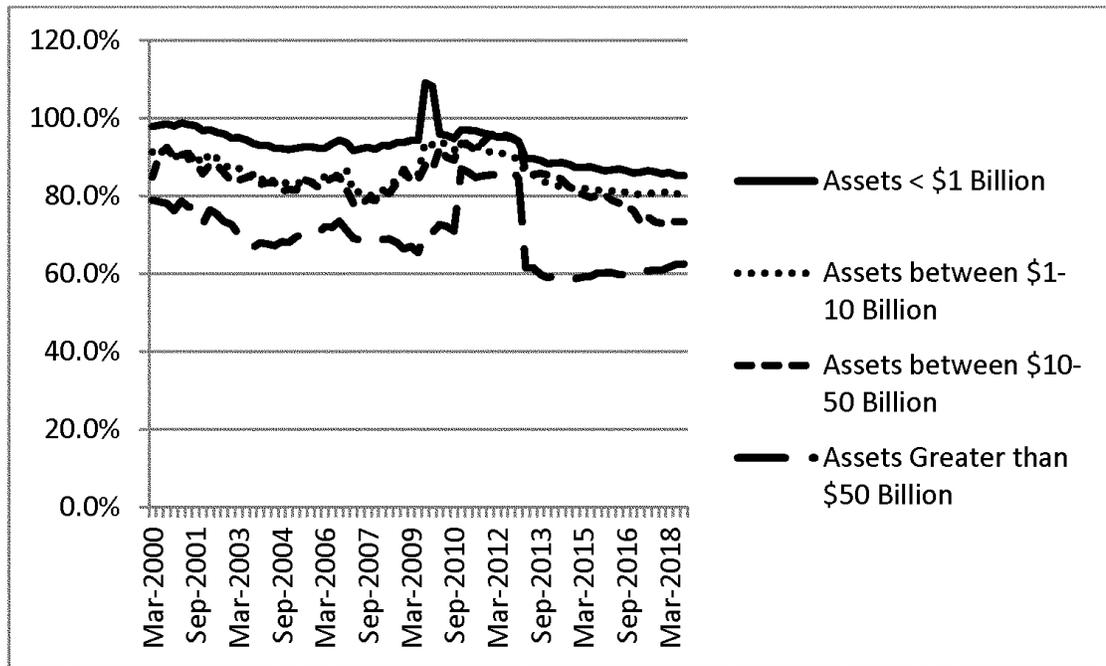
⁵⁹ Through 2010 core deposits include insured brokered deposits. Beginning in 2011, brokered deposits are excluded from core deposits.

September 30, 2010, for banks with assets over \$50 billion, estimated insured deposits represented only 69 percent of core deposits, but, at March

31, 2011, after the coverage of all noninterest bearing transaction accounts over \$250,000 was established temporarily under the Dodd-Frank Act,

estimated insured deposits rose to 84 percent. (See Chart 2.)

Chart 2⁶⁰
Estimated Insured Deposits as a Share of “Core” Deposits, 1st Qtr 2000 – 3rd Qtr 2018



Note: From October 14, 2008 to December 31, 2010, domestic non-interest bearing transaction accounts were guaranteed in full under the Transaction Account Guarantee Program (TAG), part of the FDIC’s Temporary Liquidity Guarantee Program (TLGP). From December 31, 2010 to December 31, 2012, the Dodd-Frank Act provided temporary unlimited deposit insurance coverage for non-interest bearing transaction accounts. These programs account for the observed shifts up and down in the Estimated Insured Deposits as a Share of “Core” Deposits shown in the chart during these periods.

Note: From October 14, 2008 to December 31, 2010, domestic non-interest bearing transaction accounts were guaranteed in full under the Transaction Account Guarantee Program (TAG), part of the FDIC’s Temporary Liquidity Guarantee Program (TLGP). From December 31, 2010 to December 31, 2012, the Dodd-Frank Act provided temporary unlimited deposit insurance coverage for non-interest bearing transaction accounts. These programs account for the observed shifts up and down in the Estimated Insured Deposits as a Share of “Core” Deposits shown in the chart during these periods.

Effective with the March 31, 2011, UBPR, the FFIEC revised the definition of core deposits to take into account the increase in the deposit insurance limit

to \$250,000 under Dodd-Frank. The new definition includes time deposits up to \$250,000 but excludes brokered deposits of any denomination. Using Call Report and Thrift Financial Report (TFR) data as of March 31, 2011, the new definition of core deposits added \$24.9 billion (or 0.3 percent) to core deposits. However, the increase in core deposits, as the result of the new definition, occurred almost exclusively at smaller banks and thrifts, since the decrease in core deposits due to exclusion of brokered deposits tended to be less than the increase in core deposits due to inclusion of time deposits within the new threshold of up

to \$250,000. Core deposits at banks and thrifts with assets under \$10 billion increased by \$143.2 billion under the new definition, but core deposits at banks with assets of at least \$10 billion declined by \$118.3 billion. Large credit card banks and specialty lenders with affiliated brokerage firms were among those banks with the largest decline in core deposits as a result of the revised definition.

Brokered Deposits

FDIC-insured banks report total brokered deposits and the amount of brokered deposits under the insurance limit on their Call Reports and TFRs.

⁶⁰Through 2010 core deposits include insured brokered deposits. Beginning in 2011, brokered deposits are excluded from core deposits.

Before 2010, brokered deposits were reported as insured, as any deposits, up to the \$100,000 threshold. Beginning March 31, 2010, the threshold for reporting insured brokered deposits on Call Reports and TFRs was increased to \$250,000.⁶¹ Insured depository institutions also began reporting total reciprocal brokered deposits in their June 30, 2009, Call Reports and TFRs.

The Economic Growth, Regulatory Reform, and Consumer Protection Act, enacted on May 24, 2018, allows certain banks to except a limited amount of reciprocal deposits from brokered deposits.

As of September 30, 2018, brokered deposits totaled \$985.7 billion. Fewer than half of all FDIC-insured banks (2,221 banks, or 40.6 percent) reported

brokered deposits on their September 30, 2018, Call Reports. As of this date, brokered deposits made up 8.0 percent of industry domestic deposits, in contrast to second quarter 2009 when banks began reporting total reciprocal brokered deposits, brokered deposits accounted for 10.1 percent of industry domestic deposits.

BROKERED DEPOSITS HELD BY INSURED DEPOSITORY BANKS AS OF SEPTEMBER 30, 2018

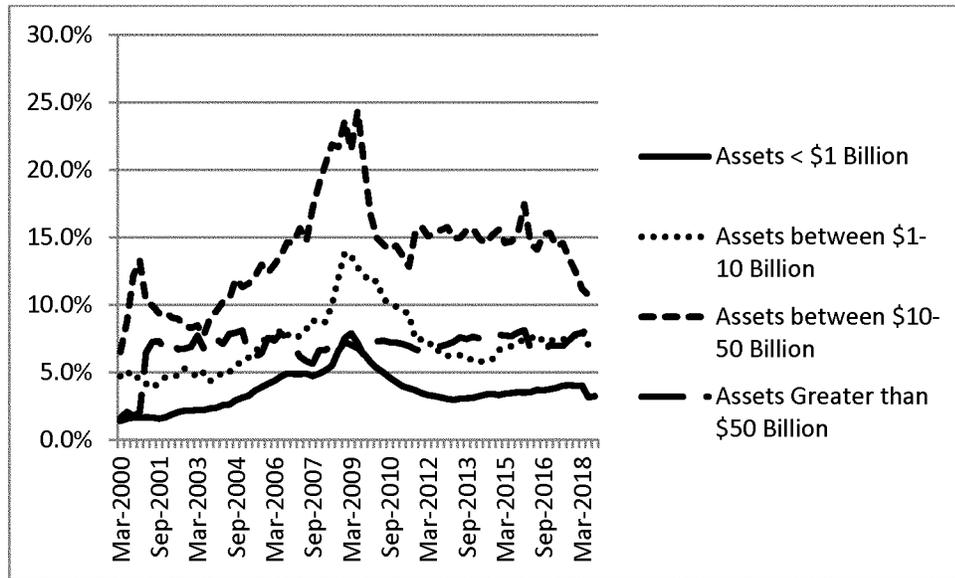
Asset size group	Total number of banks	Number of banks with brokered deposits	Total brokered deposits (billions)	Share of total brokered deposits (%)	Total domestic deposits	Share of total domestic deposits (%)
Under \$1 Billion	4,704	1,656	\$31.92	3.2	\$988.05	8.0
\$1–10 Billion	635	439	90.16	9.1	1,349.56	11.0
\$10–50 Billion	97	89	171.87	17.4	1,605.40	13.0
Over \$50 Billion	41	37	691.78	70.2	8,378.84	68.0
All Banks	5,477	2,221	985.73	.....	12,321.84	.....

Brokered deposits typically make up a lower share of deposit funding for small banks compared to banks with \$10 billion or more in assets. In aggregate, banks with assets between

\$10 billion and \$50 billion reported brokered deposits equal to 10.7 percent of their domestic deposits as of September 30, 2018, the highest of any asset cohort group, while banks with

assets under \$1 billion reported brokered deposits equal to just 3.2 percent of domestic deposits. (See Chart 3.)

Chart 3
Brokered Deposits as a Share of Domestic Deposits, 1st Qtr 2000 – 3rd Qtr 2018



Note: The reversal of growth in the use of brokered deposits occurring between 2009 and 2012 is likely the joint result of the dramatic decline in interest rates occurring over that period, coupled with significant new restrictions on the use of brokered deposits by banks classified as adequately and undercapitalized.

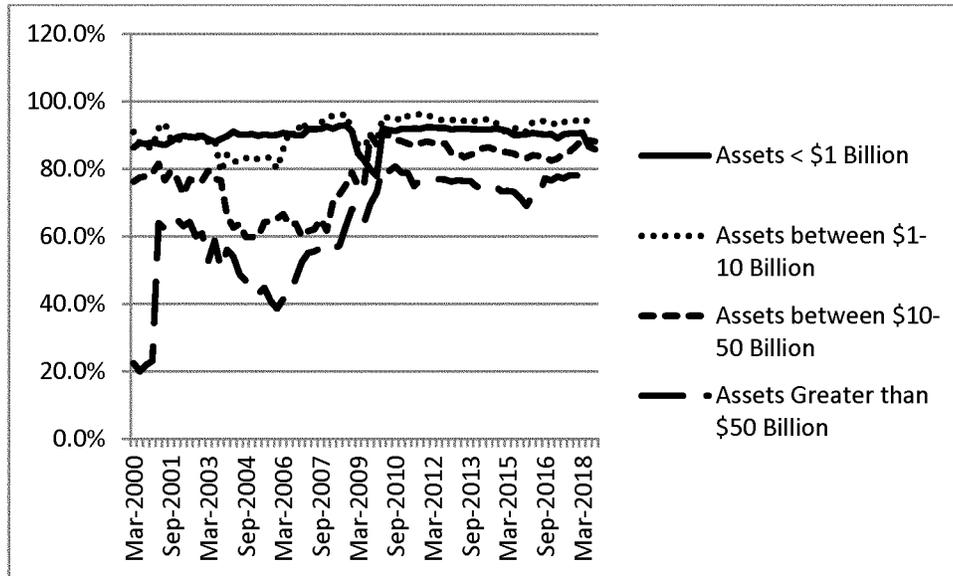
⁶¹ Certain brokered retirement accounts are included in insured brokered deposits.

Note: The reversal of growth in the use of brokered deposits occurring between 2009 and 2012 is likely the joint result of the dramatic decline in interest rates occurring over that period, coupled with significant new restrictions on the use of brokered deposits by banks classified as adequately and undercapitalized.

At the end of the third quarter of 2018, insured brokered deposits made up more than 82.5 percent of total brokered deposits at all banks. Insured brokered deposits as a percent of all brokered deposits was highest at banks with assets of \$50 billion or less. In

aggregate, insured brokered deposits made up 93.7 percent of total brokered deposits at banks with assets between \$1–10 billion, as compared to 79.5 percent at banks with assets greater than \$50 billion. (See Chart 4.)

Chart 4
Insured Brokered Deposit Share of All Brokered Deposits, 1st Qtr 2000 – 3rd Qtr 2018



Section 29 of the Federal Deposit Insurance Act (FDI Act) sets forth restrictions on the acceptance of brokered deposits that also appear in the FDIC’s regulations.⁶² Under Section 29, banks are restricted from accepting, renewing, or rolling over brokered deposits if they are less than well capitalized. This restriction may be

waived for adequately capitalized banks. Undercapitalized institutions are not allowed to receive new brokered deposits and must follow an FDIC-approved plan to remove them from their books over time. After rising to a peak in mid-2009, the use of brokered deposits as a share of domestic deposits declined for both adequately capitalized

banks and well capitalized banks. As of September 30, 2018, of the 5,477 insured depository institutions, 99.6 percent were well capitalized, while 0.2 percent were rated as adequately capitalized. Of those rated as adequately capitalized, roughly half held brokered deposits. (See Chart 5.)⁶³

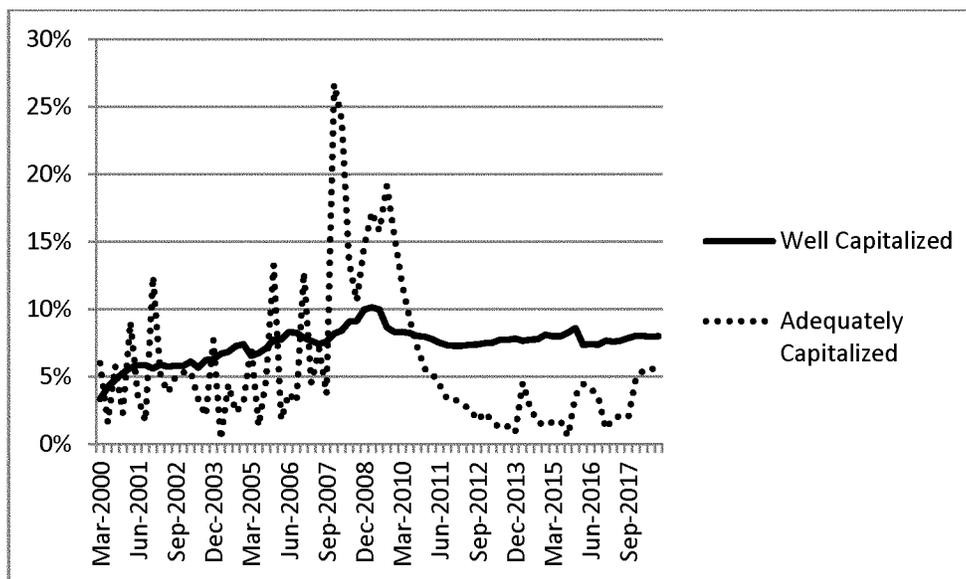
⁶² See 12 U.S.C. 1831f; 12 CFR 337.6.

⁶³ Please note that the data and chart are based only on capital ratio thresholds used for PCA. However, an IDI that otherwise meets the ratio threshold requirements for the well capitalized PCA category: (1) Will be classified as an adequately

capitalized if it is subject to a written agreement, order, capital directive, or prompt corrective action directive to meet and maintain a specific capital level for any capital measure; and (2) may be reclassified as adequately capitalized, if, following notice and an opportunity for hearing, the bank is

determined to be unsafe or unsound or has failed to correct a less-than-satisfactory rating for asset quality, management, earnings, or liquidity. See 12 CFR 6.4(c)(1)(v) and (e), 12 CFR 208.43(b)(1)(v) and (c), and 12 CFR 324.403(b)(1)(v) and (d).

Chart 5
Brokered Deposits as a Share of Domestic Deposits by PCA Capitalization Category, 1st Qtr
2000 – 3rd Qtr 2018



Brokered Deposits during the 2007–2017 Financial Crisis

During the financial crisis and the years that followed, from the beginning of 2007 through the end of 2017, the Deposit Insurance Fund (DIF) incurred \$74.4 billion in losses as of December

31, 2016. During this period, excluding Washington Mutual, 530 banks failed and were placed in FDIC receivership.

Typically, as institutions get closer to failure, their capital level declines and they are no longer able to accept, renew, or roll over brokered deposits, so levels of brokered deposits at failure are

usually low. Nevertheless, of the 530 failed banks, twelve, approximately 2.3 percent, held a majority (50% or greater) as brokered deposits; 280 or approximately 52.8 percent, held less than 1% of their total deposits as brokered deposits.⁶⁴ (See Chart 6.)

CHART 6
Brokered Deposits at 530 Failed Institutions, 2007–2017

Brokered deposits as % of total deposits	Number failed institutions w/DTC-titled brokered CDs	% of Institutions	Number failed institutions w/non-DTC titled brokered deposits ⁶⁵	% of institutions	Number failed institutions w/internet deposits
90–100	1	0.19	0	0.00	1
80–89	2	0.38	0	0.00	1
70–79	3	0.57	0	0.00	2
60–69	0	0.00	0	0.00	8
50–59	6	1.13	1	0.19	8
40–49	8	1.51	1	0.19	16
30–39	17	3.21	0	0.00	31
20–29	30	5.66	3	0.57	46
10–19	53	10.00	20	3.77	57
5–9	56	10.57	33	6.23	47
1–4	74	13.96	77	14.53	55
0–1	8	1.51	184	34.72	27
0	272	51.32	211	39.81	231

⁶⁴ The largest concentrations of brokered deposits can be characterized as 3 types of deposits: 1) Master Certificates of Deposits; 2) sweep deposits that are viewed as brokered; and 3) reciprocal deposits. Listing service deposits are also discussed below, but typically, are not reported as brokered. Master Certificates of Deposits are held on the books of the issuing bank in the name of a

subsidiary of Depository Trust Corporation (DTC) as custodian for deposit brokers who are often broker dealers. These broker dealers, in turn, issue retail CDs, typically in denominations of \$1,000, under the Master Certificate of Deposit to their retail clients.

⁶⁵ Banks that used reciprocal deposits are not included in Non-DTC CD Brokered Deposits unless

they also held other non-DTC CD brokered deposits. While all reciprocal deposits were brokered deposits between 2007 and 2017, since May 24, 2018, a significant portion of reciprocal deposits are excepted from brokered deposits.

Reciprocal Deposits

A reciprocal deposit is an arrangement based upon a network of banks that place funds at other participating banks in order for depositors to receive insurance coverage for the entire amount of their deposits. In these arrangements, institutions within the network are both sending and receiving identical amounts of deposits simultaneously. As a result of this arrangement, the institutions themselves (along with the network sponsors) are “in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions,” and the

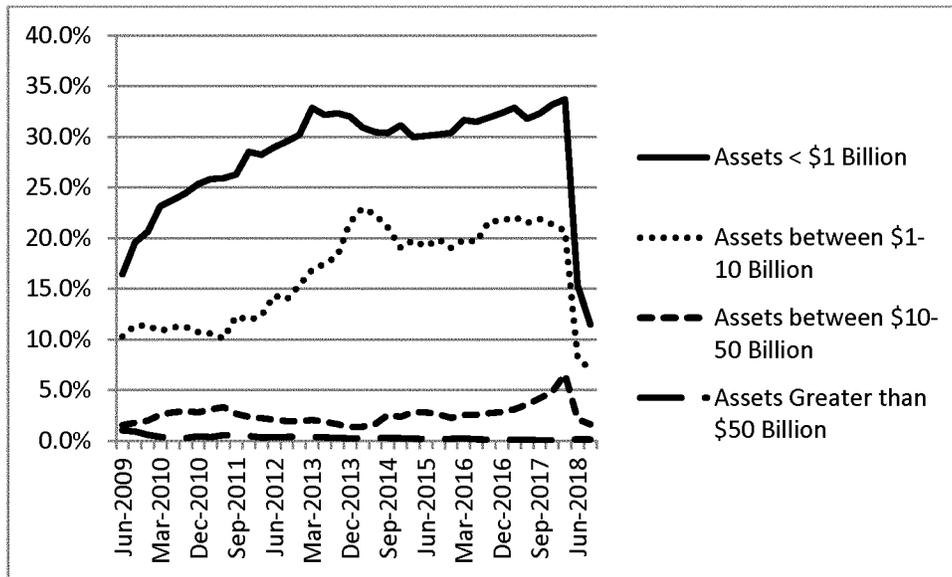
involvement of deposit brokers within the reciprocal network means the deposits are brokered deposits. Since banks first reported reciprocal deposits on the Call Report in June 2009, reciprocal deposits as a share of total brokered deposits increased greatly, primarily among small banks. For banks with assets less than \$1 billion, reciprocal deposits as a percent of total brokered deposits rose from 16.4 percent on June 30, 2009, to a peak of 33.7 percent on March 31, 2018.

The Economic Growth, Regulatory Reform, and Consumer Protection Act, enacted on May 24, 2018, allows certain banks to except a limited amount of reciprocal deposits from brokered

deposits. The immediate result of this Act has been to dramatically reduce the percent of reciprocal deposits that are classified as brokered deposits. For example, for banks with assets less than \$1 billion, reciprocal deposits as a share of brokered deposits declined from 33.7 percent on March 31, 2018, to 11.5 percent on September 30, 2018. (See Chart 7.)

For the largest banks, those with assets greater than \$50 billion, reciprocal deposits as a share of total brokered deposits has remained relatively low, accounting for 0.1 percent of total brokered deposits as of June 30, 2018.

Chart 7
Reciprocal Brokered Deposits as a Share of Total Brokered Deposits, 2nd Qtr 2009- 3rd Qtr 2018



Listing Services

A “listing service” is a company that compiles information about the interest rates offered by banks on deposit products, especially CDs. A particular company can be a “listing service” (compiling information about deposits) as well as a “deposit broker” (facilitating the placement of deposits). In recognition of this possibility, the FDIC has set forth specific criteria to

determine when a listing service qualifies as a deposit broker.⁶⁶

The FDIC began collecting data on non-brokered, or “passive,” listing service deposits in the first quarter of 2011. As of September 30, 2018, a total of 1,369 banks reported a positive balance for non-brokered listing service deposits. In aggregate, these banks held approximately \$69.6 billion in listing service deposits, which represented 0.6

percent of total domestic deposits. (See Chart 8.)

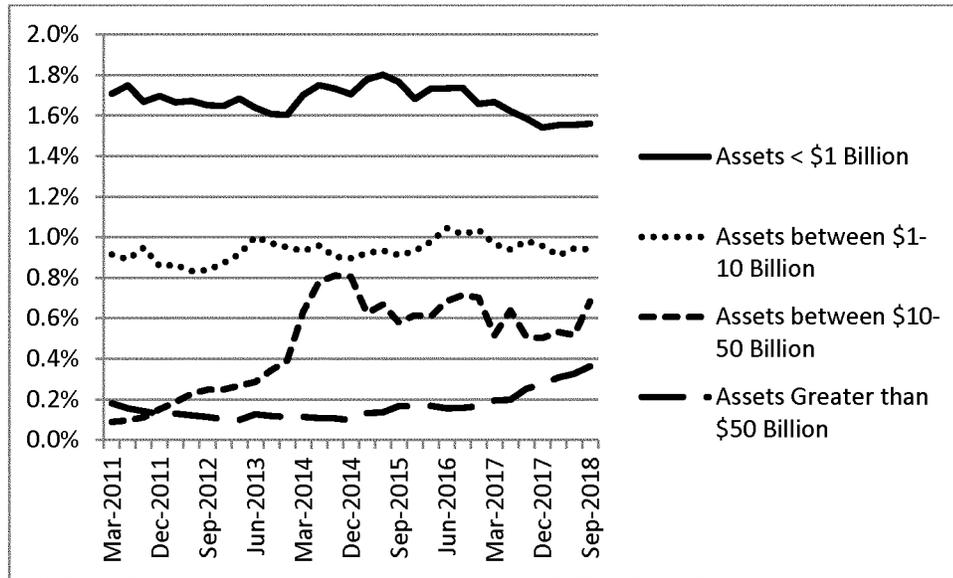
Listing service deposits made up a higher share of domestic deposits at smaller banks. On average from 2011 to the third quarter of 2018, non-brokered listing service deposits represented 1.3 percent of domestic deposits at banks with less than \$10 billion in total assets, compared to 0.9 percent of domestic deposits at banks with \$10 billion to \$50 billion in total assets. (See Chart 8.)

⁶⁶For the specific criteria to determine when a listing service qualifies as a deposit broker see Advisory Opinion No. 90–24 (June 12, 1990). Advisory Opinion No. 92–50 (July 24, 1992). The criteria were subsequently updated in Advisory

Opinion No. 02–04 (November 13, 2002) and Advisory Opinion No. 04–04 (July 28, 2004). Assuming these criteria are satisfied, the FDIC takes the position that a company is not “facilitating the placement of deposits,” and is therefore not a

deposit broker, even if the company provides a platform for the execution of trades. Consequently, the deposits themselves are not classified as brokered deposits.

Chart 8
Listing Service Deposits as a Share of Total Domestic Deposits, 1st Qtr 2011- 3rd Qtr 2018

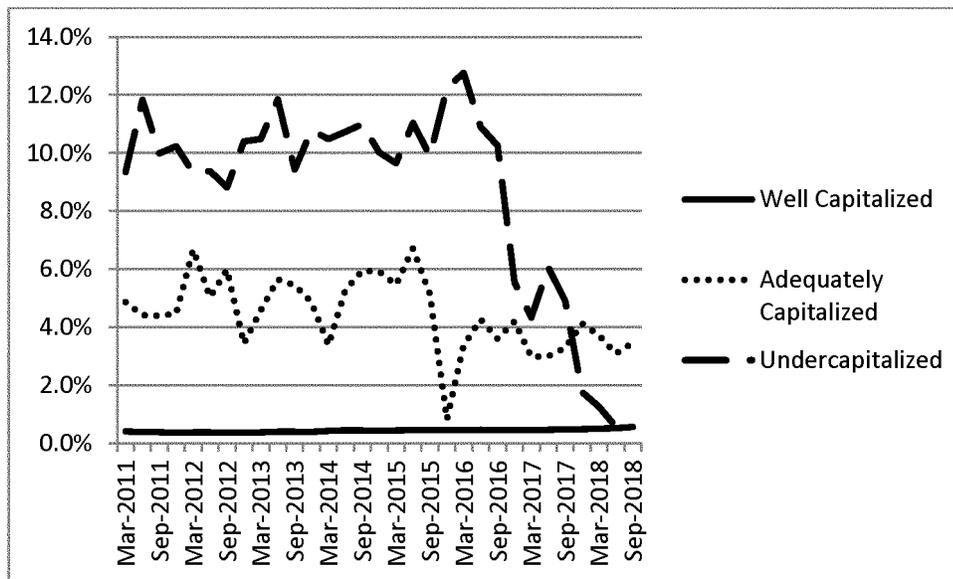


Banks that are less than well capitalized are subject to restrictions on accepting, renewing, or rolling over

brokered deposits, and historically some of these banks have turned to listing

service deposits as an alternate source of funding. (See Chart 9.)

Chart 9
Listing Service Deposits as a Share of Domestic Deposits by PCA Capitalization Category, 1st Qtr 2011 – 2nd Qtr 2018



Listing service deposits, however, may only provide funding to less than well capitalized banks to the extent that such a bank can offer rates high enough to attract deposits. A low interest rate

environment, such as the one during and after the financial crisis, enabled less than well-capitalized banks to list high rate deposits and attracts funding. As interest rates have been rising in

recent years, these banks are less likely to be able to use listing service deposits as an alternate source of funding to brokered deposits. From 2010 through most of 2015, rates were low enough

that weekly average rates on 1-year CDs fell below the FDIC rate cap. Thus, for most banks during that time, the FDIC rate cap was not a binding constraint in attracting funding and banks were more likely to be able to offer high rates via listing services to attract deposits. Since 2016, average market rates have exceeded the FDIC rate cap.

Appendix 2

Statistical Analysis

The analysis summarized in this appendix uses data from FDIC's Failure Transaction Database, Call Reports/TFRs, and supervisory CAMELS ratings.

Failure Probability Models

The sample used for analysis includes banks and thrifts that failed between 1988 and 2017. These banks were insured by the Bank Insurance Fund (BIF), Savings Association Insurance Fund (SAIF), and DIF. The data exclude thrifts resolved by FSLIC or the Resolution Trust Corporation (RTC). It is well documented that FHLBB supervised thrifts (insured by FSLIC) received regulatory forbearance and were allowed to operate with lower net worth and were closed under procedures that differ significantly from the 1991 FDICIA prompt corrective action rules that apply over much of the sample period. Moreover, the analysis excludes any bank or thrift that received open bank assistance. The sample includes 1,403 failures which consist of 1,267 bank failures between 1988 and 2017 and 136 thrift failures between 1989 and 2017.⁶⁷ In the remaining sections, "banks" is used to refer to both banks and thrifts.

The failure prediction models have a three-year failure prediction horizon. The models use bank data at year-end to predict the probability of the bank failing in the next three years. The models use year-end Call Reports from 1987 to 2014 to predict bank failures from 1988 to 2017.⁶⁸ The models are estimated as a pooled time-series cross section. The standard errors are clustered at the bank level.

Bank failures are modeled as a function of banks' income statement and balance sheet information, supervisory composite CAMELS ratings, and time fixed effects to capture differences in

economy-wide unconditional average bank default rates. The model uses the total equity-to-assets ratio rather than the Tier 1 capital ratio because the Tier 1 capital ratio was not used in the 1980s. Core deposits are defined as: total domestic deposits net of large time deposits⁶⁹ and fully insured brokered deposits.

A bank's nonperforming loans and other real estate owned are used to measure a bank's asset quality. Nonperforming loans are defined as a sum of loans past due 90+ days and non-accruing loans. We also include a bank's concentration in CRE, C&D, C&I, and consumer loans. A bank's asset growth rate measures percent change in bank's total assets from one year ago.

Bank earnings are measured as a ratio—income before taxes to assets. A bank's interest expense is also included as an explanatory variable. A bank's composite CAMELS ratings are represented as separate binary (0,1) variables to allow for non-linear ratings effects on the probability of default. "CAMELS 3" is a binary variable that indicates a bank's composite CAMELS rating is 3. "CAMELS 4 or 5" is a binary variable that indicates a bank's composite CAMELS rating is 4 or 5. All financial variables are normalized by total assets with the exception of CAMELS 3, CAMELS 4 or 5, and Asset Growth.

Time fixed effects are included to capture any difference in the unconditional probability of bank failure across years. The unconditional likelihood of a bank failing differs by period in part because macroeconomic conditions and regulation vary. In the probability of failure models, time fixed effect coefficients estimate the unconditional failure probability for 3-year periods.⁷⁰

Loss Rate Models

Failed bank loss rates are computed as a ratio of the most recent estimate of the failure expense and the bank's total assets as of the quarter before its failure. For the most part, the loss rates for recent bank failures are estimates and not final costs as a receivership process can take many years to conclude. The sample used for the analysis includes

banks that failed between April 13, 1984 and December 15, 2017.⁷¹ The banks in the sample were insured by the BIF, SAIF, and DIF. The analysis excludes any banks that received open bank assistance.

Failed bank loss rates are modeled as a function of the income and balance sheet characteristics of the failed bank. The model explains loss rates using a failed bank's equity, nonperforming loans, other real estate owned, core deposits, brokered deposits, income earned but not collected, and total loans to executives as explanatory variables. These variables are scaled by a bank's asset size. The model allows loss rates to differ for small (asset size \$500 million or less), medium (asset size between \$500 million to \$1 billion), and large (asset size \$1 billion and higher) banks. Call Report/TFR data are from the last quarter before the bank failure date.⁷²

Reciprocal Deposit Data

Banks began reporting their reciprocal brokered deposit funds separated from non-reciprocal brokered deposits beginning in June 2009. In analyzing the effects of reciprocal deposits, we use Call Reports/TFRs and CAMELS rating data from June 2009 through December 2017. The analysis examines reciprocal deposit data through December 2017. During this time period, all reciprocal deposits were considered brokered deposits. The Economic Growth, Regulatory Reform, and Consumer Protection Act, which was signed into law on May 24, 2018, allows certain banks to except a limited amount of reciprocal deposits from brokered deposits.

Listing Service Deposit Data

Banks began reporting deposits obtained through the use of deposit listing services that are not brokered deposits beginning in March 2011. In analyzing the effects of reciprocal deposits, we use Call Reports and CAMELS rating data from March 2011 through December 2017.

Estimation Results

Core Deposits and Bank Failure Probability

In this section, we examine the relationship between core deposits and bank failure probabilities. Core deposits provide a bank with a stable and

⁶⁷ Thrift institutions refer to those with institution classes of Stock and Mutual Savings Banks, Savings Banks and Savings and Loans, and State Stock Savings and Loans.

⁶⁸ We use non-overlapping three year intervals. For example, 1987 Call Report data is used to predict banks failures that occurring in 1988, 1989, and 1990; 1990 Call report data is used to predict bank failures in 1991, 1992, and 1993. This timing pattern is continued through the end of the sample.

⁶⁹ To reflect a change in insured deposits limit, large time deposits are time deposits over \$100,000 up to December 2009. Starting in March 2010, large time deposits refer to time deposits over \$250,000. Because the last year-end Call Reports data used is 2017, the core deposit variable reflects the prevailing definition through 2017.

⁷⁰ For example, when Call Report and CAMELS ratings data from December 1987 are used to predict failures in 1988, 1989, and 1990, the time fixed effect coefficient measures the unconditional probability of failure for 1988, 1989, and 1990.

⁷¹ The loss rate data for more recent bank failures is updated through 2017.

⁷² There are some banks in the sample that have not filed Call Reports or TFRs on the quarter prior to its failure. For those banks, we use Call Reports as of two quarters prior to failure.

relatively cost effective source of funds. Core deposits, moreover, are an important component of customer-bank relationships. Many core depositors have long-term financial relationships with a bank that involve deposits, lending, and other financial services that generate bank profits. A bank's core deposit base is a measure of the size of a bank's opportunity set for relationship lending. Academic studies as well as

FDIC resolutions experience suggest that core deposits are a significant source of bank franchise value.

Table 1 reports the results of a failure probability model that includes equity and the core deposits to assets ratio as predictive variables. The estimated coefficient on equity is negative, statistically significant, and very large in magnitude, suggesting that adequate equity buffers are among the most

important factors lowering a bank's risk of default. The coefficient estimate on core deposits is also negative and statistically significant. Controlling for bank equity, the core deposits ratio is negative and statistically significant, suggesting that banks with higher core deposits have lower failure probability.⁷³

TABLE 1—CORE DEPOSITS AND BANK FAILURE PROBABILITIES

Variable	Coefficient estimates
Intercept	*** - 2.331 [0.000]
Equity	*** - 0.284 [0.000]
Core deposits	*** - 0.027 [0.000]
Nonperforming loans	*** 0.132 [0.000]
Other real estate owned	*** 0.124 [0.000]
Income before taxes	*** - 0.145 [0.000]
Interest expense	*** 0.172 [0.000]
CAMELS rating 3	*** 0.867 [0.000]
CAMELS rating 4 or 5	*** 1.687 [0.000]
Asset growth	*** 0.012 [0.000]
CRE loans	*** 0.019 [0.000]
C&D loans	*** 0.061 [0.000]
C&I loans	*** 0.024 [0.000]
Consumer loans	*** 0.013 [0.000]
Pseudo R2	0.515
Wald Chi2	*** 3,224
N	98,237

Notes:

¹ Uses December Call Report data from 1987, 1990, 1993, 1996, 1999, 2002, 2005, 2008, 2011, and 2014 to predict failures from 1988–2017.

² Core deposits are defined as domestic deposits minus time deposits over the insurance limit and fully insured brokered deposits.

³ All financial variables are normalized by total assets with the exception of CAMELS rating 3, CAMELS rating 4 or 5, and Asset Growth. CAMELS rating 3 and CAMELS rating 4 or 5 are dummy variables indicating that the institution is CAMELS 3-rated and the institution is CAMELS 4 or 5-rated, respectively. Asset Growth is the institution's one-year asset growth rate.

⁴ Year fixed effects are included but not reported.

⁵ Standard errors are clustered by bank.

*** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

Brokered Deposits and the Probability of Bank Failure

In this section, we examine the relationship between brokered deposits and bank failure probability and loss rates to the insurance fund. To summarize the results in this section, we find that brokered deposit use is associated with higher probability of

bank failure and higher insurance fund loss rates. Brokered deposits may elevate a bank's risk profile in part because brokered deposits are frequently used as a substitute for bank core deposits and, less frequently, for equity, and so from the FDIC's perspective, banks that use brokered deposits operate with a higher risk

liability structure relative to banks that do not use brokered deposits.

Bank failure probability model estimates are reported in Table 2. Column (1) of Table 2 reports that brokered deposits have a positive, statistically significant effect on a bank's estimated probability of failure over a three-year horizon. In this logistic regression specification, the income

⁷³ The regression includes time fixed effects, but the coefficient estimates are not reported in Table 1.

before tax ratio is negatively correlated with bank failures, implying that banks with higher earnings ratios are less likely to fail. Banks with higher nonperforming loan and other real estate owned ratios are more likely to fail. All of these effects are statistically significant at the 1 percent level. There is a positive and statistically significant relationship between lagged asset growth rate and bank failures. The estimated coefficient for the growth rate is positive and statistically significant suggesting that, other things equal, banks experiencing rapid growth are more likely to fail within the next 3 years. Estimates also suggest that CRE, C&D, C&I, and consumer loan concentrations increase failure probability estimates. Banks with a composite CAMELS rating of 3 and those with a rating of 4 or 5, are more likely to fail compared to CAMELS 1 or 2 rated banks. This model specification shows a statistically significant relationship between interest expense and bank failures. The model also includes time fixed effects, but these estimates are not reported.⁷⁴

In the estimates reported in Table 2, Column (1), brokered deposits are the only funding variable included in the regression (equity and core deposits are excluded from the regression). In this specification, brokered deposits are clearly associated with an increase in bank failure probability, but the reason for the increase is unclear. When a bank increases its brokered deposit-to-asset ratio, there must be an offsetting change in at least one of the bank's other funding sources. That is, the bank must change its equity-to-asset ratio, its core deposit-to-asset ratio, or its other non-core deposits and other liabilities to asset ratio to offset the increase in its brokered deposit ratio. This implicit shift in a bank's liability structure is one possible source of the increase in bank fragility that is identified by the positive

coefficient on brokered deposits reported in Column (1). For example, if the bank's equity-to-asset ratio declines to offset an increase in a bank's brokered deposit ratio, then the bank is using brokered deposits to increase its leverage which would increase its probability of failure. We investigate these potential capital structure effects on bank failure probability using a series of regressions reported in Columns (2) and (3) of Table 2.

To control for bank leverage, we include a bank's equity-to-asset ratio in the failure model. The results are reported in Table 2, Column (2). By controlling for the equity ratio, the estimated coefficient on brokered deposits measures the effect of increasing a bank's reliance on brokered deposits and decreasing its reliance on other liabilities (such as core deposits, federal funds purchased, and FHLB advances), holding a bank's equity-to-asset ratio unchanged. The negative and statistically significant coefficient estimate on the equity ratio implies that greater equity lowers a bank's probability of default. The positive and statistically significant coefficient on the brokered deposits ratio (unchanged from previous) suggests that, holding bank leverage constant, a higher brokered deposits ratio (with decreased reliance on other funding sources) unambiguously increases the probability that a bank will fail in the subsequent three years. These results show that the use of brokered deposits increases a bank's failure probability even when they are not used as a substitute for bank equity.

Controlling for a bank's leverage ratio, the use of brokered deposits raises the estimated probability of bank failure. Why? As we have demonstrated in the prior section, core deposits are an important category of bank liabilities. Core deposits are associated with a lower probability of bank failure. Other

things held constant, should a bank with a large core deposit franchise become distressed, long-standing FDIC resolution experience suggests that it is much more likely to be recapitalized through a purchase or a merger and not through an FDIC resolution. Thus, one possible avenue through which failure probability might be affected by the use of brokered deposits is if brokered deposits are used as a substitute for core deposit funding.

In Table 2, Column (3), we estimate the effects of brokered deposits on the probability of bank failure holding constant a bank's core deposit ratio. In this specification, core deposits are negative and statistically significant whereas brokered deposits are positive and statistically significant. The interpretation is that, holding constant the asset risk characteristics of a bank, provided a bank's share of funding from core deposits remains unchanged, on average, the use of brokered deposits increases a bank's probability of failure.

In Table 2, Column (4), we include three bank funding categories as controls: brokered deposits, equity, and core deposits. The coefficients of equity and core deposits are both negative and statistically significant, indicating that higher equity and core deposit funding shares both reduce the probability of bank failure. In this specification, the estimated coefficient on the brokered deposits ratio measures the effect of increasing brokered deposits, holding constant equity and core deposits, and reducing reliance on other bank liabilities. The estimated coefficient on brokered deposits is not statistically significant. These results suggest that brokered deposits can be substituted for other bank liabilities without any statistically measureable effect on a bank's failure probability, provided that a bank's share of equity and core deposit funding and its asset risk characteristics remain unchanged.

TABLE 2—BROKERED DEPOSITS AND FAILURE PROBABILITY OVER A THREE-YEAR HORIZON

Variable	Coefficient estimates (1)	Coefficient estimates (2)	Coefficient estimates (3)	Coefficient estimates (4)
Intercept	*** -6.447 [0.000]	*** -4.674 [0.000]	*** -5.119 [0.000]	*** -2.312 [0.000]
Brokered deposits	*** 0.026 [0.000]	*** 0.022 [0.000]	*** 0.013 [0.014]	-0.001 [0.790]
Equity .....	.....	*** -0.273 [0.000]	.....	*** -0.284 [0.000]
Core deposits .....	.....	.....	*** -0.016	*** -0.027

⁷⁴ The omitted period, the period without an estimate of time fixed effect, is 1988–1990 and so time fixed effects estimates the unconditional probability of a 3 year period relative to the unconditional probability for 1988–1990. The time

fixed effect coefficients estimates are negative and statistically significant indicating that the unconditional probability of failure was lower in the periods 1991–1993, 1994–1996, 1997–1999, 2000–2002, 2003–2005, 2006–2008, 2012–2014 and

2015–2017 (relative to 1988–1990). The time fixed effect coefficient for 2009–2011 is negative but statistically insignificant indicating no average default rate difference relative to 1988–1990.

TABLE 2—BROKERED DEPOSITS AND FAILURE PROBABILITY OVER A THREE-YEAR HORIZON—Continued

Variable	Coefficient estimates (1)	Coefficient estimates (2)	Coefficient estimates (3)	Coefficient estimates (4)
Nonperforming loans	*** 0.164 [0.000]	*** 0.138 [0.000]	[0.000] *** 0.164 [0.000]	[0.000] *** 0.132 [0.000]
Other real estate owned	*** 0.142 [0.000]	*** 0.117 [0.000]	*** 0.147 [0.000]	*** 0.124 [0.000]
Income before taxes	*** -0.148 [0.000]	*** -0.149 [0.000]	*** -0.140 [0.000]	*** -0.145 [0.000]
Interest expense	*** 0.114 [0.000]	*** 0.199 [0.000]	*** 0.097 [0.000]	*** 0.172 [0.000]
CAMELS rating 3	*** 0.992 [0.000]	*** 0.862 [0.000]	*** 1.002 [0.000]	*** 0.867 [0.000]
CAMELS rating 4 or 5	*** 2.280 [0.000]	*** 1.596 [0.000]	*** 2.347 [0.000]	*** 1.688 [0.000]
Asset growth	*** 0.009 [0.000]	*** 0.014 [0.000]	*** 0.007 [0.000]	*** 0.012 [0.000]
CRE loans	*** 0.022 [0.000]	*** 0.020 [0.000]	*** 0.021 [0.000]	*** 0.019 [0.000]
C&D loans	*** 0.065 [0.000]	*** 0.066 [0.000]	*** 0.062 [0.000]	*** 0.061 [0.000]
C&I loans	*** 0.031 [0.000]	*** 0.030 [0.000]	*** 0.028 [0.000]	*** 0.024 [0.000]
Consumer loans	*** 0.021 [0.000]	*** 0.015 [0.000]	*** 0.018 [0.000]	*** 0.013 [0.000]
Pseudo R ²	0.471	0.509	0.473	0.515
Wald Chi2	*** 3,678	*** 3,193	*** 3,763	*** 3,228
No. of observations	98,237	98,237	98,237	98,237

Notes:

¹ Uses December Call Report data from 1987, 1990, 1993, 1996, 1999, 2002, 2005, 2008, 2011, and 2014 to predict failures from 1988–2017.

² Core deposits is defined as domestic deposits minus time deposits over the insurance limit and fully insured brokered deposits.

³ All financial variables are normalized by total assets with the exception of CAMELS rating 3, CAMELS rating 4 or 5, and Asset Growth. CAMELS rating 3 and CAMELS rating 4 or 5 are dummy variables indicating that the institution is CAMELS 3-rated and the institution is CAMELS 4 or 5-rated, respectively. Asset Growth is the institution's one-year asset growth rate.

⁴ Year fixed effects are included but not reported.

⁵ Standard errors are clustered by bank.

*** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

To summarize, these series of regression model estimates show that the use of brokered deposits is associated with a higher probability of bank failure. The higher probability owes to a core deposit or equity effect: When banks substitute brokered deposits for core deposits or equity, this can increase their probability of failure. It is also possible that the use of brokered deposits is a general indicator of a higher risk appetite on the part of bank management which, may be reflected in the riskiness of the assets that a bank purchases. We turn to this issue in the next section.

Brokered Deposits and Bank Asset Growth and Quality

To determine whether the use of brokered deposits may also be a general indicator of a higher risk appetite on the part of bank management, as reflected in the bank's asset growth or nonperforming loans, the FDIC examined the relationship between brokered deposits and asset growth, and

between brokered deposits and nonperforming loans.

To assess whether the use of brokered deposits helps to explain the variation in observed bank growth rates, we estimate alternative models in which a bank's 3-year growth rate is in part determined by its 3-year average use of brokered deposits. Overall, the regression analysis suggests that banks using brokered deposits often exhibit higher 3-year growth rates compared to banks that do not use brokered deposits. This positive relationship is likely to be the result of a complex series of choices made by bank management that drive both a bank's growth rate and its use of brokered deposits. The underlying structural choice models are undoubtedly much more complex than the models estimated in this analysis. For example, we would expect that aggregate and local market lending conditions, interest rates and employment all to be factors included in the simultaneous determination of a bank's growth rate and brokered deposit usage.

To analyze the relationship between brokered deposits and asset quality, we estimated various models that explain the level of non-performing bank loans at the end of three years using macroeconomic controls and bank-specific measures of risk, including variables that measure their use of brokered deposit funding. Nonperforming loans are defined as a sum of loans past due 90+ days, non-accruing loans, and other real estate owned. Banks that are willing to undertake riskier funding structures may also be willing to invest in higher risk loan portfolios. If this is true, banks that fund themselves with brokered deposits would also tend to be banks with higher non-performing loans.

The results of the regression analysis include an estimated coefficient for the brokered deposits to assets ratio that is positive and statistically significant, implying that an increase in the brokered deposit ratio is associated with an increase in the nonperforming loans ratio three years into the future. In contrast, higher core deposits are

associated with more conservative lending practices. Banks with high reserves, liquid assets, and consumer loans tend to have a lower nonperforming loan-to-asset ratio three years later. In contrast, banks with high interest expenses, income before taxes, C&I loans, C&D loans, and CRE loans are more likely to have a higher nonperforming loan ratio three years later. An increase in bank size, on average, is associated with a lower nonperforming loan ratio.

The FDIC also tested an alternative definition of a nonperforming loans ratio (the sum of loans past due 90+ days and non-accruing loans), and the results are qualitatively similar to those in the initial regression analysis. Brokered deposits continue to be positively correlated with nonperforming loan ratios.

Loss Rate Models

In this section, we investigate whether banks' use of brokered deposit funding is associated with higher DIF loss rates when a bank fails. Banks with heavy reliance on brokered deposits may have a low franchise value because they lack a large core deposit customer base. In addition, banks that fund themselves with brokered deposits tend to have higher non-performing loans which may contribute to higher DIF losses.

Table 3 reports the results of the loss rate regression analysis. Column (1) of Table 3 suggests that higher nonperforming loans, other real estate owned, income earned but not collected, loans to executives to asset ratios are associated with higher loss rates. Banks with higher C&D, C&I, and consumer loans also tend to have higher loss rates. Medium-sized (asset size between \$500 million to \$1 billion) and large failed banks (asset size \$1 billion

and higher) tend to have lower loss rates compared to small banks (asset size \$500 million or less). The year fixed-effects (not reported) are added to capture any difference in unconditional loss rates across years. These fixed effects capture loss rate differences that may be driven by year-to-year differences in the strength of the economy or supervision and regulation.⁷⁵

In the failure loss rate model specification reported in Table 3, Column (1), only brokered deposits are included as a funding variable. The estimated coefficient for brokered deposits measures the effect of an increase in brokered deposits and an offsetting reduction in other funding sources on the loss rate. The positive and statistically significant coefficient on brokered deposits in Column (1) suggests that an increase in a bank's reliance on brokered deposits (and an offsetting decrease in other funds either equity or other liabilities) increases the DIF loss rate.

In Table 3 Column (2), the failed bank's equity ratio is also included as an explanatory variable. The positive and statistically significant coefficient on brokered deposits suggests that increasing reliance on brokered deposits, holding bank equity constant and reducing other liabilities (such as core deposits, fed funds purchased, FHLB advances), there is an increase in the DIF loss rate. The negative and statistically significant coefficient on the equity ratio suggests that increasing equity and decreasing a bank's reliance on other liabilities with no change in brokered deposits reduces the loss rate.

In Table 3, Column (3), the failed bank's core deposit ratio and brokered deposit ratio are included as explanatory variables. The positive and

statistically significant coefficient on brokered deposits suggests that, increasing reliance on brokered deposits, holding core deposits constant and reducing other liabilities (such as federal funds purchased, FHLB advances) and possibly equity, there is an increase in the DIF loss rate. The negative and statistically significant coefficient on the core deposit ratio suggests that increasing core deposits and decreasing a bank's reliance on other liabilities while holding brokered deposits constant reduces the DIF loss rate.

The model specification reported in Table 3, Column (4) includes brokered deposits, equity, and core deposits as funding measures. In this specification, the estimated coefficient on brokered deposits is negative and statistically insignificant suggesting that, other control variables held constant, when equity and core deposits are unchanged, increasing brokered deposits and decreasing other bank liabilities has no statistically measurable effect on loss rates. In contrast, replacing other liabilities with equity or core deposits with no change in brokered deposits decreases a bank's failure loss rate.

To summarize these results, we find that the use of brokered deposits results in higher loss rates to the DIF. These higher losses can be linked to two causes, a leverage effect and a core deposit effect. The leverage effect arises because brokered deposits are often used as a substitute for bank equity and so when brokered deposits are in use there is less capital to cushion the DIF's loss. The core deposit effect is the substitution of brokered for core deposits. This lowers bank franchise value which also increases the DIF loss rate.

TABLE 3—BANK FAILURE LOSS RATE MODELS

Variable	Coefficient estimates (1)	Coefficient estimates (2)	Coefficient estimates (3)	Coefficient estimates (4)
Intercept	*** 6.350 [0.000]	*** 9.324 [0.000]	*** 9.680 [0.000]	*** 17.465 [0.000]
Brokered deposits	*** 0.104 [0.000]	*** 0.082 [0.003]	* 0.063 [0.061]	- 0.015 [0.665]
Equity .....	.....	*** -0.470 [0.000]	.....	*** -0.550 [0.000]
Core deposits .....	.....	.....	** -0.044 [0.030]	*** -0.102 [0.000]
Nonperforming loans	*** 0.431 [0.000]	*** 0.327 [0.000]	*** 0.441 [0.000]	*** 0.333 [0.000]
Other real estate owned	*** 0.835	*** 0.738	*** 0.845	*** 0.746

⁷⁵ For example, legislative changes such as the cross guarantee provision in FIRREA of 1989 and the least cost resolution requirement in FDICIA of 1991. Unconditional loss rates of banks that failed

in 1998, 2007, 2008, and 2009 are higher compared to loss rates in 1984 (the base year) with statistical significance. Compared to loss rates in 1984, loss rates are substantially lower in 1985, 1990, 1991,

1992, 1993, 1994, 2000, and 2004 with statistical significance.

TABLE 3—BANK FAILURE LOSS RATE MODELS—Continued

Variable	Coefficient estimates (1)	Coefficient estimates (2)	Coefficient estimates (3)	Coefficient estimates (4)
Income earned but not collected	[0.000] *** 3.620	[0.000] *** 3.888	[0.000] *** 3.690	[0.000] *** 4.095
Loan to executive officers	[0.000] *** 0.334	[0.000] ** 0.302	[0.000] ** 0.323	[0.000] ** 0.272
Bank size between \$500 mil–\$1 bil	[0.008] *** –5.517	[0.015] *** –5.118	[0.010] *** –5.882	[0.027] *** –5.886
Bank size >\$1 billion	[0.000] *** –9.064	[0.000] *** –9.015	[0.000] *** –9.567	[0.000] *** –10.158
CRE loans	[0.000] –0.002	[0.000] –0.014	[0.000] –0.001	[0.000] –0.013
C&D loans	[0.940] *** 0.140	[0.650] *** 0.163	[0.974] *** 0.134	[0.674] *** 0.151
C&I loans	[0.001] *** 0.243	[0.000] *** 0.216	[0.001] *** 0.237	[0.000] *** 0.199
Consumer loans	[0.000] *** 0.128	[0.000] *** 0.117	[0.000] *** 0.125	[0.000] *** 0.108
Adjusted R^2	[0.000] 0.350	[0.000] 0.373	[0.000] 0.351	[0.000] 0.381
No. of observations	1,943	1,943	1,943	1,943

Notes:

¹ Estimates use data from 1984 to 2017 to predict failure loss rates in 1984 to 2017.

² Core deposits is defined as domestic deposits minus time deposits over the insurance limit and fully insured brokered deposits.

³ All financial variables are normalized by total assets with the exception of *Bank size between \$500 mil–\$1 bil* and *Bank size >\$1 billion*. *Bank size between \$500 mil–\$1 bil* is a dummy variable indicating that the institution's asset size is between \$500 million and \$1 billion. *Bank size >\$1 billion* is a dummy variable indicating that the institution's asset size is over \$1 billion.

⁴ The regressions include year fixed effects, but not reported.

*** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

Analysis of Reciprocal Deposits

In this section we use the available data to analyze reciprocal deposit use patterns and the effects of reciprocal deposits on the probability of bank failure and DIF loss rates. Banks began reporting reciprocal brokered deposit funds separately from non-reciprocal brokered deposits beginning June 2009. This analysis examines reciprocal deposit data through December 2017. During this time period, all reciprocal deposits were considered brokered deposits. The Economic Growth, Regulatory Reform, and Consumer Protection Act, which was signed into law on May 24, 2018, allows certain banks to except a limited amount of reciprocal deposits from brokered deposits.

The data show that while a minority of banks use reciprocal deposits, those that use this source of funding tend to raise a large percentage of their brokered deposits using reciprocal deposits. From June 2009 through December 2010, the use of reciprocal deposits became more widespread, but was still uncommon. Over this period, on average, the use of brokered deposits declined from December 2011, then increased starting in December 2015. The relative importance of reciprocal deposits as a component of brokered deposits increased from December 2011 to

December 2013 and has since fallen. Table 4 reports the distribution of different brokered deposit ratios by Call Report date.⁷⁶ The first panel of Table 4 reports the distribution of different brokered deposit ratios (total brokered, reciprocal brokered, and non-reciprocal brokered deposits to assets ratios) for December 2011. The median values for each of these ratios are zero; in December 2011, out of 7,366 banks, 3,015 banks had non-zero brokered deposits.

In December 2011, an average bank's reliance on brokered deposits (2.43%) was split between reciprocal brokered deposits (0.58%) and non-reciprocal brokered deposits (1.85%). Only a very small share of banks has a heavy reliance on reciprocal brokered deposits. The 99th percentile of the reciprocal brokered deposit ratio is 11.61% and the maximum observed ratio is 49.55%.

Rows (4) and (5) of Table 4 report the distributions of the ratios of reciprocal deposits and non-reciprocal brokered deposits to total brokered deposits for

⁷⁶ Banks report a total for brokered deposits and also report the amount of this total that are reciprocal deposits. We exclude observations when a bank reports a positive reciprocal brokered deposit value but reports a zero value for total brokered deposits. We also exclude from the sample banks that report higher values for reciprocal brokered deposits than for total brokered deposits.

banks that report positive brokered deposits. The median reciprocal to total brokered deposits ratio is 0.77. Among banks using brokered deposits, on average 31.44% of brokered deposits are reciprocal deposits. Fourteen percent of banks using brokered deposits use *only* reciprocal brokered deposits.

Rows (6) and (7) of Table 4 report the distributions of reciprocal deposits and non-reciprocal brokered deposits to total brokered deposits ratios for the sample of banks that report positive reciprocal brokered deposits. The data show that while reciprocal brokered deposits are not used widely among banks that rely on brokered deposits for funding, when they are used, they frequently are a bank's primary source of brokered funding.

Comparing data from December 2011 and December 2017, fewer banks are using brokered deposits, but among those banks that do, reliance on brokered deposits has been increasing. The mean total brokered deposits to assets ratio in December 2017 was 2.90% which increased from 2.43% in December 2011. The trend for banks' reliance on reciprocal deposits is less clear. In December 2011, 1,348 banks reported positive reciprocal deposit

⁷⁷ Only 1,348 banks reported positive reciprocal brokered deposits out of 3,015 banks that report positive brokered deposits.

balances. This number declined to 1,199 banks in December 2014, and has remained relatively stable, declining somewhat to 1,184 by December 2017.

The average usage of reciprocal deposits has increased; the mean reciprocal deposits to assets ratio was 0.80% in December 2017 compared to 0.58% in

December 2011. Generally, the share of brokered deposits funded by reciprocal versus non-reciprocal deposits has remained stable.

TABLE 4—DISTRIBUTION OF DIFFERENT BROKERED DEPOSITS RATIOS BY CALL REPORT DATE

	Ratios	N	Max	99th	95th	90th	Med	Mean
December 2011								
(1)	Total brokered/assets	7,366	90.83	27.28	12.15	7.30	0.00	2.43
(2)	Reciprocal brokered/assets	7,366	49.55	11.61	3.63	1.29	0.00	0.58
(3)	Non-reciprocal brokered/ assets.	7,366	90.83	25.47	9.82	5.40	0.00	1.85
(4)	Reciprocal brokered/total brokered.	3,015	100.00	100.00	100.00	100.00	0.00	31.44
(5)	Non-reciprocal brokered/ total brokered.	3,015	100.00	100.00	100.00	100.00	100.00	68.56
(6)	Reciprocal brokered/total brokered.	1,348	100.00	100.00	100.00	100.00	97.13	70.31
(7)	Non-reciprocal brokered/ total brokered.	1,348	99.99	99.70	96.67	90.91	2.87	29.69
December 2017								
(1)	Total brokered/assets	5,678	87.66	29.92	13.69	9.00	0.00	2.90
(2)	Reciprocal brokered/assets	5,678	41.37	13.09	5.52	2.25	0.00	0.80
(3)	Non-reciprocal brokered/ assets.	5,678	87.66	25.32	10.27	6.62	0.00	2.10
(4)	Reciprocal brokered/total brokered.	2,526	100.00	100.00	100.00	100.00	0.00	31.79
(5)	Non-reciprocal brokered/ total brokered.	2,526	100.00	100.00	100.00	100.00	100.00	68.21
(6)	Reciprocal brokered/total brokered.	1,184	100.00	100.00	100.00	100.00	86.76	67.81
(7)	Non-reciprocal brokered/ total brokered.	1,184	99.99	99.65	96.81	91.86	13.24	32.19

Reciprocal Deposit Usage at Failed Banks

In this section, we examine the extent to which failed banks relied on reciprocal brokered deposits. The analysis includes banks that failed between July 2009 and December 15, 2017. During this period, 458 banks failed.

Table 5 reports number (percentage in parenthesis) of failed banks that reported positive reciprocal deposits and non-reciprocal brokered deposits on their balance sheet prior to their failure.

In this table, data are analyzed according to the Call Report data reported a selected number of quarters before the bank failure date. Reciprocal deposits were first reported on Call Reports in June 2009. Hence, we are limited to 180 failures, which failed between April 2011 and December 2017, to have 8 quarters of Call Report data with reciprocal deposit information. In contrast, there are 458 failures, which failed between July 2009 to December 2017, with 1 quarter of Call Report data with reciprocal deposit information.

The data suggest a number of consistent patterns. Column (3) shows that somewhere between 60 and 70 percent of the failed banks used brokered deposits for at least six quarters before they failed. There is also evidence that suggests that some of these failed banks stop using brokered deposits in the quarter prior to their failure. Of these failed banks, roughly 20 percent used reciprocal deposits for up to seven quarters prior to their failure, but like brokered deposits, some also stopped using reciprocal deposit funding the quarter before they failed.⁷⁸

TABLE 5—BROKERED AND RECIPROCAL DEPOSITS USAGE IN FAILED BANKS

Number of quarters before failure	Number of observations	Number of banks with positive brokered deposits reported (%)	Number of banks with positive non-reciprocal brokered deposits reported (%)	Number of banks with positive reciprocal brokered deposits reported (%)
(1)	(2)	(3)	(4)	(5)
8	180	122 (67.78)	116 (64.44)	39 (21.67)
7	206	140 (67.96)	134 (65.05)	44 (21.36)
6	236	165 (69.92)	159 (67.37)	53 (22.46)
5	277	196 (70.76)	183 (66.06)	64 (23.10)

⁷⁸ We have not investigated why these banks stopped using reciprocal deposits.

TABLE 5—BROKERED AND RECIPROCAL DEPOSITS USAGE IN FAILED BANKS—Continued

Number of quarters before failure (1)	Number of observations (2)	Number of banks with positive brokered deposits reported (%) (3)	Number of banks with positive non-reciprocal brokered deposits reported (%) (4)	Number of banks with positive reciprocal brokered deposits reported (%) (5)
4	322	224 (69.57)	211 (65.53)	67 (20.81)
3	363	251 (69.15)	235 (64.74)	64 (17.63)
2	408	277 (67.89)	260 (63.73)	70 (17.16)
1	458	295 (64.41)	283 (61.79)	63 (13.76)

Notes:

¹ Based on 458 Failures between July 2, 2009 and December 15, 2017. All failures after June 2009 when the reciprocal deposits were first reported on the Call Reports.

Figure 1 graphs the failing banks' reciprocal deposits to assets ratio prior to failure. The median reciprocal deposits ratio at 5, 4, 3, 2, and 1 quarter(s) before failure is 0%. In other words, the median failed bank did not hold any reciprocal deposits up to 5 quarters prior to failure. The reciprocal deposit ratios at the 90th percentile of the distribution (the failed banks most reliant on reciprocal deposits) for the 5 quarters before failure decline from nearly 1.6% to just over 0.2% of

reciprocal deposit usage as banks approach failure.

Figure 2 graphs the failing banks' usage of non-reciprocal brokered deposits (as a percentage of assets) prior to failure. Figure 2 shows that the median bank usage of non-reciprocal brokered deposits also declines as the banks approach failure. In contrast, those banks most reliant on brokered deposits (the 90th percentile of the distribution), do not show any significant run off in non-reciprocal

brokered deposits as the banks approach failure.

Given the small sample size involved in this analysis, it is inappropriate to draw strong overall conclusions regarding the behavior of reciprocal deposits balances at failing banks. Moreover, since not all weak banks fail, the behavior of reciprocal deposit funding at weak banks (not analyzed in this memo) could also inform the regulatory debate about safety and soundness issues associated with reciprocal deposit usage.

Figure 1

Distribution of the Ratio of Reciprocal Brokered Deposits to Total Assets in Failed Banks in the Quarters prior to Bank Failure

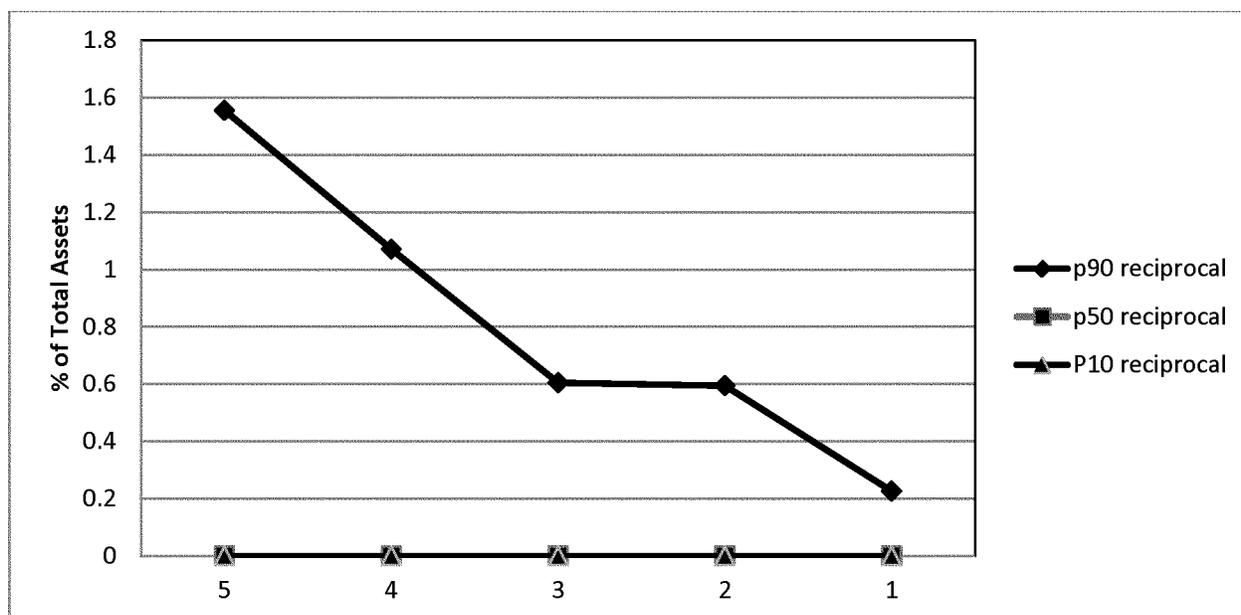
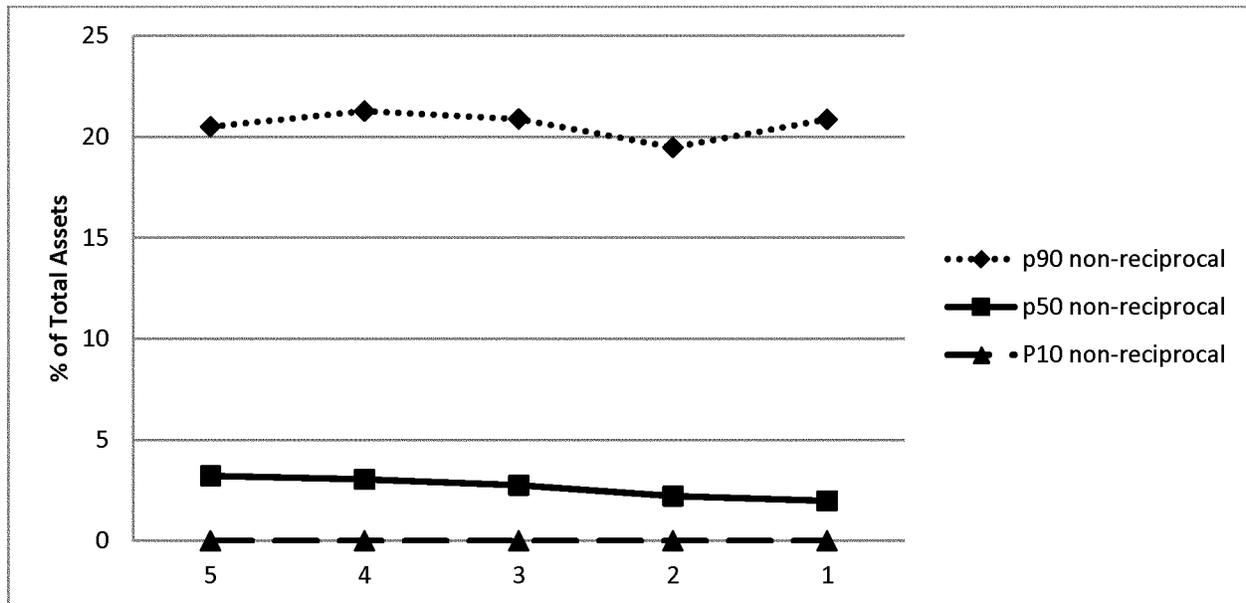


Figure 2
Distribution of the Ratio of Non-Reciprocal Brokered Deposits to Total Assets in Failed Banks in the Quarters Prior to Failure



Failure Prediction and Reciprocal Deposits

We estimate three-year failure prediction models using 2009, 2012, and 2015 data to predict failures from 2010 to 2017. We estimate failure models as a function of reciprocal and non-reciprocal brokered deposits. The results are reported in Table 6. Table 6 reports the estimated coefficients and p-values of the logistic regressions.

In the failure model specification reported in Column (1) of Table 6, two funding ratios, reciprocal deposits and non-reciprocal brokered deposits are included. Table 6 reports that the non-reciprocal brokered deposits ratio has a positive and statistically significant effect on a bank's estimated probability of failure.

Column (1) of Table 6 also shows that higher nonperforming loans and other real estate owned are positively and statistically significant variables in the bank failure probability model.

Because we measure the banks' liability components as ratios, as a bank increases its use of reciprocal deposits and non-reciprocal deposits, there are necessarily offsetting changes in the bank's other funding sources. By including other funding measures in the models, we investigate whether the implicit shift in a bank's liability structure (as a bank increases its dependence on reciprocal and non-reciprocal brokered deposits) is a

possible source of the increase in failure probability.

Column (2) of Table 6 reports the results of the failure probability model when we include a bank's equity to asset ratio to control for bank leverage. By including the equity ratio in the model, the coefficient estimates on reciprocal and non-reciprocal brokered deposits measure the effect of increasing a bank's reliance on these deposit sources and decreasing its reliance on other liabilities, holding the bank's equity ratio unchanged. Holding the bank equity ratio constant, the estimated coefficient on non-reciprocal brokered deposits ratio is positive with a p-value of 0.128. The estimated coefficient on reciprocal deposits ratio remains statistically insignificant.

Column (3) of Table 6 reports the failure model estimates when the model includes a bank's reciprocal deposits, non-reciprocal brokered deposits, and core deposits to assets ratios. In this specification, the estimated coefficient on the reciprocal deposits ratio measures the effect of increasing reciprocal deposits, holding constant non-reciprocal brokered deposits and core deposits and reducing other bank liabilities. The coefficient of the reciprocal deposits ratio remains statistically insignificant. The coefficient of non-reciprocal deposits is statistically significant when core deposits are held constant. The coefficient of the core deposits ratio on bank failure probability is statistically

insignificant. This result differs from the results in an earlier section as well as long standing FDIC experience where, on average, core deposits reduce the failure probability.

Column (4) of Table 6 reports the failure model estimates when the model includes a bank's reciprocal deposits, non-reciprocal brokered deposits, equity, and core deposits to assets ratios. In this specification, the estimated coefficient on the reciprocal deposits ratio measures the effect of increasing reciprocal deposits, holding constant non-reciprocal brokered deposits, equity, and core deposits and reducing other bank liabilities. The coefficient of reciprocal deposits remains statistically insignificant. The coefficient of non-reciprocal deposits is not statistically significant when the equity and core deposits ratios are both held constant.

The results suggest that, on average, failed banks that used reciprocal brokered deposits did not use them as a substitute for equity or core deposit funding. The regression results show that equity and core deposits both decrease a bank's probability of failure. If banks that used reciprocal deposits used them as a substitute for equity or core deposit funding, the reciprocal deposit coefficient in Column (1) would be positive and significant and mirror the coefficient for non-reciprocal deposits. The fact that the reciprocal deposit coefficient in Column (1) is insignificant is consistent with the

interpretation that banks that used reciprocal brokered deposits in this sample period did not use them to substitute for equity or core deposit

funding. At the same time, this analysis is based on a small sample limited to failures between 2010 and 2017. We believe it is inappropriate to place a

high degree of confidence in the results of the analysis based on this limited sample.

TABLE 6—THREE YEAR FAILURE PREDICTION MODELS FOR RECIPROCAL DEPOSITS

Variables	Coefficient estimates (1)	Coefficient estimates (2)	Coefficient estimates (3)	Coefficient estimates (4)
Intercept	*** -7.053 [0.000]	*** -2.995 [0.000]	* -9.289 [0.069]	-1.602 [0.137]
Non-reciprocal brokered deposits	*** 0.023 [0.001]	0.014 [0.128]	*** 0.033 [0.001]	-0.003 [0.836]
Reciprocal deposits	-0.015 [0.544]	-0.028 [0.349]	0.001 [0.978]	-0.040 [0.181]
Equity .....	.....	*** -0.508 [0.000]	.....	*** -0.520 [0.000]
Core deposits .....	.....	.....	0.019 [0.515]	** -0.019 [0.033]
Nonperforming loans	*** 0.190 [0.000]	*** 0.142 [0.000]	*** 0.184 [0.000]	*** 0.142 [0.000]
Other real estate owned	*** 0.086 [0.001]	0.040 [0.210]	** 0.075 [0.030]	0.042 [0.182]
Income before taxes	*** -0.090 [0.000]	** -0.097 [0.026]	*** -0.092 [0.000]	** -0.101 [0.028]
Interest expense	-0.018 [0.499]	*** 0.419 [0.000]	0.561 [0.746]	* 0.359 [0.078]
Asset growth	** 0.009 [0.037]	*** 0.021 [0.000]	0.014 [0.388]	*** 0.020 [0.000]
CRE loans	0.0002 [0.979]	0.0007 [0.929]	-0.0007 [0.923]	0.001 [0.890]
C&D loans	*** 0.035 [0.004]	*** 0.047 [0.001]	*** 0.034 [0.007]	*** 0.046 [0.001]
C&I loans	0.007 [0.534]	0.022 [0.111]	0.012 [0.589]	0.021 [0.121]
Consumer loans	-0.014 [0.484]	-0.030 [0.599]	-0.026 [0.506]	-0.025 [0.632]
CAMELS 3	*** 1.772 [0.000]	*** 1.498 [0.000]	*** 1.772 [0.000]	*** 1.501 [0.000]
CAMELS 4 or 5	*** 3.730 [0.000]	*** 2.101 [0.000]	*** 3.576 [0.000]	*** 2.087 [0.000]
Pseudo R2	0.543	0.633	0.545	0.634
Wald Chi2	867	733	838	744
No. of observations	21225	21225	21225	21225

Notes:

¹ Using year-end Call Reports from 2009, 2012, and 2015 to predict 363 failures from 2010 to 2017.

² Core deposits is defined as domestic deposits minus time deposits over the insurance limit and fully insured brokered deposits.

³ All financial variables are normalized by total assets with the exception of CAMELS rating 3, CAMELS rating 4 or 5, and Asset Growth. CAMELS rating 3 and CAMELS rating 4 or 5 are dummy variables indicating that the institution is CAMELS 3-rated and the institution is CAMELS 4 or 5-rated, respectively. Asset Growth is the institution's one-year asset growth rate.

⁴ The regressions include time fixed effects, but the coefficient estimates are not reported.

⁵ Standard errors are clustered by bank.

*** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

Failure Loss Rate Models Including Reciprocal Deposits

In this section, we examine whether banks' reliance on reciprocal brokered deposits are associated with differential failure loss rates. Again, data on reciprocal brokered deposits limits the sample to banks that failed between July 2009 and December 2017.⁷⁹

Failed bank loss rates are modeled as a function of the income and balance

⁷⁹ The Loss rate model is based on 457 failures instead of 458 as reported in Table 5. One institution was excluded from loss rate model estimation because of abnormality in its last Call

sheet characteristics of the failed bank. The explanatory variables included in the model are reciprocal deposits, non-reciprocal brokered deposits, equity, core deposits, nonperforming loans, other real estate owned, income earned but not collected, and loans to executive officers. In addition, we include a bank's concentration in CRE (commercial real estate), C&D (construction and development), C&I

Report data. Namely, its core deposits to assets ratio was higher than 100%.

⁸⁰ There are some banks in the sample that have not filed Call Reports/TFRs on the quarter prior to

(commercial and industrial), and consumer loans. The model allows loss rates to differ for small (asset size \$500 million or less), medium (asset size between \$500 million to \$1 billion), and large (asset size \$1 billion and higher) banks. The year fixed-effects are added to capture any difference in unconditional loss rates across years. Call Report/TFR data are from the last quarter before the bank failure date.⁸⁰

its failure. For those banks, we use Call Reports/TFRs as of two quarters prior to failure.

TABLE 7—LOSS RATE MODELS INCLUDING RECIPROCAL BROKERED DEPOSITS

Variable	Coefficient estimates (1)	Coefficient estimates (2)	Coefficient estimates (3)	Coefficient estimates (4)
Intercept	*** 11.754 [0.000]	*** 13.479 [0.000]	0.551 [0.890]	5.101 [0.220]
Non-reciprocal brokered deposits	* 0.092 [0.090]	* 0.095 [0.073]	*** 0.262 [0.000]	*** 0.218 [0.003]
Reciprocal deposits	-0.253 [0.448]	-0.230 [0.483]	-0.131 [0.694]	-0.145 [0.658]
Equity .....	.....	*** -0.738 [0.000]	.....	*** -0.623 [0.001]
Core deposits .....	.....	.....	*** 0.168 [0.001]	** 0.121 [0.016]
Nonperforming loans	*** 0.502 [0.000]	*** 0.415 [0.000]	*** 0.467 [0.000]	*** 0.404 [0.000]
Other real estate owned	*** 0.827 [0.000]	*** 0.783 [0.000]	*** 0.801 [0.000]	*** 0.771 [0.000]
Income earned but not collected	*** 6.453 [0.000]	*** 6.361 [0.000]	*** 6.276 [0.000]	*** 6.247 [0.000]
Loan to executive officers	0.041 [0.915]	-0.074 [0.844]	0.020 [0.958]	-0.071 [0.848]
Bank size between \$500 mil-\$1 bil	*** -6.063 [0.000]	*** -5.905 [0.000]	*** -5.526 [0.001]	*** -5.540 [0.001]
Bank size > \$1 billion	*** -8.686 [0.000]	*** -8.305 [0.000]	*** -7.151 [0.000]	*** -7.253 [0.000]
CRE loans	0.018 [0.695]	0.027 [0.549]	0.013 [0.780]	0.022 [0.628]
C&D loans	0.123 [0.103]	* 0.137 [0.065]	* 0.134 [0.073]	* 0.143 [0.053]
C&I loans	** 0.162 [0.043]	* 0.138 [0.079]	* 0.151 [0.056]	* 0.134 [0.087]
Consumer loans	** 0.705 [0.013]	*** 0.758 [0.007]	** 0.702 [0.012]	*** 0.747 [0.007]
Adjusted R ²	0.315	0.341	0.332	0.348
No. of observations	457	457	457	457

Notes:

¹ Estimates use data from 2009 to 2017 to predict 457 failure loss rates from July 2, 2009 to December 15, 2017.

² Core deposits are defined as domestic deposits minus time deposits over the insurance limit and fully insured brokered deposits.

³ All financial variables are normalized by total assets with the exception of *Bank size between \$500 mil-\$1 bil* and *Bank size > \$1 billion*. *Bank size between \$500 mil-\$1 bil* is a dummy variable indicating that the institution's asset size is between \$500 million and \$1 billion. *Bank size > \$1 billion* is a dummy variable indicating that the institution's asset size is over \$1 billion.

⁴ The regressions include year fixed effects, but not reported.

*** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

Table 7 reports the results of the failure loss rate model. Column (1) of Table 7 shows that higher nonperforming loans and other real estate owned are associated with higher loss rates. Banks with higher C&I and consumer loans (to assets ratios also tend to have higher loss rates. Medium-sized and large failed banks tend to have lower loss rates compared to small banks.

In the specification reported in Column (1), reciprocal deposits and non-reciprocal brokered deposits ratios are included. The estimated coefficients for reciprocal deposits and non-reciprocal brokered deposits ratios measure the effect of increases in these ratios and an offsetting reduction in other funding sources on the loss rate. The positive and statistically significant coefficient on non-reciprocal brokered deposits suggests that an increase in

non-reciprocal brokered deposits (and an offsetting decrease in other funds either equity or other liabilities) increases the DIF loss rate. The coefficient on reciprocal deposits ratio is not statistically significant.

Column (2) of Table 7 reports results when the failed bank's equity ratio is also included as an explanatory variable. The positive and statistically significant coefficient on non-reciprocal brokered deposits ratio suggests that increasing reliance on non-reciprocal brokered deposits, holding bank equity constant and reducing liabilities other than reciprocal deposits, increases the DIF loss rate. The estimated coefficient on reciprocal deposits ratio remains statistically insignificant. The negative and statistically significant coefficient on the equity ratio suggests that increasing equity and decreasing a bank's reliance on other liabilities with

no change in non-reciprocal brokered and reciprocal deposits reduces the loss rate.

Column (3) of Table 7 reports results when the reciprocal deposits, non-reciprocal brokered deposits, and core deposits ratios are included as funding measures. The estimated coefficient on non-reciprocal brokered deposits ratio is positive and statistically significant suggesting that, holding the reciprocal deposits and core deposits ratios constant, increasing non-reciprocal deposits and decreasing other bank liabilities and possibly equity, increases the failure loss rate. Reciprocal deposits are statistically insignificant.

Column (4) of Table 7 reports results when the reciprocal deposits, non-reciprocal brokered deposits, equity, and core deposits ratios are included as funding measures. The estimated coefficient on the non-reciprocal

brokered deposits ratio is positive and statistically significant, suggesting that, holding reciprocal deposits, equity, and core deposits ratios constant, increasing non-reciprocal deposits and decreasing other bank liabilities increases the failure loss rate.

The results reported in Table 7 do not suggest that the use of reciprocal deposits have been associated with higher loss rates on average while non-reciprocal brokered deposits clearly have a strong relationship with FDIC losses. At the same time, the sample size is small and specialized to the crisis. Unlike the full brokered deposit sample results (reported in an early section) and FDIC practical resolution experience, core deposits do not clearly reduce FDIC losses. While the reasons for this difference in findings are beyond the scope of this analysis, it is likely that they owe in part to the intensive FDIC resolution activity in this sample period with heavy reliance on loss sharing agreements. There were an unusually

large number of bank franchises available through the FDIC resolution process at a time when franchise values may also have been depressed due to unusually weak opportunities for profitable lending growth. These issues raise concerns that the limited data in reciprocal deposit sample may not be representative of the characteristics of the true failure population. On balance, we believe it is inappropriate to place a high degree of confidence in the results of the analysis of this limited and potentially unrepresentative sample period.

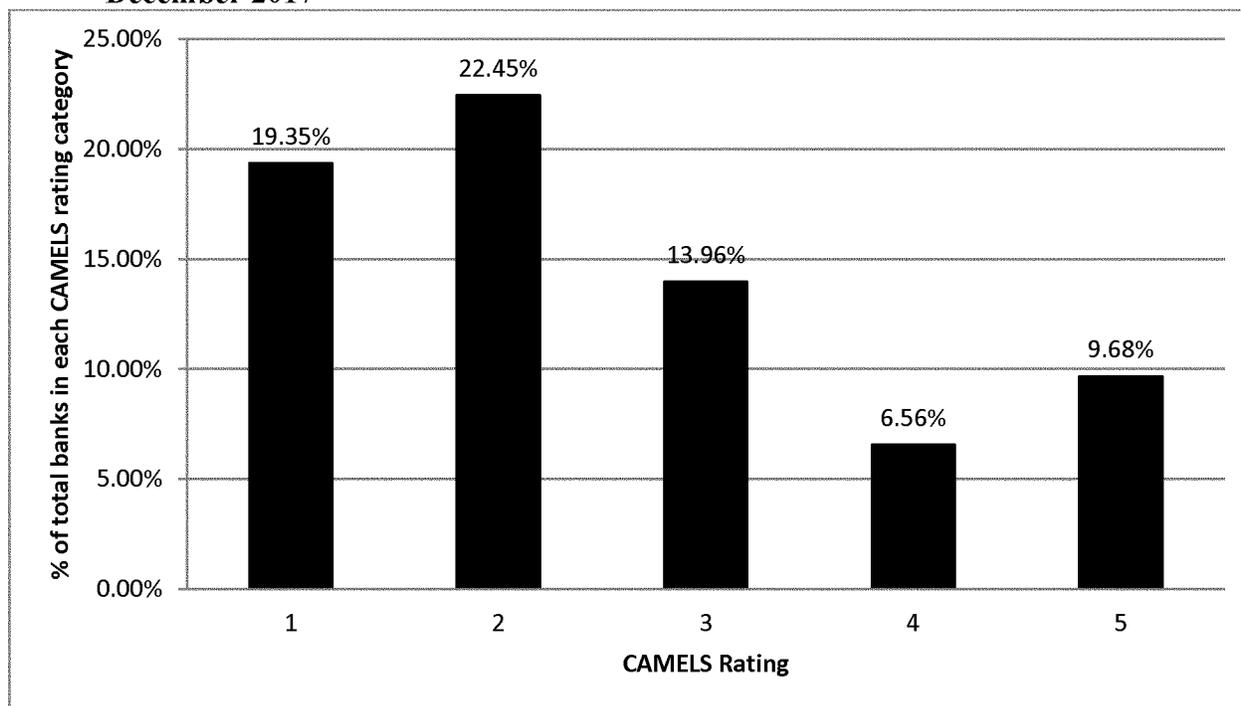
CAMELS Ratings of Banks Using Reciprocal Deposits

In this section, we investigate what type of banks use reciprocal deposits. In particular, we analyze the financial health of these banks by looking at their CAMELS ratings. We identify banks with positive reciprocal deposits on their balance sheet. We investigate the relationship between CAMELS ratings

and the use of reciprocal brokered deposits. During the crisis, in 2009 and 2010, banks with reciprocal deposits made up higher percentages of banks with a 3, 4, or 5 composite CAMELS rating. Banks with reciprocal deposits made up a smaller share of banks with a 1 CAMELS rating. By 2011, banks with reciprocal deposits made up higher percentages of banks with a 2 or 3 CAMELS rating, although the share banks with reciprocal deposits and a 4 or 5 CAMELS rating was still higher than the share with a 1 CAMELS rating. In 2017, banks with reciprocal deposits made up higher percentages of banks with a 1 or 2 CAMELS rating.

Figure 3 charts the percentages of banks with positive reciprocal deposits for each rating category as of December 2017. For instance, 19.35% of all banks with CAMELS rating of 1 had reciprocal deposits in December 2017. A substantially lower share, 6.56% of 4 rated banks and 9.68% of 5 rated banks had reciprocal deposits.

Figure 3
Percentage of Banks with Positive Reciprocal Deposits by CAMELS Rating, December 2017



Analysis of Listing Services Deposits

In this section we use the available data to analyze non-brokered listing service deposit use patterns and the effects of listing service deposits on the probability of bank failure and DIF loss rates. Banks began reporting non-

brokered listing service deposit funds beginning March 2011.

Table 8 reports the distribution of different listing service deposit ratios by Call Report date. The first panel of Table 8 reports the distribution of different listing service deposit ratios (total listing service deposits relative to total

assets, total domestic deposits, and total brokered deposits) for December 2011. Row (3) reports the distribution of the ratios of listing service deposits to total brokered deposits, among banks that reported non-zero brokered deposits.

Across the available Call Report filing dates, the average bank's reliance on

listing service deposits shows a stable trend. The mean total listing service to assets ratio in December 2017 was 1.18% which was similar to 1.36% in December 2011. In December 2017, the average listing service deposit to total brokered deposit ratio was much higher at 1197.21.

TABLE 8—DISTRIBUTION OF LISTING DEPOSITS AS A RATIO OF ASSETS AND DOMESTIC DEPOSITS BY CALL REPORT DATE

		N	Max	99th	95th	90th	Med	Mean
December 2011								
(1)	Listing services deposits/Assets	7366	85.89	23.18	9.57	3.56	0	1.36
(2)	Listing services deposits/Total Domestic Deposits.	7364	100.00	28.11	11.18	4.34	0	1.61
(3)	Listing services deposits/Total Brokered Deposits.	3015	86730	4089.05	514.81	173.12	0	239.09
December 2017								
(1)	Listing services deposits/Assets	5679	45.92	19.69	7.71	3.48	0	1.18
(2)	Listing services deposits/Total Domestic Deposits.	5678	97.71	25.43	9.66	4.35	0	1.49
(3)	Listing services deposits/Total Brokered Deposits.	2527	2550800	1627.28	281.10	122.34	0	1197.21

Listing Service Deposit Usage at Failed Banks

In this section, we examine the extent to which failed banks relied on non-brokered listing service deposits. Because of data limitations on listing service deposits, the analysis includes only banks that failed between April 8, 2011 and December 15, 2017. During this period, 180 banks failed.

Table 9 reports number (percentage in parenthesis) of failed banks that

reported positive listing service deposits on their balance sheet prior to their failure. In this table, data are analyzed according to the Call Report data reported a selected number of quarters before the bank failure date. Listing service deposits were first reported on Call Reports in March 2011. We are limited to 63 failures, which failed between January 2013 and December 2017, to have 8 quarters of Call Report data with listing service deposit information. In contrast, there are 180

failures, which failed between April 2011 to December 2017, with 1 quarter of Call Report data with listing service deposit information.

The data suggest a number of consistent patterns. Somewhere between 60 and 65 percent of the failed banks used listing service deposits for at least 8 quarters before they failed. There is also evidence that suggests that some of these failed banks increased use of listing service deposits in the quarters leading up to their failure.

TABLE 9—LISTING DEPOSITS USAGE IN FAILED BANKS BY QUARTER BEFORE FAILURE

Number of quarters before failure	Number of observations	Number of banks with positive listing deposits reported (%)
(1)	(2)	(3)
8	63	40 (63.49)
7	71	44 (61.97)
6	83	51 (61.45)
5	98	62 (63.27)
4	114	72 (63.16)
3	132	85 (64.39)
2	158	108 (68.35)
1	180	116 (64.44)

Notes:

¹Based on 180 failures between April 8, 2011 and December 15, 2017. All failures are after March 2011 when the listing services deposits were first reported on the Call Reports.

Figure 4 graphs the failing banks' listing service deposits to assets ratio prior to failure, based on 180 failures between April 8, 2011, and December 15, 2017. The median listing service deposits ratio increases from approximately 4% at 5 quarters before failure to just over 5% at 1 quarter before failure. The listing service deposit ratios at the 90th percentile of the distribution (the failed banks most reliant on listing service deposits) increased from about 26% at 5 quarters

before failure to 33% at 1 quarter before failure, which shows an increase of listing service deposit usage as banks approach failure.

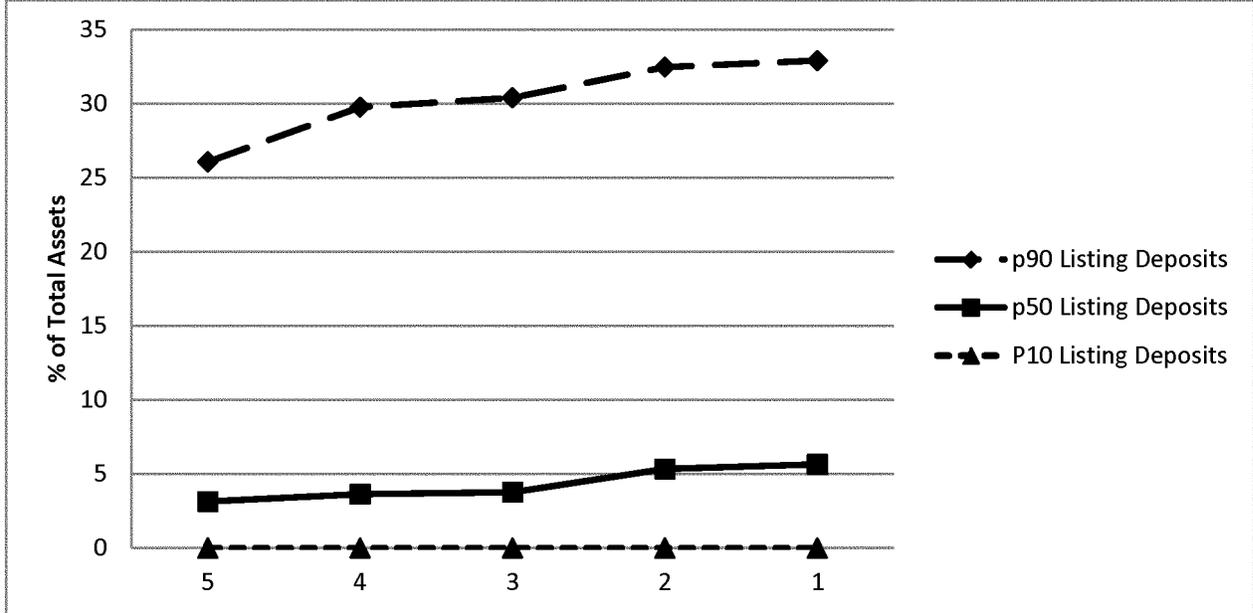
Figure 5 graphs the failing banks' usage of listing service deposits (as a percentage of assets) prior to failure, based on 63 failures between January 11, 2013 and December 15, 2017. This time frame incorporates banks that failed and had at least 8 quarters of data on listing service deposits. Figure 5 shows that the median bank usage of

listing service deposits remains relatively stable as the banks approach failure. In contrast, those banks most reliant on listing service deposits (the 90th percentile of the distribution), show an initial increase in listing service deposits as the banks approach failure.⁸¹

⁸¹Given the small sample size involved in this analysis, it is inappropriate to draw strong overall conclusions regarding the behavior of listing service deposits balances at failing banks. Moreover, since all weak banks do not fail, the behavior of listing

Figure 4

Distribution of Listing Services Deposits to Total Assets Ratio in the Quarters Prior to Failure



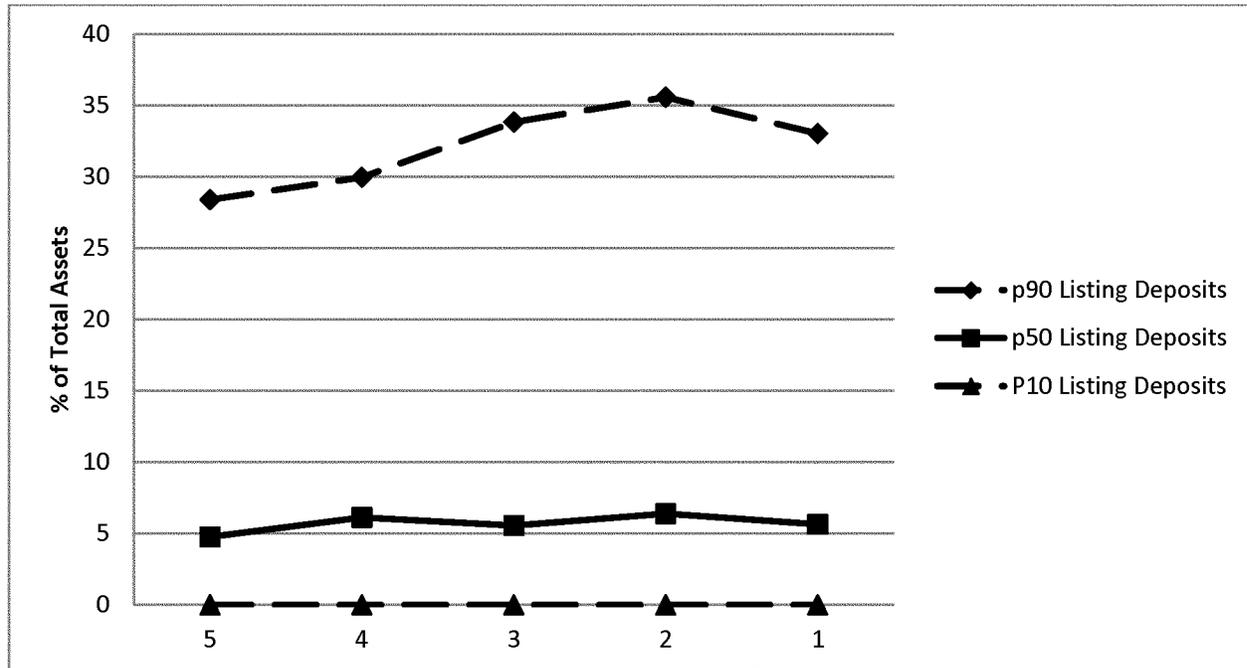
Notes:

¹Based on 180 failures between April 8, 2011 and December 15, 2017. All failures are after March 2011 when the listing services deposits were first reported on the Call Reports.

service deposit funding at weak banks (not analyzed in this memo) could also inform the regulatory debate about safety and soundness issues associated with listing service deposit usage.

Figure 5

Distribution of Listing Services Deposits to Total Assets Ratio in the Quarters Prior to Failure



Notes:

¹Based on 63 failures, between January 11, 2013 and December 15, 2017, with full 8 quarters of data on whether the banks had listing services deposits.

Failure Prediction and Listing Service Deposits

We estimate three-year failure prediction models using 2011 and 2014 data to predict failures between 2012 and 2017. We estimate failure models as a function of non-brokered listing service deposits and non-listing, non-brokered deposits. Table 10 reports the estimated coefficients and p-values of the logistic regressions.

In the failure model specification reported in Column (1) of Table 10, only the listing service deposits ratio is included to characterize a bank's liability structure. Column (1) of Table 10 reports that the listing service deposits ratio has a positive and statistically significant effect on a bank's estimated probability of failure.

Because we measure the banks' liability components as ratios, as a bank increases its use of listing service deposits, there are necessarily offsetting changes in the bank's other funding sources. By including other funding measures in the models, we investigate whether the implicit shift in a bank's liability structure (as a bank increases its dependence on listing service and

other non-listing, non-brokered deposits) is a possible source of the increase in failure probability.

Column (2) of Table 10 reports the results of the failure probability model when we include a bank's equity to asset ratio to control for bank leverage. By including the equity ratio in the model, the coefficient estimates on listing service deposits measure the effect of increasing a bank's reliance on this deposit source and decreasing its reliance on other liabilities, holding the bank's equity ratio unchanged. The estimated coefficient on the listing service deposits ratio becomes statistically insignificant when equity is held constant.

Column (3) of Table 10 reports the failure model estimates when the model includes a bank's listing service deposits and non-listing, non-brokered deposits. In this specification, the estimated coefficient on the listing deposits ratio measures the effect of increasing listing deposits, holding constant non-listing, non-brokered deposits and reducing other bank liabilities. The estimated coefficient on listing service deposits is positive and statistically significant. Moreover, the

estimated coefficient on non-listing, non-brokered deposits is positive and statistically significant. To the extent that non-listing, non-brokered deposits is a measure of banks' core deposits, this result differs from those reported in Tables 1 and 2 based on a dataset with longer bank failure experiences. Column (4) of Table 10 reports the failure model estimates when the model includes a bank's listing deposits, non-listing non-brokered deposits, and equity ratios. In this specification, the estimated coefficient on the listing deposits ratio measures the effect of increasing listing deposits, holding constant non-listing non-brokered deposits and equity, and reducing other bank liabilities. The coefficient of listing deposits becomes statistically insignificant. The coefficient of non-listing, non-brokered deposits is no longer statistically significant when the equity ratio is held constant.

This analysis is based on a small sample limited to failures between 2012 and 2017. We believe it is inappropriate to place a high degree of confidence in the results of the analysis based on this limited sample.

TABLE 10—THREE YEAR FAILURE PREDICTION MODELS INCLUDING LISTING SERVICES DEPOSITS

Variables	Coefficient estimates	Coefficient estimates	Coefficient estimates	Coefficient estimates
	(1)	(2)	(3)	(4)
Intercept	*** -8.068 [0.000]	*** -2.929 [0.000]	*** -15.281 [0.000]	** -4.416 [0.019]
Listing services deposits	** 0.021 [0.025]	0.013 [0.248]	*** 0.109 [0.000]	0.028 [0.215]
Equity		*** -0.537 [0.000]		*** -0.519 [0.000]
Non-listing, non-brokered deposits			*** 0.087 [0.000]	0.015 [0.456]
Nonperforming loans	*** 0.137 [0.000]	*** 0.124 [0.001]	*** 0.138 [0.000]	*** 0.125 [0.001]
Other real estate owned	*** 0.088 [0.002]	* 0.065 [0.064]	* 0.054 [0.066]	0.059 [0.101]
Income before taxes	*** -0.256 [0.002]	** -0.218 [0.008]	*** -0.310 [0.000]	*** -0.222 [0.006]
Interest expense	0.394 [0.146]	** 0.728 [0.024]	*** 0.668 [0.000]	*** 0.861 [0.001]
Asset growth	-0.005 [0.687]	0.002 [0.890]	-0.002 [0.858]	0.003 [0.835]
CRE loans	-0.011 [0.335]	-0.022 [0.104]	-0.019 [0.151]	-0.023 [0.102]
C&D loans	-0.009 [0.693]	-0.017 [0.548]	0.0001 [0.996]	-0.015 [0.584]
C&I loans	0.008 [0.734]	0.036 [0.164]	0.011 [0.649]	0.036 [0.165]
Consumer loans	0.007 [0.872]	-0.004 [0.959]	-0.018 [0.799]	-0.007 [0.929]
CAMELS 3	0.941 [0.274]	0.643 [0.382]	0.790 [0.313]	0.650 [0.373]
CAMELS 4 or 5	*** 3.656 [0.000]	*** 1.459 [0.008]	*** 3.170 [0.000]	*** 1.449 [0.009]
Pseudo R2	0.500	0.609	0.526	0.609
Wald Chi2	*** 259	*** 374	*** 287	*** 377
N	13,857	13,857	13,857	13,857

Notes:

- ¹ Using year-end Call Reports 2011 and 2014 to predict 113 failures between 2012 and 2017.
 - ² Listing services deposits are defined as estimated amount of deposits obtained through the use of deposit listing services that are not brokered.
 - ³ Non-listing, non-brokered deposits are defined as domestic deposits minus listing service deposits and brokered deposits.
 - ⁴ All financial variables are normalized by total assets with the exception of CAMELS rating 3, CAMELS rating 4 or 5, and Asset Growth. CAMELS rating 3 and CAMELS rating 4 or 5 are dummy variables indicating that the institution is CAMELS 3-rated and the institution is CAMELS 4 or 5-rated, respectively. Asset Growth is the institution's one-year asset growth rate.
 - ⁵ The regressions include time fixed effects, but the coefficient estimates are not reported.
 - ⁶ Standard errors are clustered by bank.
- *** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

Failure Loss Rate Models Including Listing Service Deposits

In this section, we examine whether banks' reliance on listing service deposits are associated with differential failure loss rates. Data on listing deposits limits the sample to banks that failed between April 8, 2011, and December 15, 2017.

Failed bank loss rates are modeled as a function of the income and balance

sheet characteristics of the failed bank. The explanatory variables included in the model are listing service deposits, non-listing, non-brokered deposits, equity, nonperforming loans, other real estate owned, income earned but not collected, and loans to executive officers. In addition, we include a bank's concentration in CRE (commercial real estate), C&D (construction and development), C&I

(commercial and industrial), and consumer loans. The model allows loss rates to differ for small (asset size \$500 million or less), medium (asset size between \$500 million to \$1 billion), and large (asset size \$1 billion and higher) banks. The year fixed-effects are added to capture any difference in unconditional loss rates across years. Call Report/TFR data are from the last quarter before the bank failure date.

TABLE 11—LOSS RATE MODELS INCLUDING LISTING DEPOSITS

Variable	Coefficient estimate	Coefficient estimate	Coefficient estimate	Coefficient estimate
	(1)	(2)	(3)	(4)
Intercept	*** 11.256 [0.001]	*** 11.920 [0.001]	-1.982 [0.813]	-0.231 [0.979]
Listing Services Deposits	** 0.103 [0.029]	* 0.092 [0.053]	** 0.259 [0.012]	** 0.237 [0.026]
Equity		-0.359 [0.247]		-0.269 [0.391]
Non-listing, non-brokered deposits			* 0.149 [0.086]	0.135 [0.126]
Nonperforming loans	** 0.273 [0.021]	** 0.254 [0.033]	** 0.296 [0.012]	** 0.280 [0.020]
Other real estate owned	*** 0.528	*** 0.520	* 0.507	*** 0.503

TABLE 11—LOSS RATE MODELS INCLUDING LISTING DEPOSITS—Continued

Variable	Coefficient estimate (1)	Coefficient estimate (2)	Coefficient estimate (3)	Coefficient estimate (4)
Income earned but not collected	[0.000] *** 13.242	[0.000] *** 13.167	[0.001] * 13.802	[0.001] *** 13.692
Loan to executive officers	[0.000] -0.265	[0.000] -0.287	[0.000] -0.180	[0.000] -0.205
Bank size \$500 mil–\$1 billion	[0.617] -4.117	[0.588] -3.924	[0.733] -2.638	[0.699] -2.633
Bank size > \$1 billion	[0.126] * -5.854	[0.145] * -5.773	[0.347] -4.358	[0.348] -4.439
CRE loans	[0.089] -0.030	[0.094] -0.025	[0.217] -0.034	[0.209] -0.030
C&D loans	[0.607] 0.052	[0.668] 0.052	[0.558] 0.006	[0.608] 0.011
C&I loans	[0.720] 0.101	[0.720] 0.096	[0.965] 0.105	[0.941] 0.100
Consumer loans	[0.379] 0.330	[0.405] 0.359	[0.360] 0.242	[0.381] 0.272
Adjusted R2	[0.437] 0.193	[0.398] 0.195	[0.568] 0.203	[0.524] 0.202
No. of observations	180	180	180	180

Notes:

- ¹ Estimates based on data from March 2011 to September 2017 to predict loss rates of 180 failures from April 8, 2011 to December 15, 2017.
 - ² Listing services deposits are defined as estimated amount of deposits obtained through the use of deposit listing services that are not brokered.
 - ³ Non-listing, non-brokered deposits are defined as domestic deposits minus listing service deposits and brokered deposits.
 - ⁴ All financial variables are normalized by total assets with the exception of *Bank size between \$500 mil–\$1 bil* and *Bank size > \$1 billion*. *Bank size between \$500 mil–\$1 bil* is a dummy variable indicating that the institution's asset size is between \$500 million and \$1 billion. *Bank size > \$1 billion* is a dummy variable indicating that the institution's asset size is over \$1 billion.
 - ⁵ Failure year fixed effects are included but not reported.
- *** Indicates statistical significance at the 1 percent level. ** Indicates statistical significance at the 5 percent level. * Indicates statistical significance at the 10 percent level. P-values are reported in brackets.

Table 11 reports the results of the failure loss rate model. Column (1) of Table 11 shows that higher nonperforming loans, other real estate owned, and income earned but not collected are associated with higher loss rates. Large failed banks tend to have lower loss rates compared to small banks.

In the specification reported in Column (1), the listing service deposits ratio is included. The estimated coefficient for the listing service deposits ratio measures the effect of an increase in this ratio and an offsetting reduction in other funding sources on the loss rate. The positive and statistically significant coefficient on listing service deposits suggests that an increase in listing service deposits (and an offsetting decrease in other funds either equity or other liabilities) increases the DIF loss rate.

Column (2) of Table 11 reports results when the failed bank's equity ratio is also included as an explanatory variable. The positive and statistically significant coefficient on the listing service deposits ratio suggests that increasing reliance on listing service deposits, holding bank equity constant

and reducing other liabilities, increases the DIF loss rate. The estimated coefficient on equity is not statistically significant.

Column (3) of Table 11 reports results when listing services deposits and non-listing, non-brokered deposits ratios are included as funding measures. The estimated coefficient on listing services deposits ratio remains positive and statistically significant suggesting that, holding the non-listing, non-brokered deposits ratios constant, increasing listing services deposits and decreasing other bank liabilities and possibly equity, increases the failure loss rate.

Column (4) of Table 11 reports results when the listing services deposits, non-listing non-brokered deposits, and equity ratios are included as funding measures. The estimated coefficient on the listing services deposits ratio is positive and statistically significant, suggesting that, holding non-listing non-brokered deposits and equity ratios constant, increasing listing services deposits and decreasing other bank liabilities increases the failure loss rate. An unexpected result is that equity remains statistically insignificant in reducing DIF loss rates. The non-listing,

non-brokered deposits ratio also becomes statistically insignificant.

The results reported in Table 11 suggest that the use of listing service deposits are associated with higher loss rates on average. At the same time, the sample size is small and specialized to the failures from 2012 to 2017. Unlike the full brokered deposit sample results (reported in an early section) and FDIC practical resolution experience, equity does not clearly reduce FDIC losses.⁸²

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. 2018-28273 Filed 2-5-19; 8:45 am]

BILLING CODE 6714-01-P

⁸² The limited data in listing service deposit sample may not be representative of the characteristics of the true failure population. On balance, we believe it is inappropriate to place a high degree of confidence in the results of the analysis of this limited and potentially unrepresentative sample period.



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Part IV

Securities and Exchange Commission

17 CFR Parts 229 and 240

Disclosure of Hedging by Employees, Officers and Directors; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 240

[Release No. 33-10593; 34-84883; IC-33333; File No. S7-01-15]

RIN 3235-AL49

Disclosure of Hedging by Employees, Officers and Directors

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting a rule to implement a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The new rule requires a company to describe any practices or policies it has adopted regarding the ability of its employees (including officers) or directors to purchase financial instruments, or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of equity securities granted as compensation, or held directly or indirectly by the employee or director. The new rule requires a company to describe the practices or policies and the categories of persons they affect. If a company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted. The new disclosure is required in a proxy statement or information statement relating to an election of directors.

DATES:

Effective date: March 8, 2019.

Compliance dates: Companies that do not qualify as “smaller reporting companies” or “emerging growth companies” (each as defined in 17 CFR 240.12b-2) must comply with these disclosure requirements for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019.

Companies that qualify as “smaller reporting companies” or “emerging growth companies” must comply with these disclosure requirements for proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2020.

FOR FURTHER INFORMATION CONTACT:

Carolyn Sherman, Special Counsel, or Anne Krauskopf, Senior Special Counsel, at (202) 551-3500, in the Office of Chief Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are amending 17 CFR 229.402 (“Item 402” of Regulation S-K¹) by revising paragraph (b) to add Instruction 6; 17 CFR 229.407 (“Item 407” of Regulation S-K) to add new paragraph (i); and 17 CFR 14a-101 (“Schedule 14A”) to revise Item 7.

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¹ 17 CFR 229.10 *et seq.*

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I. Introduction

On February 9, 2015, the Commission proposed rule amendments² to implement Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”).³ Section 955 added Section 14(j) to the Securities Exchange Act of 1934 (the “Exchange Act”).⁴ Section 14(j) directs the Commission to require, by rule, each issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders whether any of its employees or members of its board of directors, or any designee of such employee or director, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities either (1) granted to the employee or director by the issuer as part of the compensation of the employee or director; or (2) held, directly or indirectly, by the employee or director.

The Senate Committee on Banking, Housing, and Urban Affairs stated in its report on the Act that Section 14(j) is intended to “allow shareholders to know if executives are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform.”⁵ In this regard, we infer that the statutory purpose of Section 14(j) is to provide transparency to shareholders at the time of an annual meeting, which is when directors are elected, about whether a company’s employees or directors may engage in transactions that reduce or avoid the incentive alignment associated with equity ownership related to their employment or board service.

² See Rel. No. 33-9723 (Feb. 9, 2015) [80 FR 8485 (Feb. 17, 2015)] (the “Proposing Release”), available at: <http://www.sec.gov/rules/proposed/2015/33-9723.pdf>.

³ Public Law 111-203, 124 Stat. 1900 (July 21, 2010).

⁴ 15 U.S.C. 78a *et seq.*

⁵ See Report of the Senate Committee on Banking, Housing, and Urban Affairs, S. 3217, Report No. 111-176 (Apr. 30, 2010) (“Senate Report 111-176”).

Twenty-two commenters, including individuals, professional and trade associations, law firms, consulting firms, pension funds, and institutional investor associations, submitted comment letters in response to the Proposing Release. We have reviewed and considered all of the comments that we received on the Proposing Release. In general, commenters supported the proposed amendments and their objectives,⁶ although several commenters provided suggestions for clarifying the proposed amendments' disclosure standard.⁷

As discussed below, we are adopting new Item 407(i) of Regulation S-K, along the lines proposed, but with certain modifications, consistent with commenters' suggestions. We believe the adopted amendments will fulfill the statutory purpose of Section 14(j), while providing a clearer and more straightforward standard of disclosure that should benefit both registrants and investors.

II. Background

The Commission's rules currently require some disclosure about company hedging policies and practices. Item 402(b) of Regulation S-K requires a Compensation Discussion and Analysis ("CD&A") that discloses material information necessary to an understanding of a company's compensation policies and decisions regarding the "named executive officers."⁸ Under Item 402(b)(2)(xiii), an example of the kind of information that should be provided, if material, includes a description of the company's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership) and any company policies regarding hedging the economic risk of such ownership. This CD&A disclosure

⁶ See, e.g., letters from Chris Barnard, Council of Institutional Investors dated Apr. 16, 2015 and Sept. 7, 2017 (collectively "CIIF"), Taylor Dove, Susie E. Hawthorne, Michael Nau and Public Citizen expressing general support for the proposed rules.

⁷ See, e.g., letters from American Bar Association Section of Business Law Committee on Federal Regulation of Securities dated Jul. 8, 2015 and Oct. 13, 2015 (collectively "ABA" unless specified by date), Keith P. Bishop, Business Roundtable, and Davis Polk suggesting modifications.

⁸ As defined in Item 402(a)(3) of Regulation S-K, "named executive officers" are all individuals serving as the company's principal executive officer during the last completed fiscal year, all individuals serving as the company's principal financial officer during that fiscal year, the company's three other most highly compensated executive officers who were serving as executive officers at the end of that year, and up to two additional individuals who would have been among the three most highly compensated but for not serving as executive officers at the end of that year.

item requirement by its terms addresses only hedging by the named executive officers. In providing their CD&A disclosure, however, some companies describe policies that address hedging by employees and directors, as well as the named executive officers. CD&A does not apply to smaller reporting companies ("SRCs"),⁹ emerging growth companies ("EGCs"),¹⁰ registered investment companies¹¹ or foreign private issuers ("FPIs").¹²

Other disclosure requirements also may reveal when company equity securities have been hedged:

- For companies with a class of equity securities registered pursuant to Section 12 of the Exchange Act,¹³ hedging transactions by officers and directors in transactions involving one or more derivative securities—such as options, warrants, convertible securities, security futures products, equity swaps, stock appreciation rights and other securities that have an exercise or conversion price related to a company equity security or derive their value from a company equity security—are subject to reporting within two business days on Form 4, pursuant to Exchange Act Section 16(a).¹⁴

⁹ As defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2]. The Commission recently amended the definition of "smaller reporting company" to include registrants with a public float of less than \$250 million, as well as registrants with annual revenues of less than \$100 million for the previous year and either no public float or a public float of less than \$700 million. See *Smaller Reporting Company Definition*, Release No. 33-10513 (Jun. 28, 2018) [83 FR 31992 (Jul. 10, 2018)].

¹⁰ Section 101 of the Jumpstart Our Business Start-Ups Act (the "JOBS Act") [Pub. L. 112-106, 126 Stat. 306 (2012)] codified the definition of "emerging growth company" in Section 3(a)(80) of the Exchange Act and Section 2(a)(19) of the Securities Act. See also Exchange Act Rule 12b-2 [17 CFR 240.12b-2], which reflects inflation adjustments to the definition of "emerging growth company."

¹¹ Registered investment companies are investment companies registered under Section 8 of the Investment Company Act of 1940 ("Investment Company Act"). 15 U.S.C. 80a *et seq.*

¹² As defined in Rule 3b-4 [17 CFR 240.3b-4].

¹³ 15 U.S.C. 78l.

¹⁴ 15 U.S.C. 78p(a). For Section 16 purposes, the term "derivative securities" is defined in Exchange Act Rule 16a-1(c) [17 CFR 240.16a-1(c)], which excludes rights with an exercise or conversion privilege at a price that is not fixed. Exchange Act Rule 16a-1(d) defines "equity security of the issuer" as any equity security or derivative security relating to the issuer, whether or not issued by that issuer. See also Exchange Act Rule 16a-4, which provides that for Section 16 purposes, both derivative securities and the underlying securities to which they relate shall be deemed to be the same class of equity securities.

The Commission has clarified that Section 16 applies to equity swap and similar transactions that a Section 16 issuer may use to hedge and has addressed how these derivative securities transactions should be reported, including specifically identifying them through the use of transaction code K. See *Ownership Reports and*

- Some hedging transactions, such as prepaid variable forward contracts,¹⁵ may involve pledges of the underlying company equity securities as collateral. Item 403(b) of Regulation S-K, which requires disclosure of the amount of company equity securities beneficially owned by directors, director nominees and named executive officers,¹⁶ also requires disclosure of the amount of shares that are pledged as security.¹⁷ The rule amendments we are adopting today will require additional disclosure about an issuer's hedging practices or policies, but will not affect these existing requirements.

III. Discussion of the Amendments

The Commission proposed to implement Section 14(j) by amending Item 407 of Regulation S-K, to add new paragraph (i), which would require companies to disclose whether they permit employees and directors to hedge their company's equity securities. The disclosure called for by Section 14(j) is primarily corporate governance-related because it requires a company to provide information in its proxy statement about whether the company's employees and directors may engage in

Trading by Officers, Directors and Principal Security Holders, Release No. 34-34514 (Aug. 10, 1994) [59 FR 42449 (Aug. 17, 1994)] at Section III.G; and *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release No. 34-37260 (May 31, 1996) [61 FR 30376 (Jun. 14, 1996)] at Sections III.H and III.I. The Commission also has clarified how transactions in securities futures should be reported. *Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products*, Release No. 33-8107 (June 21, 2002) [67 FR 43234 (Jun. 27, 2002)] at Q. 13.

¹⁵ A prepaid variable forward contract obligates the seller to sell, and the counterparty to purchase, a variable number of shares at a specified future maturity date. The number of shares deliverable will depend on the per share market price of the shares close to the maturity date. The contract specifies maximum and minimum numbers of shares subject to delivery, and at the time the contract is entered into, the seller will pledge to the counterparty the maximum number of shares. The Commission has indicated that forward sales contracts are derivative securities transactions subject to Section 16(a) reporting. *Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, Release No. 33-8230 (May 7, 2003) [68 FR 25788 (May 18, 2003)], text at n. 42.

¹⁶ Item 403(b) of Regulation S-K [17 CFR 229.403(b)]. Disclosure is required on an individual basis as to each director, nominee, and named executive officer, and on an aggregate basis as to executive officers of the issuer as a group and must be provided in proxy statements, annual reports on Form 10-K [referenced in 17 CFR 240.310], and registration statements under the Securities Act and under the Exchange Act on Form 10.

¹⁷ See *Executive Compensation and Related Person Disclosure*, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158 (Sept. 8, 2006)] (the "2006 Executive Compensation Disclosure Release") at Section IV.

transactions that could reduce the extent to which their equity holdings and equity compensation are aligned with shareholders' interests. Because Section 14(j) calls for disclosure about employees and directors and their alignment with shareholders' interests, it is more closely related to the Item 407 corporate governance disclosure requirements than to Item 402 of Regulation S-K, which focuses only on the compensation of named executive officers and directors. Two commenters expressed general support for locating the new disclosure requirement in the Commission's corporate governance-related disclosure rules.¹⁸ Accordingly, we are implementing Section 14(j) by amending Item 407 to keep the disclosure requirements relating to corporate governance matters together in a single item of Regulation S-K.¹⁹

The final amendments will:

- Require the company to describe any practices or policies regarding the ability of employees, directors or their designees to purchase financial instruments, or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of company equity securities. A company will be required either to provide a fair and accurate summary of any practices or policies that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed, or to disclose the practices or policies in full;
 - if the company does not have any such practices or policies, require the company to disclose that fact or state that hedging transactions are generally permitted;
 - specify that the equity securities for which disclosure is required are only equity securities of the company or of any parent or subsidiary of the company or any subsidiary of any parent of the company;
 - require the disclosure in any proxy statement on Schedule 14A or information statement on Schedule 14C²⁰ with respect to the election of directors; and

¹⁸ See letters from Business Roundtable and CFA Institute.

¹⁹ As a result, the new disclosure would not be subject to shareholder advisory votes to approve the compensation of named executive officers, as disclosed pursuant to Item 402, that are required pursuant to Section 14A(a)(1) of the Exchange Act and Rule 14a-21(a) [17 CFR 240.14a-21(a)]. We recognize, however, that there is an executive compensation component of the new disclosure as it relates to existing CD&A obligations. See Section III.D.3, below.

²⁰ 17 CFR 240.14c-101.

- clarify that the term "employee" includes officers of the company.

Nothing in these amendments or this release should be construed as suggesting companies need to have a practice or policy regarding hedging, or a particular type of practice or policy. These amendments relate only to disclosure of hedging practices or policies.

A. Scope of the Disclosure Requirement

1. Proposed Amendments

Section 14(j) was enacted to require disclosure of whether any employee or director of the issuer, or any designee of such employee or director, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities. While Section 14(j) specifically refers to particular transactions,²¹ it also requires disclosure more generally of whether any employee or director of the issuer, or any designee of such employee or director, is permitted to purchase financial instruments that are designed to hedge or offset any decrease in the market value of equity securities.

The proposed amendments would have implemented Section 14(j) by requiring disclosure of "whether the registrant permits" any employees (including officers) or directors, or any of their designees, to purchase these specific types of financial instruments, and also would have required the same disclosure with respect to other transactions that could have the same economic effects as those specified in the statute, consistent with the purpose of Section 14(j). The proposed amendments were intended to cover all transactions that establish downside price protection—whether by purchasing or selling a security, derivative security or otherwise.

Consistent with the statute, the proposed amendments applied to hedging transactions relating to equity securities that are held, directly or indirectly, by employees or directors. The proposal did not define the circumstances in which securities would be considered held, directly or indirectly.

Establishing downside price protection is the essence of the

²¹ By covering "exchange funds," we believe that Section 14(j) should be interpreted to cover transactions involving dispositions or sales of securities. This is because an employee or director can acquire an interest in an exchange fund only in exchange for a disposition to the exchange fund of equity securities held by the employee or director.

transactions contemplated by Section 14(j). While this principle guided the Commission's consideration of the transactions subject to disclosure, the Commission did not propose to define the term "hedge."²² Under the proposed amendments, a company would disclose the categories of transactions it permits and the categories of transactions it prohibits.²³ The proposed amendments would have required a company that permits hedging transactions to disclose sufficient detail to explain the scope of the permitted transactions. Additionally, the proposed amendments would have required a registrant that permits hedging by some, but not all, of the categories of covered persons to disclose the categories of persons who are permitted to engage in hedging transactions and those who are not.

2. Comments on the Proposed Amendments

Commenters expressed a variety of views on the scope of the proposed amendments. One commenter expressed general support for requiring disclosure of the types of hedging transactions that a company permits as well as those that it prohibits, and the categories of persons that it allows and does not allow to hedge.²⁴ Similarly, another commenter stated that the rule, as proposed, would provide investors with a more complete understanding regarding the persons permitted to engage in hedging transactions and the types of hedging transactions allowed.²⁵ Another commenter stated that mandating disclosure of whether a company "permits" hedging would imply that affirmative company permission is required for these transactions and suggested that the relevant disclosure requirement instead should be whether the company prohibits hedging by employees.²⁶ Several other commenters similarly indicated that requiring disclosure of the categories of hedging transactions that a registrant permits as well as prohibits could result in a disclosure standard that is confusing, overly broad and onerous for registrants to satisfy without accurately reflecting the policy decisions that a company has made with

²² In the context of Section 16, the Commission has stated that "[t]he term 'hedging' means lessening the risk of loss by offsetting the risk of a securities position with an opposite position in a related security." See Release No. 34-26333 (Dec. 2, 1988) [53 FR 49997 (Dec. 13, 1988)] at n. 137.

²³ Proposed Instructions 3 and 4 to Item 407(i).

²⁴ See letter from CFA Institute.

²⁵ See letter from CII.

²⁶ See letter from Keith P. Bishop.

respect to hedging.²⁷ Instead, these commenters recommended that the Commission adopt a more focused disclosure standard. For example, two of these commenters recommended an approach that would require companies to describe the material aspects of their policies regarding hedging.²⁸

In response to a specific request for comment on the scope of transactions covered by the proposed amendments, commenters made varying recommendations. Some supported a principles-based approach to defining the scope of covered hedging transactions.²⁹ One stated that covering all transactions with comparable economic consequences to the specified financial instruments would provide more complete disclosure and would be in line with legislative intent.³⁰ Another said that the proposed approach is preferable to defining the term “hedge,” because any definition of that term would encourage circumvention and may require constant updating as new financial instruments are developed.³¹

In contrast, two commenters specifically recommended defining the term “hedge.” One commenter suggested including common examples of derivative instruments and any instrument that produces the effect of limiting the insider’s equity risk in the company without engaging in an outright sale, while explicitly excluding exchange funds from the definition.³² The other commenter suggested limiting the definition to financial instruments that are substantially similar to those listed in Section 14(j) and providing objective criteria for determining what is, and is not, a financial instrument subject to the new disclosure requirement.³³ This commenter recommended excluding any financial instrument that is not a “derivative security”³⁴ with respect to the company’s equity securities that is designed to hedge or offset decreases in the market value of a company’s equity securities.³⁵

In addition, some commenters recommended that the proposed amendments be modified to clarify that

the new disclosure requirement will not apply to portfolio diversification transactions.³⁶ For example, these commenters noted that the purchase of equity securities of one or more unrelated companies as an investment strategy could be considered a hedging transaction subject to the proposed disclosure if those securities “are negatively correlated at any level as compared to the company’s equity securities,”³⁷ or if they are diversification transactions in securities of market sectors that are counter-cyclical to the company’s equity securities.³⁸ One commenter recommended specific language to clarify that portfolio diversification is not within the scope of the new disclosure requirement.³⁹ Two commenters also recommended that all long and short positions relating to equity securities other than the company’s own equity securities be excluded from the scope of the new disclosure requirement.⁴⁰

The Commission solicited comment on whether it is necessary to clarify the application of the proposed amendments to account for the view that there is a meaningful distinction between an index that includes a broad range of equity securities, one component of which is company equity securities, and a financial instrument, even one nominally based on a broad index, designed to or having the effect of hedging the economic exposure to company equity securities. Commenters generally agreed that there is a meaningful distinction between such a broad-based index and a financial instrument designed to, or having the effect of, hedging the economic exposure to company equity securities.⁴¹ In this regard, several

commenters recommended that the new disclosure requirement not apply to certain categories of transactions.⁴² For example, commenters suggested that a company be able to disclose that it prohibits all hedging transactions even if it permits: (1) Transactions in a broad-based index that includes company equity securities;⁴³ (2) the purchase and sale of mutual funds, index funds and other diversified investment vehicles;⁴⁴ or (3) the purchase of broad-based indexes, exchange traded funds, indexes and baskets.⁴⁵

Some commenters recommended that we provide guidance on the meaning of the concept of “held, directly or indirectly” as used in the new disclosure requirement,⁴⁶ for example by reference to the term “beneficial ownership” as defined in Exchange Act Rule 13d-3(d)(1).⁴⁷

Finally, the Commission requested comment on whether to require disclosure of any hedging transactions that have occurred—in the annual proxy statement as well as in promptly filed Form 4 filings. Comments on whether to require new annual proxy statement disclosure of hedging transactions were mixed, with some commenters generally supporting requiring such disclosure,⁴⁸ and others stating that it is unnecessary due to the existing Section 16 reporting requirements.⁴⁹

3. Final Amendments

The scope of the disclosure requirement we are adopting is in line with the proposed amendments but with certain modifications to address commenters’ concerns about potential implementation challenges. As adopted, Item 407(i) requires the company to describe any practices or policies it has adopted (whether written or not)⁵⁰ regarding the ability of employees (including officers) or directors of the

³⁶ See letters from ABA, McDermott and Society of Corporate Secretaries & Governance Professionals (“SCSGP”).

³⁷ See letter from McDermott.

³⁸ See letter from ABA.

³⁹ See letter from SCSGP, recommending that it cover “. . . transactions that are designed to ~~or~~ and have the *direct* effect of hedging or offsetting any decrease in the market value of equity securities. . . .” and to add a new instruction stating that “[t]he disclosure mandated here is limited to instruments that are tied to and principally designed to perform opposite of the [company’s] equity securities. It does not include investments that provide general portfolio diversification.”

⁴⁰ See letters from ABA and McDermott.

⁴¹ See e.g., letters from Business Roundtable, Davis Polk & Wardwell LLP (“Davis Polk”), McDermott and SCSGP. In contrast, one commenter did not agree that the new disclosure requirement should explicitly distinguish between instruments that provide exposure to a broad range of companies or securities and those that are designed to hedge particular securities or have that effect, and that all should be covered by the disclosure requirement. See letter from Joyce Dillard.

⁴² See letters from ABA, Business Roundtable, Cleary Gottlieb, Davis Polk, McDermott and SCSGP.

⁴³ See letters from ABA, Business Roundtable, Cleary Gottlieb Steen & Hamilton LLP (“Cleary Gottlieb”) and McDermott.

⁴⁴ See letter from Davis Polk.

⁴⁵ See letter from SCSGP.

⁴⁶ See letters from ABA, Davis Polk and Joyce Dillard.

⁴⁷ 17 CFR 240.13d-3(d)(1). See letters from ABA and Davis Polk.

⁴⁸ See letters from Clinton Carlisle and Joyce Dillard.

⁴⁹ See letters from ABA and Business Roundtable.

⁵⁰ For example, a company that does not have a written hedging policy might have a practice of reviewing, and perhaps restricting, hedging transactions as part of its program for reviewing employee trading in company securities. Similarly, a company might have a practice of including anti-hedging provisions in employment agreements or equity award documentation.

²⁷ See letters from ABA, Business Roundtable and Davis Polk.

²⁸ See letters from Business Roundtable and Davis Polk.

²⁹ See letters from ABA, Business Roundtable, CFA Institute and Chris Barnard.

³⁰ See letter from Chris Barnard.

³¹ See letter from ABA.

³² See letter from Clinton Carlisle.

³³ See letter from McDermott Will & Emery (“McDermott”). See also letter from ABA (recommending that we consider this approach).

³⁴ As defined in Exchange Act Rule 16a-1(c) [17 CFR 240.16a-1(c)].

³⁵ See letter from McDermott.

company, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of company equity securities granted to the employee or director by the company as part of the compensation of the employee or director, or held, directly or indirectly, by the employee or director. The company will be required to provide a fair and accurate summary of the practices or policies that apply, including the categories of persons covered and any categories of hedging transactions that are specifically permitted and any categories that are specifically disallowed. Alternatively, the company will be required to disclose the practices or policies in full. The rule does not direct companies to have practices or policies regarding hedging, or dictate the content of any such practice or policy. If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted.⁵¹

Although Section 14(j) refers to whether certain categories of persons are “permitted” to engage in covered transactions, we recognize, as one commenter observed, that the statute’s use of “permitted” is potentially confusing, as companies generally do not affirmatively permit hedging transactions, and could result in uncertainty in making the required disclosure.⁵² We also are mindful of concerns that requiring disclosure of categories of hedging transactions that are permitted could result in lengthy disclosures that do not accurately reflect the policy decisions that a company has made with respect to hedging.⁵³

In implementing Section 14(j), we have sought to fulfill the statutory purpose of informing shareholders whether the covered persons can avoid downside price risk with respect to company equity securities with a clear and simple disclosure requirement. In doing so, we have construed the statute’s use of the term “permit” as calling for disclosure as to whether the company has a practice or policy regarding the ability of covered persons

to engage in such transactions. Therefore, as adopted, Item 407(i) requires disclosure about whether the company has adopted any practices or policies regarding the ability of covered persons to engage in transactions that hedge or offset any decrease in the market value of these securities. If the company does not have any such practices or policies, Item 407(i) requires it to disclose that fact or state that hedging transactions are generally permitted.

In the Proposing Release, the Commission solicited comment on whether, as an alternative to the proposed disclosure, the company should be required to describe its applicable hedging policies.⁵⁴ As noted above, some commenters recommended such an approach, with one such commenter stating that it would focus the required disclosures on material information.⁵⁵ After considering the comments received, we are persuaded that the approach we are adopting is a better means of achieving Section 14(j)’s statutory purpose. By requiring the company to describe any practice or policy it has adopted and the categories of persons covered, we believe investors will be informed with greater clarity as to the scope of the company’s practices or policies regarding hedging transactions, and the compliance challenges associated with the proposed approach will be addressed. One commenter expressed concern that the proposed rules would discourage the use of hedging.⁵⁶ Neither Section 14(j) nor the rule amendments would require a company to prohibit hedging transactions or to otherwise adopt practices or policies addressing hedging by any category of individuals.

As in the proposal, Item 407(i) as adopted does not define the term “hedge” because we believe the language of Section 14(j), which refers to financial instruments “that are designed to hedge or offset any decrease in the market value” is clear and indicates that “hedge” should be applied as a broad principle. Like the proposed rule, the rule as adopted applies to transactions with the same economic effects—to hedge or offset any decrease in the market value of company equity securities—as the transactions specified by the statute, the disclosure of which is consistent with the purpose of Section 14(j).⁵⁷ While we

recognize commenters’ observations that the language of the proposal could be far reaching,⁵⁸ potentially scoping in transactions that may not necessarily raise the same concerns as the financial instruments specified by Section 14(j), such as portfolio diversification transactions, we believe the adopted approach will alleviate these concerns by requiring disclosure of any practice or policy the company has adopted regarding these types of transactions. In this regard, a company would only need to describe portfolio diversification transactions, broad-based index transactions, or other types of transactions, if its hedging practice or policy addresses them.

As in the existing CD&A disclosure item, which applies to company policies regarding hedging the economic risk of named executive officers’ ownership of the company’s securities,⁵⁹ the scope of the new disclosure requirement is not limited to any particular types of hedging transactions. Moreover, by focusing on the company’s practices or policies, the rule avoids adopting a definition that could prove either over- or under-inclusive, and allows for flexibility to address new downside price protection techniques as they develop. Based on their CD&A disclosures, it appears that many companies already have, and presumably enforce, practices or policies that rely on an undefined concept of “hedging.” Under the final amendments, each company will continue to make its own judgments in determining what activities, if any, should be covered by a practice or policy. Further, to the extent a company currently discloses its practices or policies regarding hedging transactions in the CD&A, (either in full or in a summary that would meet the requirements of Item 407(i)), the amendments will not require the company to revise its practices or policies—or its disclosure. A company that has disclosed a policy that covers only a subset of employees or directors would not be required to further disclose that it did not have a policy with regard to the company’s other employees or directors.

Consistent with the statutory language, Item 407(i) as adopted applies to hedging transactions relating to

recourse pledge of securities. Similarly, selling a security future that establishes a position that increases in value as the value of the underlying equity security decreases can provide the downside price protection that is the essence of the transactions contemplated by Section 14(j).

⁵⁸ See letters from ABA, McDermott and SCSSGP.

⁵⁹ Item 402(b)(2)(xiii) of Regulation S-K, discussed in Section I.I.D, below.

⁵¹ Item 407(i) of Regulation S-K. For example, if a company does not have any such practices or policies, it could state: “Our company does not have any practices or policies regarding hedging or offsetting any decrease in the market value of registrant equity securities.”

⁵² See letter from Keith P. Bishop.

⁵³ See letters from ABA, Business Roundtable and Davis Polk.

⁵⁴ Proposing Release at 8490.

⁵⁵ See letter from Business Roundtable.

⁵⁶ See letter from John A. Olagues.

⁵⁷ For example, a short sale can hedge the economic risk of ownership, as can entering into a borrowing or other arrangement involving a non-

company equity securities that are “held, directly or indirectly,” by employees (including officers) or directors. This terminology covers a broad variety of means by which equity securities can be held. As adopted, the new disclosure requirement does not define the term “held, directly or indirectly.”⁶⁰ Rather, under the amendments as adopted, companies will describe the scope of their hedging practices or policies, which may include whether and how they apply to securities that are “indirectly” held. Because companies can address this issue in describing the scope of their practices or policies, we do not believe that further guidance on this topic is necessary.

As noted above, while comments were mixed on whether to require disclosure in the annual proxy statement of any hedging transactions that have occurred, the final amendments will not require annual meeting proxy statement disclosure about such hedging transactions. We believe that such disclosure would be largely duplicative of disclosures required by the existing Section 16 reporting requirements, which shareholders can review to determine if officers and directors are in fact hedging, and take into consideration in their voting decisions. In addition, while disclosing information about hedging transactions of employees other than officers and directors may potentially provide some benefits to investors, collecting such information and preparing the disclosure would likely impose significant additional costs on companies.⁶¹

B. Defining the Term “Equity Securities”

1. Proposed Amendments

Section 14(j) uses the term “equity securities,” but does not by its terms limit disclosure to equity securities of the reporting company.⁶² As such, the term “equity securities” could be interpreted to include the equity securities of any company that an employee or director holds. A proposed instruction specified that the term “equity securities,” as used in the proposed rule, would mean any equity

⁶⁰ Further, the final amendments do not reference the term “beneficial ownership,” as determined under Exchange Act Rule 13d-3(d)(1), as suggested by some commenters, because the voting power and investment power standards articulated in that rule do not necessarily correlate to whether a person has the risk of loss in an equity security that would be mitigated by a hedge.

⁶¹ See letter from Clinton Carlisle.

⁶² In addition, the Exchange Act’s and Exchange Act Rules’ definitions of “equity security” do not limit the scope of this term to equity securities of a particular company.

securities (as defined in Exchange Act Section 3(a)(11)⁶³ and Exchange Act Rule 3a11-1⁶⁴) issued by the company, or of any parent or subsidiary of the company or any subsidiary of any parent of the company, which equity securities are registered under Section 12 of the Exchange Act.⁶⁵

2. Comments on the Proposed Amendments

Commenters recommended various approaches to defining the scope of “equity securities” for purposes of the new disclosure requirement. Some commenters agreed with the proposal,⁶⁶ with one expressing the view that the level of complexity of disclosure due to including equity securities of affiliated companies would reflect the level of complexity of the hedging policy of the company in question.⁶⁷ Others suggested using a broader definition, for example by including “equity securities” of additional categories of affiliated entities.⁶⁸ Two commenters stated that the new disclosure requirement should not be limited to transactions relating to equity securities that are registered under Exchange Act Section 12 or traded in an established public market.⁶⁹ Some commenters recommended including only “equity securities” of the company,⁷⁰ or otherwise narrowing the definition, for example by including equity securities of certain other entities if they are

⁶³ 15 U.S.C. 78c(a)(11). Exchange Act Section 3(a)(11) defines “equity security” as any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

⁶⁴ 17 CFR 240.3a11-1. Exchange Act Rule 3a11-1 defines “equity security” to include any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

⁶⁵ Proposed Instruction 1 to Item 407(i).

⁶⁶ See, e.g., letters from CFA Institute, CII and Florida State Board of Administration.

⁶⁷ See letter from Florida State Board of Administration.

⁶⁸ See letter from Joyce Dillard.

⁶⁹ See letters from Joyce Dillard and Michael Nau.

⁷⁰ See letters from ABA and SCSGP.

reported as compensation under Item 402, or if the company allows them to count towards an executive’s equity retention requirements.⁷¹

3. Final Amendments

As was proposed, the Item 407(i) disclosure requirement will apply to equity securities issued by the company and its parents, subsidiaries or subsidiaries of the company’s parents.⁷² We have included these other entities within the scope of “registrant equity securities” because we understand that these equity securities can be relevant to the compensation practices of some issuers. Further, in a change from the proposal, Item 407(i) uses the term “registrant equity securities,” rather than “equity securities,” to indicate the scope of the rule is narrower than potentially any equity security, but broader than only the equity security of the particular company that is the employer or on whose board the director sits.⁷³ The relevant instruction specifies the scope of covered equity securities for both compensatory equity securities grants⁷⁴ and other equity securities holdings.⁷⁵

Disclosure of whether a company has adopted practices or policies regarding a director’s or employee’s ability to hedge such equity securities granted as compensation or otherwise held from whatever source acquired will more fully inform shareholders whether employees and directors are able to engage in transactions that reduce the alignment of their interests with the economic interests of other shareholders of the company and any affiliated company in which the employees or directors might have an interest. For example, companies may grant equity securities of affiliated companies to their employees or directors that are intended to achieve similar incentive alignment as grants in the company’s equity securities, or have ownership requirements or guidelines regarding such equity securities.⁷⁶ In instances such as these, the rule would require disclosure regarding whatever practice or policy regarding hedging applies.

Consistent with Item 407(i)’s focus on the company’s hedging practices or policies, the final amendments do not limit coverage to company equity

⁷¹ See letter from SCSGP.

⁷² Instruction 1 to Item 407(i).

⁷³ This term also avoids confusion with the broader definitions of “equity security” in Exchange Act Section 3(a)(11) [15 U.S.C. 78c(a)(11)] and Rule 3a11-1 [17 CFR 240.3a11-1].

⁷⁴ Item 407(i)(1)(i).

⁷⁵ Item 407(i)(1)(ii).

⁷⁶ An example is where a company creates a publicly-traded subsidiary.

securities that are registered under Exchange Act Section 12. Instead, the company's practices or policies will determine which, if any, classes of securities are covered. For example, to the extent a company has a different hedging practice or policy with respect to different classes of equity securities, the company's disclosure should reflect that fact.

C. Employees and Directors Subject to the Disclosure Requirement

1. Proposed Amendments

Section 14(j) covers hedging transactions conducted by any employee or member of the board of directors or any of their designees. The Commission proposed to apply the term "employee" to anyone employed by an issuer, including its officers. Further, under the proposed rule, whether someone is a "designee" would be determined based on the particular facts and circumstances.

2. Comments on the Proposed Amendments

Some commenters supported the proposed Item 407(i) disclosure requirement covering all employees of the company.⁷⁷ These commenters expressed the view that shareholders should have information about whether employees can dilute the original intention of company-provided compensation incentives,⁷⁸ and that all employees have an ability to affect share price and contribute to the prosperity of a company.⁷⁹ Another commenter recommended expanding the scope to include consultants.⁸⁰ Two commenters specifically supported the inclusion of "officers" in the group of employees, which the proposed disclosure requirement would cover.⁸¹

The Commission requested comment on whether to limit the definition of "employee" to the subset of employees that participate in making or shaping key operating or strategic decisions that influence the company's stock price, or to add an express materiality qualifier to the definition to permit each issuer to determine whether disclosure about all of its employees would be material information for its investors. Some commenters suggested narrowing the scope of the new disclosure requirement to cover a more limited group of

employees,⁸² such as directors and executive officers,⁸³ or only requiring disclosure about a policy that governs non-executive employees if a company determines the information is material to its investors.⁸⁴ Some of these commenters stated that including only "executive officers" as defined by Exchange Act Rule 3b-7⁸⁵ or "officers" as defined in Exchange Act Rule 16a-1(f)⁸⁶ would result in disclosure of the information that is material to shareholders, and that limiting the scope of covered "employees" would reduce company costs.⁸⁷

The Commission also requested comment about whether to include an instruction clarifying who is a "designee." Some commenters expressed the view that it is not clear who the term "designee" is intended to cover, and recommended that the Commission provide guidance as to its meaning.⁸⁸ One of these commenters recommended defining "designee" as someone specifically appointed to make decisions that the authorizing person would reasonably believe could result in the hedging of equity securities the person beneficially owns.⁸⁹ Another recommended defining "designee" to include immediate family members and family or affiliated investment vehicles.⁹⁰

⁸² See letters from ABA, Business Roundtable, Cleary Gottlieb, Davis Polk, McDermott and SCSSGP.

⁸³ See, e.g., letters from Business Roundtable, Cleary Gottlieb and SCSSGP.

⁸⁴ See letter from Davis Polk.

⁸⁵ See, e.g., letters from Cleary Gottlieb and SCSSGP. Exchange Act Rule 3b-7 [17 CFR 240.3b-7] defines "executive officer" as a company's ". . . president, any vice president of the [company] in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the [company]," and includes executive officers of subsidiaries of the company if they perform such policy making functions for the company.

⁸⁶ See letters from ABA and Davis Polk. Exchange Act Rule 16a-1(f) defines "officer" as ". . . an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer," and if they perform policy-making functions for the issuer, includes officers of a company's parent(s) or subsidiaries and officers or employees of the general partner(s) or of the trustee(s), respectively, of an issuer that is a limited partnership or a trust.

⁸⁷ See, e.g., letters from ABA, Davis Polk and SCSSGP.

⁸⁸ See letters from ABA, Davis Polk and Keith P. Bishop.

⁸⁹ See letter from Davis Polk.

⁹⁰ See letter from ABA.

3. Final Amendments

The final amendments require disclosure of practices or policies that apply to employees, including officers, as well as directors. We believe the inclusion of officers is consistent with Congress' intent.⁹¹ Accordingly, as was proposed, Item 407(i) adds the parenthetical "(including officers)" after the term "employees" in the language of the new disclosure requirement.⁹²

Describing the persons covered by the new disclosure requirement as "any employees (including officers) or directors of the registrant, or any of their designees" is consistent with the mandate in Section 14(j). Although some commenters suggested that we limit the persons covered by Item 407(i), in light of the statutory mandate, we have not narrowed the scope of the requirement to address only policies directed at directors and executive officers or to add a materiality qualifier. We also note that the change in the final rules to focus Item 407(i)'s disclosure on the company's practices or policies should help to alleviate concerns about the rule's compliance costs. Companies of different sizes, industries and workforces may have different kinds of practices or policies with respect to hedging, and each company will make its own judgments in determining the categories of persons to which they apply. The rule as adopted will require companies to provide disclosure reflecting their particular policy choices with respect to hedging.⁹³

The amendments as adopted require disclosure of any company practices or policies regarding "designees." While we continue to believe that whether someone is a "designee" depends on the particular facts and circumstances involved, the focus of Item 407(i), as adopted, is on disclosure of a company's particular practices or policies. Because companies with hedging practices or policies will determine who is covered by the scope of the practice or policy, we do not believe that further guidance on this topic is necessary.

⁹¹ For example, the Senate Report 111-176 contemplates disclosure under Section 14(j) regarding "executives."

⁹² This clarification is needed because Exchange Act Rule 12b-2 defines "employees" as not including a "director, trustee or officer," unless the context otherwise requires.

⁹³ We have not, however, specified that "employees" includes consultants, because we have not heard concerns about the alignment of their interests with those of shareholders and they may be more likely to monetize their equity compensation.

⁷⁷ See letters from CII, Florida State Board of Administration and Public Citizen.

⁷⁸ See letters from CII and Florida State Board of Administration.

⁷⁹ See letters from CII and Public Citizen.

⁸⁰ See letter from Joyce Dillard.

⁸¹ See letters from CFA Institute and Florida State Board of Administration.

D. Implementation

1. Manner and Location of Disclosure

1. Proposed Amendments

Section 14(j) calls for disclosure in any proxy or consent solicitation material for an annual meeting of the shareholders. Shareholder annual meetings are typically the venue in which directors are elected.⁹⁴ We proposed to implement Section 14(j) by amending Items 7 and 22 of Schedule 14A to require the new Item 407(i) information if action is to be taken with respect to the election of directors. Although the language of Section 14(j) refers to disclosure in any proxy or consent solicitation material for an annual meeting of the company's shareholders, this language, construed strictly, could result in the disclosure appearing in different instances than we currently require other corporate governance related disclosure. In particular, under our current rules, if a company solicits proxies⁹⁵ with respect to the election of directors, its proxy statement must include specified corporate governance information required by Item 407 of Regulation S-K, whether or not the election takes place at an annual meeting.⁹⁶ The proposal reflected the view that Item 407(i) disclosure similarly would be relevant information for shareholders evaluating a company's corporate governance practices in the context of director elections.

The proposal did not call for Item 407(i) disclosure to be included in Securities Act or Exchange Act registration statements or in the Form 10-K Part III disclosure,⁹⁷ even if that

⁹⁴ The Commission has previously recognized that directors ordinarily are elected at annual meetings. *See, e.g.*, Rule 14a-6(a) [17 CFR 240.14a-6(a)], which acknowledges that registrants soliciting proxies in the context of an election of directors at an annual meeting may be eligible to rely on the exclusion from the requirement to file a proxy statement in preliminary form. Rule 14a-3(b) [17 CFR 240.14a-3(b)] requires proxy statements used in connection with the election of directors at an annual meeting to be preceded or accompanied by an annual report containing audited financial statements. The requirement for registrants to hold an annual meeting at which directors are to be elected, however, is imposed by a source of legal authority other than the federal securities laws, such as state corporate law. *See, e.g.* Delaware General Corporate Law, Section 211(b).

⁹⁵ Rule 14a-1(f) [17 CFR 240.14a-1(f)] defines the term "proxy" to include every proxy, consent or authorization within the meaning of Section 14(a) of the Exchange Act. A solicitation of consents therefore constitutes a solicitation of proxies subject to Section 14(a) and Regulation 14A.

⁹⁶ *See* Items 7(b)-(d) and 8(a) of Schedule 14A.

⁹⁷ This approach is consistent with the disclosure requirements for registration statements under the Securities Act and for annual reports on Form 10-K, which include only selected provisions of Item

disclosure is incorporated by reference from the company's definitive proxy statement or information statement.⁹⁸

In addition to including the new disclosure requirement, the Commission proposed to amend Item 7 of Schedule 14A to streamline its current provisions by more succinctly cross-referencing disclosure Items.

2. Comments on Proposed Amendments

Most commenters supported requiring the new Item 407(i) disclosure only in proxy or consent solicitation material and information statements with respect to the election of directors.⁹⁹ Two of these commenters stated that the new Item 407(i) disclosure would not be relevant to investors in Securities Act or Exchange Act registration statements or annual reports.¹⁰⁰ In contrast, one commenter stated that the new Item 407(i) disclosure also should be required in annual reports to capture companies that are not holding annual meetings.¹⁰¹

One commenter expressed support for the proposal to streamline Item 7, and stated that it would facilitate compliance with the new item.¹⁰²

3. Final Amendments

We are adopting the amendments to Item 7 of Schedule 14A as proposed. By providing the disclosure in a proxy statement when action is to be taken with respect to the election of directors, shareholders will be able to consider the new disclosure at the same time they are considering the company's other corporate governance disclosures and voting for directors.¹⁰³ The disclosure will provide additional information on whether the company has practices or policies affecting the alignment of incentives for employees and directors of the company whose securities they hold. We believe that this disclosure is most relevant when providing information about the election of directors. This will be the case whether shareholders are voting for directors at an annual or special meeting of

407. *See* Item 11(l) and 11(o) on Form S-1 and Items 10, 11 and 13 in Part III of Form 10-K.

⁹⁸ As permitted by General Instruction G to Form 10-K.

⁹⁹ *See* letters from ABA, Business Roundtable, CII and Davis Polk.

¹⁰⁰ *See* letters from ABA and Davis Polk.

¹⁰¹ *See* letter from Clinton Carlisle.

¹⁰² *See* letter from ABA.

¹⁰³ We are not adopting the proposed amendment to Item 22 of Schedule 14A because, as discussed in Section III.D.3.c.i., below, we are excluding listed closed-end funds from the new disclosure requirement.

shareholders, or in connection with an action authorized by written consent.¹⁰⁴

As adopted, the amendments provide that the new Item 407(i) information will not be required in Form 10-K Part III disclosure even if that disclosure is incorporated by reference from the company's definitive proxy statement or information statement.¹⁰⁵

In addition, we are amending Item 7 of Schedule 14A to streamline its current provisions in the manner proposed.¹⁰⁶

2. Disclosure on Schedule 14C

1. Proposed Amendments

Exchange Act Section 14(c) applies to companies not soliciting proxies or consents from some or all holders of a class of securities registered under Exchange Act Section 12 entitled to vote at a meeting or authorize a corporate action by execution of a written consent.¹⁰⁷ It creates disclosure obligations for a company that chooses not to, or otherwise does not, solicit proxies, consents, or other authorizations from some or all of its security holders entitled to vote. Section 14(j) expressly calls for proxy or consent solicitation materials for an annual meeting of the shareholders of the issuer to include the required disclosure. Our proxy rules require these solicitation

¹⁰⁴ We note that an annual meeting, the meeting at which companies generally provide for the election of directors, could theoretically not include an election of directors. For reasons explained above, an annual meeting ordinarily involves an election of directors. In the unlikely event that a company is not conducting a solicitation for the election of directors but is otherwise soliciting proxies at an annual meeting, the amendments do not require Item 407(i) disclosure in the proxy statement.

¹⁰⁵ Instruction 2 to Item 407(i), providing that information disclosed pursuant to Item 407(i) is not deemed incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent the company specifically incorporates that information by reference. The disclosure also is not subject to forward incorporation by reference under Item 12(b) of Securities Act Form S-3 [17 CFR 239.13] or Item 12 of Securities Act Form S-1 [17 CFR 239.11].

¹⁰⁶ Amended Item 7(b) and Instruction to Item 7 of Schedule 14A.

¹⁰⁷ Section 14(c) of the Exchange Act was enacted to "reinforce [] fundamental disclosure principles [for companies] subject to the proxy rules which did not solicit proxies . . ." By enacting Section 14(c), Congress was advised that these companies "would be required to furnish shareholders with information equivalent to that contained in a proxy statement. . . . [and that such legislation was needed] [b]ecause evasion of the disclosures required by the proxy rules is made possible by the simple device of not soliciting proxies . . ." Statement of William L. Cary, Chairman, Securities and Exchange Commission, Part I. K. Other Amendments Proposed by S. 1642, Hearings before a Subcommittee of the Committee on Banking and Currency for the U.S. Senate, Eighty-Eighth Congress, First Session on S. 1642, June 18-21 and 24-25, 1963.

materials to be filed under cover of Schedule 14A.¹⁰⁸ As provided in Item 1 of Schedule 14C, however, an information statement filed on Schedule 14C must include the information called for by all of the items of Schedule 14A to the extent each item would be applicable to any matter to be acted upon at a meeting if proxies were to be solicited, with only limited exceptions.¹⁰⁹ An information statement filed on Schedule 14C in connection with an election of directors therefore already is required to include the information required by Item 7 of Schedule 14A.

The Commission did not propose to exclude the new Item 407(i) disclosure from Schedule 14C.¹¹⁰

2. Comments on Proposed Amendments

One commenter supported the inclusion of new Item 407(i) disclosure in Schedule 14C, noting that the Item 407(i) disclosure differs in type and nature from the disclosures currently excludable.¹¹¹ The commenter indicated that the proposed approach was appropriate because it would maintain consistency in the corporate governance disclosure provided in proxy statements and information statements with respect to the election of directors. No commenters opposed the proposed approach.

3. Final Amendments

As proposed, the final amendments do not exclude Item 407(i) disclosure from Schedule 14C. Applying the disclosure obligation to Schedule 14C

¹⁰⁸ As noted above, Exchange Act Rule 14a-1(f) [17 CFR 240.14a-1(f)] defines the term “proxy” to include every proxy, consent or authorization within the meaning of section 14(a) of the [Exchange] Act. Exchange Act Rule 14a-3(a) [17 CFR 240.14a-3(a)] prohibits any proxy solicitation unless each person solicited is currently or has been previously furnished with a publicly-filed preliminary or definitive proxy statement containing the information specified in Schedule 14A [17 CFR 240.14a-101], and Exchange Act Rule 14a-6(m) [17 CFR 240.14a-6(m)] requires proxy materials to be filed under cover of Schedule 14A.

¹⁰⁹ Specifically, Item 1 of Schedule 14C permits the exclusion of information called for by Schedule 14A Items 1(c) (Rule 14a-5(e) information re shareholder proposals), 2 (revocability of proxy), 4 (persons making the solicitation), and 5 (interest of certain persons in matters to be acted upon). Other Items of Schedule 14C prescribe the information to be provided with regard to such of these topics that are relevant to information statements. Specifically, Item 3 addresses the interest of certain persons in or opposition to matters to be acted upon, and Item 4 addresses proposals by security holders. In addition, Notes A, C, D and E to Schedule 14A are applicable to Schedule 14C [17 CFR 240.14c-101].

¹¹⁰ Because the proposed amendments did not add a new exclusion for information called for by the amendment to Item 7 of Schedule 14A, the effect of the proposal was to require Item 407(i) disclosure in Schedule 14C.

¹¹¹ See letter from ABA dated Oct. 13, 2015.

filings will have the effect of applying the new Item 407(i) requirement to companies that do not solicit proxies from any or all security holders but are otherwise authorized by security holders to take an action with respect to the election of directors. Consistent with the views of one commenter, we believe that doing so is appropriate to retain consistency in the corporate governance disclosure provided in proxy statements and information statements with respect to the election of directors.

3. Relationship to Existing CD&A Obligations

a. Proposed Amendments

As noted above, one of the non-exclusive examples currently listed in the Item 402(b) requirement for CD&A calls, in part, for disclosure of any company policies regarding hedging the economic risk of company securities ownership,¹¹² to the extent material. CD&A requires information about named executive officers.

The Commission proposed amending Item 402(b) of Regulation S-K to add an instruction providing that a company may satisfy its CD&A obligation to disclose material policies on hedging by named executive officers by cross referencing the information disclosed pursuant to new Item 407(i) to the extent that the information disclosed there satisfies this CD&A disclosure requirement.¹¹³

b. Comments on Proposed Amendments

Comments on this proposed instruction were mixed. Two commenters supported permitting cross-referencing, stating that this may reduce potentially duplicative disclosure in proxy and information statements.¹¹⁴ One of these commenters suggested also permitting companies to include the new Item 407(i) disclosure in their CD&A,¹¹⁵ expressing the view that companies should have the flexibility to locate the disclosure where it best fulfills their communication objectives. Another commenter expressed concern about permitting cross-referencing the new Item 407(i) disclosure in CD&A, noting the importance of hedging policy disclosure and its direct relevance to the CD&A.¹¹⁶ In contrast, a different commenter recommended eliminating the Item 402(b) hedging disclosure requirement as unnecessary and

¹¹² Item 402(b)(2)(xiii) of Regulation S-K.

¹¹³ Proposed Instruction 6 to Item 402(b).

¹¹⁴ See letters from ABA and Chris Barnard.

¹¹⁵ See letter from ABA.

¹¹⁶ See letter from Florida State Board of Administration.

redundant in light of the new Item 407(i) disclosure.¹¹⁷

c. Final Amendments

We are amending Item 402(b) of Regulation S-K to add the instruction as proposed. We believe this new instruction to Item 402(b) will allow companies that are subject to both Item 407(i) and Item 402(b) to avoid the potential for duplicative disclosure in their proxy or information statements with respect to the election of directors.¹¹⁸ We are not eliminating Item 402(b), as one commenter suggested, as it applies to Item 402 disclosure in registration statements and annual reports, as well as proxy statements.

In response to comments, we note that companies have flexibility in where they present the new Item 407(i) disclosure. A company could choose to include its Item 407(i) disclosure outside of CD&A and provide a separate Item 402(b) disclosure as part of CD&A without a cross reference. Alternatively, it could incorporate the Item 407(i) disclosure into CD&A, either by directly including the information or by providing the Item 407(i) information outside of CD&A and adding a cross-reference within CD&A.¹¹⁹

4. Issuers Subject to the Amendments

a. Proposed Amendments

The Proposing Release discussed whether certain categories of issuers should be exempted from the new Item 407(i) disclosure requirement, or, alternatively, whether they should be subject to a delayed implementation schedule. Under the proposal, the new disclosure requirement would apply to EGCs and SRCs. Securities registered by an FPI are not subject to the proxy statement requirements of Exchange Act Section 14,¹²⁰ and therefore FPIs are not

¹¹⁷ See letter from Davis Polk.

¹¹⁸ We have modified the text of new Instruction 6 to clarify that this new instruction applies to CD&A disclosure in these proxy or information statements.

¹¹⁹ Exchange Act Rule 14a-21(a) [17 CFR 240.14a-21(a)] provides that shareholder advisory say-on-pay votes apply to executive compensation disclosure pursuant to Item 402 of Regulation S-K, which includes CD&A. Because Item 407(i) disclosure will not be subject to these votes except to the extent a company chooses to make it part of CD&A either directly or pursuant to the new cross-reference instruction, the final rule will not effect any change in the scope of disclosure currently subject to say-on-pay votes. We note that issuers may, if they prefer, avoid making the Item 407(i) disclosure part of CD&A by not cross-referencing or directly including that disclosure in their Item 402 disclosure.

¹²⁰ Exchange Act Rule 3a12-3(b) [17 CFR 240.3a12-3(b)] specifically exempts securities registered by a FPI from Exchange Act Sections 14(a) and 14(c).

subject to Section 14(j) and hence would not be required to provide Item 407(i) disclosure.

The Commission proposed to apply the disclosure requirements to closed-end investment companies with shares listed on a national securities exchange and registered under Exchange Act Section 12(b)¹²¹ (“listed closed-end funds”) as well as business development companies (“BDCs”).¹²² The Commission also requested comment on whether to require the proposed disclosure for other investment companies registered under the Investment Company Act (“funds” or “registered investment companies”) that do not hold annual meetings, including exchange-traded funds (“ETFs”)¹²³ and other open-end funds.

b. Comments on Proposed Amendments

Comments on whether EGCs or SRCs should be subject to the proposed disclosure requirement were mixed. Four commenters supported requiring the new Item 407(i) disclosure for EGCs and SRCs.¹²⁴ One commenter opposed an “early stage exemption” for EGCs or SRCs, stating that it could allow for poor hedging policies at early growth stages that would eventually need to be corrected.¹²⁵ Two commenters indicated that the Item 407(i) disclosure would be useful, and might be of greater value, to investors in these companies than to investors in other public companies because: (1) EGCs and SRCs are not subject to the CD&A requirement to disclose policies about hedging by named executive officers; (2) EGCs and SRCs are generally subject to greater market risk than other public companies; and (3) the breadth of usage of hedging transactions at those companies supports requiring disclosure.¹²⁶ Three commenters indicated that they did not expect the new disclosure requirement to impose a

significant compliance burden on EGCs and SRCs.¹²⁷

In contrast, two commenters recommended exempting EGCs and SRCs from the new disclosure requirement,¹²⁸ stating that requiring the new Item 407(i) disclosure for these companies could lead to misalignment of the interests of employees and directors with their shareholders. These commenters indicated that, since EGCs and SRCs are not required to provide CD&A disclosure, they are less likely to have hedging policies in place, and that rather than disclosing they do not have such a policy, these companies may feel compelled to adopt one. In their view, such an action may not be in the best interests of shareholders if it results in company executives, who are more likely than those of larger companies to be heavily invested in the company: (1) Refraining from undertaking risks that could be in the best interests of the company’s shareholders;¹²⁹ or (2) reducing their company stock holdings so their interests are less aligned with shareholders.¹³⁰ In addition, these commenters believed that applying the new disclosure requirement to EGCs and SRCs would impose costs that are disproportionate to the benefits to be obtained.

Two commenters agreed with the proposed treatment of FPIs.¹³¹ Both noted that securities registered by FPIs are not subject to the proxy statement requirements of Exchange Act Section 14 and do not need to make other governance disclosures under existing Item 407.

A few commenters addressed registered investment companies and none specifically addressed BDCs. Three commenters agreed with the Commission’s approach in the Proposing Release not to subject open-end investment companies and ETFs to the proposed disclosure requirement.¹³² No commenter explicitly supported the application of the proposed disclosure requirement to listed closed-end funds and three commenters opposed making listed closed-end funds subject to the proposed requirement.¹³³ Two commenters asserted that it is difficult to hedge shares of closed-end funds, either by selling short or entering into derivative positions.¹³⁴ One commenter agreed with the Commission’s

observation that closed-end funds typically are externally managed and do not employ executives or have employees like operating companies.¹³⁵ Two commenters suggested that since closed-end funds share many similar characteristics regarding corporate governance with open-end funds, they should be treated similarly for purposes of the proposed disclosure.¹³⁶ Finally, one commenter stated that the Commission had not demonstrated that closed-end fund executives had engaged in problematic hedging practices similar to those used by operating company executives and that because most closed-end funds did not have specific hedging policies already in place, they would need to develop, revise, and maintain such policies.¹³⁷

c. Final Amendments

The amendments will apply to the categories of issuers proposed, except with respect to listed closed-end funds, which we are exempting from the Item 407(i) disclosure requirement. In making these determinations, we have been guided by what we understand to be the statutory purpose behind Section 14(j), namely, to provide transparency to shareholders, if action is to be taken with respect to the election of directors, about whether a company’s employees or directors may engage in transactions that mitigate or avoid the incentive alignment associated with equity ownership.

i. Investment Companies

In a change from the proposal, after considering the comments received, we have determined not to apply the new Item 407(i) disclosure requirement to listed closed-end funds,¹³⁸ but it will apply to BDCs. We believe that this approach is consistent with the Commission’s treatment of BDCs regarding executive compensation disclosure requirements,¹³⁹ and no commenter suggested that BDCs should be excluded.

Registered investment companies have a management structure, regulatory regime, and disclosure obligations that

¹²¹ 15 U.S.C. 78l(b).

¹²² BDCs are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64]. As proposed, BDCs would be treated in the same manner as non-investment company issuers.

¹²³ ETFs are organized either as open-end funds or unit investment trusts (“UITs”). A UIT does not have a board of directors, corporate officers, or an investment adviser to render advice during the life of the trust, and does not actively trade its investment portfolio.

¹²⁴ See letters from CFA Institute, CII, Florida State Board of Administration and Public Citizen.

¹²⁵ See letter from Florida State Board of Administration.

¹²⁶ See letters from CII and Florida State Board of Administration.

¹²⁷ See letters from CFA Institute, CII and Public Citizen.

¹²⁸ See letters from ABA and SCSGP.

¹²⁹ See letters from ABA and SCSGP.

¹³⁰ See letter from SCSGP.

¹³¹ See letters from ABA and Davis Polk.

¹³² See letters from ABA, ICI and MFDF.

¹³³ *Id.*

¹³⁴ See Letters from ABA and MFDF.

¹³⁵ See Letter from ICI.

¹³⁶ See Letters from ICI and MFDF.

¹³⁷ See Letter from ICI.

¹³⁸ Section 36(a) of the Exchange Act permits the Commission, by rule, regulation, or order, to conditionally or unconditionally exempt any person security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

¹³⁹ See 2006 Executive Compensation Disclosure Release, at Section II.D.3.

differ in various respects from operating companies, which we believe makes the proposed disclosure less useful for investors in funds. Nearly all funds, unlike other issuers, are externally managed and have few, if any, employees who are compensated by the fund. Rather, personnel who operate the fund and manage its portfolio generally are employed and compensated by the fund's investment adviser.¹⁴⁰

Although fund directors, including directors of listed closed-end funds, may hold shares of the funds they serve, fund compensation practices can be distinguished from those of operating companies.¹⁴¹ We believe that the granting of shares as a component of incentive-based compensation is uncommon, and in some cases is prohibited, for both open-end and closed-end funds.¹⁴² From a practical standpoint, even if fund directors were to acquire shares of listed closed-end funds, commenters indicated that it is difficult to hedge such shares by selling short or trading in derivatives.¹⁴³ Concerns about avoiding restrictions on long-term compensation, which we understand to be one of the reasons Congress mandated this disclosure, may therefore be less likely to be raised with respect to open-end and closed-end funds.¹⁴⁴

Section 14(j) of the Exchange Act directs the Commission to require certain disclosures in connection with any proxy or consent solicitation material for an annual meeting of shareholders. Most funds, other than listed closed-end funds, are not required to hold annual meetings of shareholders.¹⁴⁵ ETFs, although traded

¹⁴⁰ In 2017, staff identified 5 (1%) internally managed listed closed-end funds based on a review of filings with the Commission. Funds also typically will contract with other service providers in addition to the investment adviser.

¹⁴¹ See Saitz, Greg, "Here Are Two Choices: Buy Fund Shares or Buy Fund Shares," July 30, 2013, available at http://www.boardiq.com/c/556021/60971/here_choices_fund_shares_fund_shares.

¹⁴² Registered investment companies are generally prohibited from issuing their securities for services. See Sections 22(g) (open-end funds) and 23(a) (closed-end funds) of the Investment Company Act. Recognizing that "effective fund governance can be enhanced when funds align the interests of their directors with the interests of their shareholders," the Commission staff has suggested circumstances under which funds may compensate fund directors with fund shares consistent with sections 22(g) and 23(a). See Interpretive Matters Concerning Independent Directors of Investment Companies, Investment Company Act Release No. 24083 (Oct. 14, 1999) (discussing, among other matters, the staff's views on application of Section 23(a) to the compensation of directors in closed-end funds using fund shares).

¹⁴³ See note 132 above and accompanying text.

¹⁴⁴ See note 5 above and accompanying text.

¹⁴⁵ The requirement to hold an annual meeting of shareholders at which directors are to be elected is

on an exchange, do not generally hold annual meetings of shareholders, and ETFs organized as UITs do not have boards of directors. Listed closed-end funds, on the other hand, generally are required to hold annual meetings of shareholders.¹⁴⁶

The Commission has considered, in the context of compensation and corporate governance, whether listed closed-end funds are more like operating companies or more like ETFs and open-end funds. As recognized in the Proposing Release, shares of listed closed-end funds trade at negotiated market prices on a national securities exchange and often trade at a "discount" to the fund's net asset value per share.¹⁴⁷ While the Commission suggested in the Proposing Release that information as to whether a listed closed-end fund's directors and employees, if any, would receive the discounted price upon a sale of the shares without an offset from a hedging transaction may be important to the voting decision of an investor, we received no public comment in support of this premise. On the contrary, a number of commenters opposed the inclusion of listed closed-end funds for a variety of reasons.¹⁴⁸

We are persuaded by commenters that listed closed-end funds are more similar to open-end funds in this context and it is not necessary to apply the hedging disclosure requirements to listed closed-end funds. Accordingly, we find it is in the public interest and consistent with the protection of investors to exclude listed closed-end funds from the Item 407(i) disclosure requirements.

ii. Emerging Growth Companies and Smaller Reporting Companies

As adopted, the amendments do not exempt EGCs or SRCs from the new disclosure requirement. We believe that information about potential alignment of shareholder interests with those of employees and directors would be relevant to shareholders of an EGC or an SRC. Moreover, given the change in the

imposed by a source of authority other than the federal securities laws. See note 94 above. Funds are typically organized under state law as a form of trust or corporation that is not required to hold an annual meeting. See Robert A. Robertson, Fund Governance: Legal Duties of Investment Company Directors § 2.-6[5]. Funds may, however, hold shareholder meetings from time to time under certain circumstances, including where less than a majority of the directors of the fund were elected by the holders of the fund's outstanding voting securities. See Section 16(a) of the Investment Company Act.

¹⁴⁶ See, e.g., Section 302.00 of the New York Stock Exchange's Corporate Governance Standards.

¹⁴⁷ Proposing Release at 8494.

¹⁴⁸ See notes 134-137 above and accompanying text.

disclosure requirement to focus on a company's existing practices or policies, we do not expect the new disclosure to impose a significant compliance burden on companies.

We are mindful that that the JOBS Act excludes EGCs from some, but not all, of the provisions of Title IX of the Act, of which Section 955 is a part,¹⁴⁹ and that EGCs and SRCs are in many instances subject to scaled disclosure requirements, including with respect to executive compensation.¹⁵⁰ We believe that it would be more consistent with our historical approach to corporate governance related disclosures,¹⁵¹ as well as the statutory objectives of Section 14(j), not to exempt these companies from the new disclosure requirement. EGCs and SRCs are not required to provide CD&A disclosure required by Item 402(b) and therefore may be less likely to have hedging practices or policies. Item 407(i) as adopted, however, does not direct them to adopt such practices or policies, or dictate the content of any such practices or policies. We believe the amendments would not impose a substantial direct cost on companies as they would simply require the company to disclose what, if any, practices or policies it has adopted and to whom they apply, or in the absence of any such practices or policies, disclose that none exists or state that hedging transactions are generally permitted. Accordingly, a company that does not believe a hedging policy would be in the best interests of its shareholders would be able to comply with the disclosure requirement without creating a practice or policy. As with any company, the complexity of the disclosure would reflect mainly the level of complexity of the hedging practices or policies of the individual company.

As discussed in Section VI below, in addition to direct costs, companies subject to the disclosure requirement

¹⁴⁹ Section 102 of the JOBS Act exempts EGCs from: The say-on-pay, say-on-frequency, and say-on-golden parachutes advisory votes required by Exchange Act Sections 14A(a) and (b), enacted in Section 951 of the Act; the "pay versus performance" proxy disclosure requirements of Exchange Act Section 14(i), enacted in Section 953(a) of the Act; and the pay ratio disclosure requirements of Section 953(b) of the Act.

¹⁵⁰ See Section 102(c) of the JOBS Act and Item 402(l) of Regulation S-K.

¹⁵¹ See Item 407(a), (b), (c), (d), (e)(1)-(3), (f) and (h) of Regulation S-K; but see Item 407(g) of Regulation S-K, which provides a phase-in period for SRCs from the disclosure required by Item 407(d)(5) of Regulation S-K and does not require SRCs to provide the disclosures required by Item 407(e)(4) and (5) of Regulation S-K. In addition, as noted above, officers and directors at EGCs and SRCs are subject to the obligation under Exchange Act Section 16(a) to report transactions involving derivative securities.

may also incur indirect costs associated with the disclosure, which may be larger for companies without practices or policies regarding hedging in place. We thus recognize that EGCs and SRCs may incur greater costs as a result of the disclosure requirement. Accordingly, we are adopting a delayed compliance date for EGCs and SRCs.

As noted below,¹⁵² in order to give companies adequate time to implement the new disclosures, we are providing a transition period. Companies that are not SRCs or EGCs are required to comply with Item 407(i) in proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019. We believe that providing a delayed compliance date for SRCs and EGCs will benefit those companies by allowing them to observe how other larger and more established companies implement Item 407(i). Accordingly, to assist SRCs and EGCs in preparing to implement Item 407(i), we are requiring them to comply with Item 407(i) in proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2020.

iii. Foreign Private Issuers

As noted above, Section 14(j) calls for disclosure in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer. Because securities registered by a FPI are not subject to the proxy statement requirements of Exchange Act Section 14,¹⁵³ under the amendments, FPIs are not required to provide the new Item 407(i) disclosure.

IV. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

V. Compliance Dates

In order to give companies adequate time to implement these disclosures, we are requiring companies that are not SRCs or EGCs to begin complying with Item 407(i) in proxy and information statements with respect to the election of directors during fiscal years beginning on or after July 1, 2019. We are delaying the required compliance for

SRCs and EGCs until fiscal years beginning on or after July 1, 2020.

VI. Economic Analysis

A. Background

We are adopting amendments to implement Section 955 of the Act, which added Section 14(j) to the Exchange Act concerning disclosure about a company's hedging policies in proxy or consent solicitation materials.¹⁵⁴ We are mindful of the costs imposed by and the benefits obtained from our rules. Exchange Act Section 3(f)¹⁵⁵ requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Additionally, Exchange Act Section 23(a)(2)¹⁵⁶ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule will have on competition and not to adopt any rule that will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The discussion below addresses the expected economic effects of the final amendments, including the likely benefits and costs, as well as the likely effects of the final amendments on efficiency, competition, and capital formation. The Commission has, where possible, quantified the economic effects expected to result from the final amendments in the analysis below. However, we are unable to quantify some of the potential effects discussed below. Notably, the benefits of the final amendments are difficult to quantify because we lack data on the extent to which shareholders currently factor information on hedging practices or policies into their decisions and the extent to which the availability of the new disclosure under the final amendments will inform shareholder decisions. Further, we are unable to quantify the indirect costs of the final amendments because we lack information to predict the extent of changes to hedging policies that companies may undertake following the amendments and the incremental costs companies may incur as a result of implementing such changes, including costs to develop and administer new or revised hedging policies and costs associated with potential changes to

incentives of directors and employees. Therefore, much of the discussion below is qualitative in nature, although the Commission describes, where possible, the direction of these effects. Finally, for purposes of this economic analysis, we address the benefits and costs resulting from the statutory mandate and our exercise of discretion together because the two types of benefits and costs are not readily separable.

B. Baseline and Affected Parties

The final amendments will affect all companies with a class of securities registered under Section 12 of the Exchange Act, including SRCs, EGCs, and BDCs. The final amendments do not apply to FPIs and investment companies registered under the Investment Company Act. In a change from the proposal, listed closed-end funds will not be subject to the final amendments.¹⁵⁷ We estimate that approximately 5,795 companies will be subject to the final amendments.¹⁵⁸ Among the companies subject to the final amendments, we estimate approximately 2,086 to be SRCs;¹⁵⁹

¹⁵⁷ Based on data from Morningstar, we identify approximately 512 closed-end funds that were listed on an exchange as of December 31, 2017.

¹⁵⁸ We estimate the number of unique operating companies subject to the final amendments by analyzing companies that filed annual reports on Form 10-K in calendar year 2017 with the Commission. This estimate excludes ABS issuers (identified based on prior ABS-related filings), registered investment companies, issuers that have not filed Form 10-K, and foreign issuers filing Forms 20-F and 40-F. We identify companies that have securities registered under Section 12(b) or Section 12(g) from Form 10-K. Companies not identified as having a class registered either under Section 12(b) or Section 12(g) are excluded. We determine whether a company identifies itself as a SRC from Form 10-K. We determine whether a company identifies itself as an EGC based on Ives Group's AuditAnalytics data. This estimate is an upper bound on the number of affected filers to the extent that not all of these filers file a proxy statement or an information statement in a given year (for example, some filers may not hold a director election).

¹⁵⁹ See note 9, above. These estimates are based on calendar year 2017 data, the last full year of data available to us. Following the amendments to the SRC definition, which expanded the range of companies that qualify for SRC status, effective September 10, 2018, we expect the proportion of SRCs among companies subject to the final amendments to be higher than estimated based on 2017 data. Among companies subject to the final amendments based on 2017 data, approximately 814 additional companies, including 567 companies that are not EGCs, would have qualified as SRCs under the expanded definition.

Those non-EGCs that were in existence prior to the recent expansion of the SRC definition and that newly qualify for SRC status under the expanded definition would have been subject to Item 402(b) in prior years.

¹⁵² See Section V, below.

¹⁵³ Exchange Act Rule 3a12-3(b) [17 CFR 240.3a12-3(b)] specifically exempts securities registered by a FPI from Exchange Act Sections 14(a) and 14(c).

¹⁵⁴ See Section I, above.

¹⁵⁵ 15 U.S.C. 78c(f).

¹⁵⁶ 15 U.S.C. 78w(a)(2).

1,224 to be EGCs;¹⁶⁰ and 80 to be BDCs.¹⁶¹ Besides companies, affected parties include employees (including officers) and directors of the affected companies, as well as investors in these companies. Equity securities covered by the final amendments include equity securities issued by the company and its parents, subsidiaries or subsidiaries of the company's parents.

We assess the economic effects of the final amendments relative to the baseline, which includes the existing state of disclosure requirements and practices. As discussed in Section II above, among the registrants subject to the final amendments, Section 12 registrants other than SRCs and EGCs are currently subject to the CD&A disclosure requirement in Item 402(b) of Regulation S-K. Under Item 402(b)(2)(xiii), an example of the kind of information that should be provided, if material, includes a description of the company's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership) and any company policies regarding hedging the economic risk of such ownership. Although Item 402(b)(2)(xiii) addresses only hedging by the named executive officers, some companies describe policies that address hedging by employees and directors, as well as named executive

officers, in providing their CD&A disclosure.¹⁶²

Additionally, Section 16(a) of the Exchange Act requires officers and directors of Section 12 registrants, including SRCs and EGCs, to report their hedging transactions involving the company's equity securities.¹⁶³ However, unless a company discloses a policy regarding hedging by officers and directors, it is not possible for investors to obtain full information about whether a company has a hedging policy or how one may apply. For example, investors may not be able to discern from current disclosure whether the disclosure of hedging transactions by officers and directors indicates that the company does not have a hedging policy; the company has a policy regarding hedging, but that the particular types of transactions are not restricted by the policy; or a company's hedging policy was violated, but the transaction was reported in accordance with Section 16(a). Similarly, it is not possible to discern from current disclosure whether the absence of reported hedging transactions indicates that the company prohibits hedging; the company does not prohibit hedging, but that officers and directors did not engage in hedging transactions; or officers and directors engaged in hedging transactions but did not comply with Section 16(a).

The extent to which there will be a change in the hedging policy

disclosures under the final amendments will vary for different categories of registrants subject to the amendments. While a number of reporting companies already make hedging policy disclosures, others will need to do so for the first time. To establish the baseline of existing practices related to disclosure of hedging policies, we analyzed information from comment letters and industry surveys of large companies' hedging policy disclosure practices¹⁶⁴ and reviewed proxy statements for information on disclosures of hedging policies for four samples of companies.¹⁶⁵ The first sample includes a randomly chosen subset of 100 S&P 500 companies that filed proxy statements during the calendar year 2017.¹⁶⁶ The second sample includes 100 randomly selected companies from the S&P SmallCap 600 that filed proxy statements during the calendar year 2017.¹⁶⁷ These companies are smaller than S&P 500 companies; however, all of them are exchange-listed, and none are SRCs (based on the pre-2018 definition).¹⁶⁸ In addition, we have examined hedging policy disclosure practices for random samples of 100 SRCs and 100 non-SRC EGCs (using the pre-2018 SRC definition).¹⁶⁹

In general, the sampled S&P 500 companies disclosed hedging policies more frequently than the other categories of sampled companies.

TABLE 1—CURRENT HEDGING POLICY DISCLOSURE PRACTICES

Covered companies	Size of the examined sample	Covered persons	Disclosed hedging policy	No disclosed policy
Companies in the S&P 500 index	100	NEOs	97 (97%)	3 (3%)
		Directors	77 (77%)	23 (23%)
		Employees	51 (51%)	49 (49%)
Companies in the S&P SmallCap 600 index	100	NEOs	71 (71%)	29 (29%)
		Directors	60 (60%)	40 (40%)

¹⁶⁰ The estimate is based on Ives Group's AuditAnalytics data on filers that identified themselves as EGCs during 2017.

¹⁶¹ The EGC, SRC, and BDC filer categories partly overlap. The estimate of the number of BDCs is based on September 2017 data at <https://www.sec.gov/open/datasets-bdc.html>.

¹⁶² Listed closed-end funds, which are not subject to the final amendments, are not subject to the CD&A disclosure requirement.

¹⁶³ Section 30(h) of the Investment Company Act subjects officers and directors of listed closed-end funds to the same duties and liabilities as those imposed by Section 16(a) of the Exchange Act.

¹⁶⁴ See notes 171–175, below.

¹⁶⁵ We did not receive comment on the methodological approach used in this baseline analysis in the Proposing Release. Our baseline analysis in this release is generally consistent with the baseline analysis in the Proposing Release; however, we are considering data from proxy statements filed in 2017, which is the most recent full calendar year of filings available to us. We also are making some modifications in light of the

availability of information in other sources about the prevalence of hedging policy disclosure among large companies. Specifically, we are considering a random sample of 100, rather than the set of all, S&P 500 companies, in light of other information on hedging policies of large companies that has become available from commenters and industry surveys. See notes 171–175, below. In light of comments regarding the potentially greater effects of the disclosure requirement on SRCs and EGCs, in a change from the baseline analysis in the Proposing Release, we are adding an analysis of samples of 100 SRCs and 100 non-SRC EGCs. Similar to the analysis in the Proposing Release, we also examine a sample of 100 S&P SmallCap 600 companies.

We note that the estimated rate of hedging policy disclosure obtained based on a sample of companies, rather than the entire set of companies, can differ from the actual rate of hedging policy disclosure for the full set of companies. However, such differences should not be systematic in light of our use of random sampling.

¹⁶⁶ A total of 489 S&P 500 companies filed proxy statements during the calendar year 2017.

¹⁶⁷ A total of 586 S&P SmallCap 600 companies filed proxy statements during the calendar year 2017.

¹⁶⁸ See note 159, above. SRC status is based on status reported in filings in calendar year 2017. Twenty-one EGCs were included in the S&P SmallCap 600 index during the calendar year 2017.

¹⁶⁹ See note 159, above. SRC status is based on status reported in filings in calendar year 2017. The SRC sample therefore does not include companies that would become newly eligible for SRC status under the expanded SRC definition following the 2018 amendments, while the non-SRC EGC sample may include such companies. Because companies newly eligible for SRC status under the 2018 amendments would tend to be larger than the companies eligible for SRC status prior to the 2018 amendments, to the extent that larger companies are more likely to disclose hedging, the prevalence of hedging disclosure in the analyzed sample of SRCs from 2017 may be lower than the prevalence of hedging disclosure among SRCs under the amended definition.

TABLE 1—CURRENT HEDGING POLICY DISCLOSURE PRACTICES—Continued

Covered companies	Size of the examined sample	Covered persons	Disclosed hedging policy	No disclosed policy
SRCs (pre-2018 definition)	100	Employees	33 (33%)	67 (67%)
		NEOs	7 (7%)	93 (93%)
		Directors	6 (6%)	94 (94%)
		Employees	1 (1%)	99 (99%)
EGCs that are not SRCs (pre-2018 definition)	100	NEOs	15 (15%)	85 (85%)
		Directors	13 (13%)	87 (87%)
		Employees	11 (11%)	89 (89%)
		Employees	11 (11%)	89 (89%)

Table 1 shows that disclosures and hedging policies are not uniform across covered categories of companies. Almost all of the S&P 500 companies sampled (97%) disclosed policies regarding hedging by named executive officers. A large majority of the S&P 500 companies sampled (77%) also disclosed their policy about hedging by directors, but only 51% disclosed hedging policies for non-executive employees. These percentages are smaller for smaller companies. Of the 100 S&P SmallCap 600 companies sampled, only 71% disclosed hedging policies for named executive officers, 60% disclosed such policies for directors, and 33% disclosed hedging policies for non-executive employees. An even smaller proportion of the sampled SRCs and non-SRC EGCs (based on the pre-2018 definition)¹⁷⁰ disclosed hedging policies: 7% of SRCs and 15% of non-SRC EGCs disclosed policies regarding hedging by named executive officers; 6% of SRCs and 13% of non-SRC EGCs disclosed policies regarding hedging by directors; and 1% of SRCs and 11% of non-SRC EGCs disclosed policies regarding hedging by non-executive employees. Among the different categories of the sampled companies that disclosed hedging policies, all or almost all such companies disclosed policies that either prohibited or restricted hedging.

These results are broadly in line with those reported by commenters and industry reports. One commenter stated that 49% of Russell 3000 companies and 84% of S&P 500 companies have hedging policies governing their officers and directors.¹⁷¹ Another commenter indicated that approximately 54% of Russell 3000 Companies and 84% of S&P 500 companies have prohibited employees from hedging company shares.¹⁷² A different commenter indicated that a survey of 100 companies among the Fortune 500 found that 95% of companies disclosed

hedging policies during the 2014 proxy season, and the vast majority of these policies involved a ban.¹⁷³ Another commenter reviewed company disclosures in Commission filings and corporate governance documents available on company websites, and found that: (1) 95% of a cross-section of 60 publicly traded companies whose CEOs are members of Business Roundtable prohibit hedging of company securities by executive officers, and (2) 85% prohibit hedging by directors.¹⁷⁴ More recent industry studies of large companies have reported that the majority of the surveyed companies disallow executive hedging.¹⁷⁵

¹⁷³ See letter from Public Citizen.

¹⁷⁴ See letter from Business Roundtable.

¹⁷⁵ A 2015 report found that among the 250 largest market capitalization S&P 500 companies, the prevalence of policies prohibiting hedging by executives is 92%. See Frederic W. Cook & Co., Inc., Corporate Governance Study 1 (December 2015), available at https://www.fwcook.com/content/Documents/Publications/FWC_2015_Corp_Gov_Study_Final.pdf.

Another recent report found hedging policies to be present in 96% of large publicly traded companies and attributed that percentage to the influence of legislation, proxy advisory firms, and shareholder scrutiny. The report considered “110 companies from 10 industries, selected to provide a broad representation of market practice among large U.S. public companies.” See Compensation Advisory Partners (CAP), CAP 100 Company Research Industry Report 2017–2018 13, <https://www.capartners.com/cap-thinking/cap-100-company-research-17-18/>.

In another report, 93 of the largest 100 companies (93%) that have equity securities listed on the NYSE or Nasdaq were found to prohibit hedging. See 2018 Shearman & Sterling LLP Corporate Governance survey, at 103.

An analysis of 2017 data indicated that 98% of a random subset of S&P 500 companies and 71% of a random subset of S&P SmallCap 600 companies disclosed hedging policies for named executive officers. In the Proposing Release, an analysis of 2012 data indicated that 67% of S&P 500 companies and 29% of a random subset of S&P SmallCap 600 companies disclosed hedging policies for named executive officers. See Proposing Release, at 8498. We cannot identify the causes of increased incidence of hedging policy disclosure among large companies with certainty and note that estimates based on samples of companies may contain noise, although differences in estimates are not likely to be biased because samples are drawn randomly. The increase in the rate of hedging policy disclosure over this time period may be partly due

Discussion of Economic Effects

To help inform our analysis of the potential benefits and costs of disclosure of practices or policies regarding hedging to shareholders, we consider the potential ways in which hedging by employees and directors may affect shareholder value. However, as discussed in Section III above, these amendments relate only to disclosure of hedging practices or policies and should not be construed as suggesting that companies should have a practice or policy regarding hedging, or a particular type of practice or policy.

Generally, by linking employees' and directors' wealth to shareholder wealth, an ownership stake in the company can provide employees and directors with an incentive to improve shareholder value.¹⁷⁶ Permitting employees and directors to hedge their exposure to the company's stock price can reduce the alignment of their incentives with the interests of shareholders, potentially resulting in less optimal corporate investment decisions and lower shareholder value. Alternatively, permitting hedging could, in some circumstances, more closely align the risk preferences of employees and directors with those of shareholders, potentially resulting in more efficient corporate investment decisions and higher shareholder value. Compared to shareholders, employees and directors are more likely to have undiversified

to the anticipation of a future requirement to provide hedging disclosures as a result of the Dodd-Frank Act and the Proposing Release, as well as due to demand from shareholders and other market participants. See also Section VI.B below, analyzing the prevalence of disclosure of hedging practices and policies in a randomly drawn sample of companies.

¹⁷⁶ See Proposing Release, at 8498, n. 86. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305–360 (1976); Bengt Holmstrom, *Moral Hazard and Observability*, 10 Bell J. Econ. 324–340 (1979); Bengt Holmstrom & Joan Ricart I. Costa, *Managerial Incentives and Capital Management*, 101 Q. J. Econ. 835–860 (1986). Terms of employee and director compensation contracts, including holding and vesting periods, may also affect the alignment of incentives with shareholder value over time.

¹⁷⁰ *Id.*

¹⁷¹ See letter from Davis Polk.

¹⁷² See letter from CII.

exposure to their company, which could lead them to avoid making risky corporate investments, even if such actions would enhance shareholder value.¹⁷⁷ Allowing employees and directors to hedge equity holdings could in some circumstances partly ameliorate the imperfect alignment of risk-taking incentives created by undiversified exposure.¹⁷⁸ The net effect of hedging by employees on the efficiency of corporate investment decisions would depend on the relative impact of these tradeoffs; the availability and cost-effectiveness of other tools to address these concerns;¹⁷⁹ and the extent and types of hedging used by employees and directors. In particular, the impact of hedging on the incentives of employees and directors may depend on the amount of hedging as well as on the type of hedging transactions used and payoffs provided by the particular instrument.

There is limited research on hedging transactions by corporate insiders. In an effort to understand these incentives, one academic study concludes that there is significant variation in the motivations for the use of derivative transactions for hedging by corporate insiders.¹⁸⁰ However, the study does not find evidence that the use of hedging instruments is associated with significant changes in earnings management, investment policy, including R&D, or company risk, and concludes that the evidence is mixed as

¹⁷⁷ See Proposing Release, at 8498–99, nn. 88–89. See, e.g., Lisa Meulbroeck, *Company Stock in Pension Plans: How Costly Is It?*, 48 J. L. & Econ. 443, (2005); Brian J. Hall & Kevin J. Murphy, *Stock Options for Undiversified Executives* 33 J. Acct. & Econ. no. 1, 3–42 (2002) (stating that a large literature has studied the resulting underinvestment concern).

See, e.g., Alfred Rappaport, *Executive Incentives vs. Corporate Growth*, 57 Harv. Bus. Rev. 81–88 (1978); Clifford Smith & Rene Stulz, *The Determinants of Firms' Hedging Policies*, 20 J. Fin. and Quantitative Analysis 391–405 (1985); Robert Kaplan, *Advanced Management Accounting*, (Prentice-Hall, 1982); and Richard Lambert, *Executive Effort and the Selection of Risky Projects*, 17 RAND J. Econ. 77–88 (1986).

¹⁷⁸ Besides concentrated financial wealth exposure, employees and directors have human capital exposure to the company. Hedging by employees and directors affects the former.

¹⁷⁹ For example, corporate hedging of cash flow risk, or a requirement that executive officers hold stock options, also can strengthen executives' incentives to take on risky but value-enhancing investment projects; however, both can involve costs. See Proposing Release, at 8499, n. 91.

¹⁸⁰ See J. Carr Bettis, John Bizjak & Swaminathan Kalpathy, *Why Do Insiders Hedge Their Ownership? An Empirical Examination*, 44 Financial Management, 655 (2015). The study also finds that insider derivative transactions are more likely among companies with overvalued equity, higher CEO pay-for-performance sensitivity, and higher insider equity ownership. Given the sample period used in the study (1996–2006), it is not clear if their findings reflect the current situation.

to whether these instruments are a contractual response to agency problems, or suboptimal contracts.¹⁸¹

1. Effects of the Item 407(i) Disclosure Requirements

Item 407(i) is being adopted to require a company to describe any practices or policies it has adopted regarding the ability of employees or directors of the company to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of company equity securities granted to the employee or director by the company as part of the compensation of the employee or director, or held, directly or indirectly, by the employee or director.¹⁸² If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted. The rule does not direct companies to have such practices or policies, or dictate the content of any such practices or policies.

Similar to the proposal, and similar to the existing Item 402(b)(2)(xiii), the final amendments do not define the term “hedge.” Instead, the final amendments use the term as a broad principle for transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of registrant equity securities. Not limiting the disclosure requirement to specific transaction types will enable it to comprehensively capture policies related to those hedging transactions that companies view as relevant in light of their specific circumstances and incentive structures. The final amendments allow for flexibility to address new downside price protection techniques as they develop, providing relevant information to investors, and avoid adopting a definition that could prove either over- or under-inclusive. However, we acknowledge that the principles-based approach could lead to less comparability in the required disclosures across companies.

Generally, information about hedging practices or policies may be relevant for shareholders seeking to assess the equity incentives of employees and directors and the extent of alignment of

¹⁸¹ *Id.* We also note that the likelihood of employees and directors using hedging at a particular firm may also be affected by other factors, including firm characteristics, risk preferences and tax circumstances of individual employees and directors, and the specific features of a firm's hedging policy.

¹⁸² See Section III, above.

those incentives with shareholder interests. As is shown in Table 1, such information is not always available to shareholders, particularly for companies not presently subject to Item 402(b)(2)(xiii). Providing this information could help mitigate the information asymmetry between companies and shareholders about the strength of employees' and directors' equity incentives, thus potentially enhancing the ability of shareholders to make fully informed voting and, potentially, investment decisions.

As discussed below, the potential economic effects of the final amendments are expected to vary across companies, depending on the nature and amount of new information contained in the disclosures, whether a company decides to implement or revise hedging policies, the nature of investment opportunities available to the company, and whether employees and directors currently engage in hedging.

The economic effects of the final amendments will likely be smaller for companies that are subject to Item 402(b)(2)(xiii), which requires disclosure of policies regarding hedging by named executive officers, if material.¹⁸³ If such companies currently disclose practices or policies regarding hedging by named executive officers, their existing disclosure may satisfy Item 407(i) requirements as to those officers. Companies subject to Item 402(b)(2)(xiii) that do not currently disclose practices or policies regarding hedging by named executive officers (either because they do not have such policies or because their disclosure would not be material), will need to provide new disclosure under Item 407(i). Because investors may already draw inferences about a company's hedging practices or policies regarding named executive officers from the absence of an Item 402(b)(2)(xiii) disclosure, the incremental effects of the Item 407(i) disclosure for investor understanding of hedging practices or policies of such companies as to those

¹⁸³ SRCs and EGCs are not subject to Item 402(b). The incremental effects of the final amendments on BDCs depend on whether the BDC currently qualifies as an SRC or EGC and thus whether it is subject to Item 402(b)(2)(xiii). Further, the incremental effects of the amendments are expected to be greater for internally managed BDCs than for BDCs that are externally managed by an investment adviser's portfolio manager because employees of the investment adviser are outside the scope of Item 407(i). Based on staff estimates, among BDCs with a class of securities registered under Section 12, approximately 87.5% are externally managed. However, directors of externally managed BDCs play a role in overseeing the BDC's investment adviser, and policies regarding director hedging are within the scope of Item 407(i).

officers may be small. Further, irrespective of whether companies subject to Item 402(b)(2)(xiii) currently disclose practices or policies regarding hedging by named executive officers, if such companies have practices or policies regarding hedging by other employees or directors, they will be required to disclose such practices or policies under Item 407(i), which will provide additional information to investors. Companies without any practices or policies regarding hedging will be required to disclose that fact or state that hedging transactions are generally permitted.

On the other hand, the incremental economic effects of the final amendments are expected to be larger for Section 12 registrants that have been reporting as SRCs or EGCs. As discussed in Section VI.B above, a relatively smaller proportion of companies that are not subject to Item 402(b)(2)(xiii) presently discloses information about hedging practices or policies. Under the final amendments, such registrants will be required to provide new disclosure about whether they have practices or policies regarding hedging by employees (including officers) and directors.

a. Benefits

Investors may benefit from the disclosures required by the final amendments in several ways.

First, new disclosures provide more clarity and transparency about incentives of employees and directors, thereby potentially reducing the information asymmetry between corporate insiders and shareholders regarding such incentives and promoting more informed voting and, potentially, investment decisions. Although shareholders currently have access to officers' and directors' historical hedging transactions through Section 16(a) reports, those shareholders may not have information about whether officers and directors can engage in hedging in the future.

Several commenters agreed that the required disclosure will enhance transparency and investor understanding of hedging practices.¹⁸⁴ For example, one commenter indicated that the new disclosures will help investors to better understand the incentives of employees (including officers) and directors to improve shareholder value.¹⁸⁵ Another

commenter stated that the disclosure of a company's hedging policy may be considered by investors in the course of voting on proposals prohibiting hedging, advisory votes on executive compensation, and director elections.¹⁸⁶

Second, the final amendments may reduce the costs for investors of researching and analyzing equity-based incentives. While Section 16(a) reports provide transaction-specific information about officer and director hedging, investors may incur costs to search and aggregate information from Forms 3, 4, and 5 and to determine whether a reported transaction constitutes hedging. Information about whether employees and directors are subject to a practice or policy regarding hedging could confirm for investors whether the reported equity holdings of officers and directors represent their actual incentives.

Third, the final amendments may potentially yield indirect benefits for investors if the public nature of the required disclosures leads companies subject to Item 407(i) to adopt changes in hedging practices or policies. If such changes better align the incentives of employees and directors with those of shareholders, such companies may experience an increase in shareholder value. Alternatively, as discussed in Section VI.C.1.b below, if the change in hedging practices or policies reduces incentive alignment, such changes could reduce shareholder wealth. We do not have data by which to be able to assess whether companies will adopt changes in hedging practices or policies, and if so, whether such changes will result in net benefits or costs.

The three types of benefits described above are likely to be most significant with respect to the disclosure practices or policies for executive officers. Some of these types of benefits may also apply to disclosure about practices or policies for directors and non-executive employees, although as discussed below, the benefits may be less pronounced.

Directors may receive equity-based compensation to better align their interests with those of the shareholders they represent.¹⁸⁷ The benefits of

disclosure about hedging policies for non-officer directors may be smaller than for officers because non-officer directors generally are less involved in corporate investment decisions than officers. Also, because their exposure to the company as a proportion to their overall wealth is likely to be lower, non-officer directors may be less likely to engage in hedging than officers.¹⁸⁸

Disclosure of hedging policies regarding employees generally may also benefit investors to the extent that they contribute, individually or as a group, to shareholder value. This potential benefit can be greater in the case of critical non-executive employees (e.g., key research scientists and founding employees), who may have equity stakes or option holdings and whose actions and decisions can also affect the company's stock price, than in the case of those employees who do not participate in making and shaping key operating or strategic decisions to the same extent. While some non-executive employees may receive equity grants as part of the companies' broad-based equity plans, their equity ownership and compensation levels on average are much lower compared to executive

Philip Hersch, *How Do Firms Adjust Director Compensation?*, 14 J. Corp. Fin. 153 (2008); James Linck, Jeffrey Netter & Tina Yang, *The Effects and Unintended Consequences of the Sarbanes-Oxley Act on the Supply and Demand for Directors*, Review of Financial Studies 22(8): 3287–3328 (2009); and Viktor Fedaseyev, James Linck, & Hannes Wagner, *The Determinants of Director Compensation* (J. Corp. Fin. 2014) working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335584.

Although these studies used samples prior to 2011, we have no reason to believe that director incentives and compensation have declined significantly in more recent years. For example, according to a 2017 industry study of “non-employee director compensation at 300 companies of various sizes and industries,” equity represented 58% of total director pay across all companies. The share of equity in director compensation was higher at large-cap companies (market cap above \$5 billion) (62%) than at mid-cap (market cap of \$1–5 billion) (58%) or small-cap (market cap below \$1 billion) (54%). Median total director pay in the survey was \$150,000 for small-cap, \$201,667 for mid-cap, and \$274,000 for large-cap companies. See Frederic W. Cook & Co., Inc., *Director Compensation Report*, 1, 6 (November 2017) available at https://www.fwcook.com/content/documents/publications/11-21-17_FWC_2017_Director_Comp_Final.pdf.

However, directors of listed closed-end funds generally do not receive equity-based compensation. See notes 141–142, above.

¹⁸⁸ Average levels of equity pay awarded to non-officer directors are lower than for executives. *Id.*

In addition, most non-officer directors have other sources of income and wealth (e.g., seats on other boards or an officer position at a different company) not tied to the company on whose board they sit. See, e.g., Ronald Masulis & Shawn Mobbs, *Independent Director Incentives: Where Do Talented Directors Spend their Limited Time and Energy?* 111 J. Fin. Econ. 406, 410, Table 1 (2013).

¹⁸⁴ See, e.g., letters from Chris Barnard, CII and Taylor Dove.

¹⁸⁵ See, e.g., letter from Chris Barnard, who also stated that hedged equity exposures do not reflect the economic exposure to actual equity performance.

¹⁸⁶ See letter from CII.

¹⁸⁷ For S&P 1500 companies, median total compensation per outside director rose from \$57,514 in 1998 to \$112,745 in 2004 (a 51% increase), far greater than the rate of increase of 24% in CEO compensation over the same period. The proportion of director pay provided by equity increased from around 45% in 1998 to over 60% in 2004. However, director incentives are typically smaller than incentives for CEOs. See David Yermack, *Remuneration, Retention, and Reputation Incentives for Outside Directors*, 59 J. Fin. 2281–2308(2004); Kathleen Farrell, Geoffrey Friesen &

officers.¹⁸⁹ Further, individual rank-and-file employees are unlikely to have a notable impact on the company's equity market value.

Nevertheless, while a decision by a single non-executive employee is unlikely to affect the stock price, the combined actions of non-executive employees motivated by equity incentives may have a significant effect on the company.¹⁹⁰ Several commenters stated that it is important to require disclosure of hedging policies for all employees, asserting that such information is useful, whether or not the employees are officers of the company.¹⁹¹ However, several other commenters stated that information about hedging below the executive level is not material to shareholders since non-executive employees do not make or shape key operating and strategic decisions that influence the company's stock price.¹⁹² Importantly, the rule requires disclosure of a company's hedging practices or policies but does not require the practices or policies to be the same for officers as for other employees or to cover any category of employees.

While the potential benefits discussed above may apply to investors in all companies subject to the final amendments, the magnitude of the benefits may vary across companies. The potential benefits of the new disclosure could be higher for shareholders of EGCs and SRCs, which are not presently subject to Item 402(b)(2)(xiii) with respect to named

executive officer hedging policies and a relatively smaller proportion of such companies presently discloses hedging practices or policies. In turn, investors in companies that currently disclose hedging policies may be unlikely to realize significant additional benefits from the prescribed disclosure or changes in hedging policies as a result of the final amendments.

The potential benefits to investors also will depend on the likelihood that officers and directors engage in hedging transactions. Information about hedging policies may be more relevant to investors in companies for which there are stronger incentives for employees and directors to hedge. The evidence on which types of companies are likely to have stronger incentives to hedge is inconclusive. For example, we expect the benefits of the new disclosure to be higher for shareholders of companies with volatile stock prices and a higher risk of stock price decline because such companies' employees and directors may have relatively stronger incentives to hedge.¹⁹³ This category of companies is likely to include EGCs and SRCs because smaller companies have generally been linked to greater distress risk.¹⁹⁴ Additionally, since company age is among the most important predictors of failure, younger companies such as EGCs are more likely to have a higher risk of financial distress.¹⁹⁵ EGCs also tend to have more growth opportunities,¹⁹⁶ riskier cash flows, and fewer financial resources. Some commenters stated that SRCs and EGCs have greater exposure to market risk and that, as a result, officers and directors of these companies may use hedging transactions more often, and therefore the value of hedging policy disclosure to investors in these companies may be greater.¹⁹⁷ However, because it is costlier to hedge the risk of illiquid stocks,¹⁹⁸ officers and directors of these

companies may instead be less likely to engage in hedging. Thus, the potential benefits of the new disclosure could instead be lower for investors in smaller companies or those companies not listed on a national securities exchange. Overall, the effects of greater risk and lower liquidity associated with small cap stocks on hedging practices may partly offset one another.¹⁹⁹

b. Costs

The costs of complying with the final amendments include direct costs of preparing the disclosures they require as well as potential indirect costs.

The costs are expected to be lower for companies that already disclose some of the information that will be required by Item 407(i), most notably for companies subject to Item 402(b)(2)(xiii). As part of the final amendments, we are adding an instruction to Item 402(b) providing that a company may, in certain circumstances, satisfy its CD&A obligation to disclose any material policies on hedging by named executive officers by cross-referencing the information disclosed pursuant to Item 407(i), if the disclosure would satisfy the Item 402(b) requirement. This approach could reduce potentially duplicative disclosure under the existing Item 402(b) requirements and the new Item 407(i) requirements, thereby reducing issuers' cost of compliance with the final amendments.

As discussed above, companies that do not currently provide any hedging

likely reflects the higher risk and cost that would be required to dynamically replicate the exposure of the derivatives contracts by trading in the underlying stock.

¹⁹⁹ To our knowledge, studies have not conclusively determined whether insiders of smaller companies tend to hedge more often. For example, Bettis, Bizjak, and Lemmon (2001) find a total of 87 zero-cost collar transactions, one method of executive hedging, by searching Forms 3, 4 and 5 filed between January 1996 and December 1998. Companies in this sample have total assets with a mean (median) value of \$3.4 billion (\$401 million). These companies are much smaller than S&P 500 companies over the same time period, whose total assets have mean (median) of \$16.15 billion (\$3.84 billion) based on our calculation. This comparison indicates that hedging by zero-cost collars is more frequent in smaller companies. See J. Carr Bettis, John Bizjak & Michael Lemmon, *Managerial Ownership, Incentive Contracting, and the Use of Zero-Cost Collars and Equity Swaps by Corporate Insiders*, 36 J. Fin. & Quantitative Analysis No. 3, 345 (2001). At the same time, liquidity may also affect the ability to hedge.

Bettis, Bizjak, and Kalpathy (2015) state that "smaller firms may not have enough market liquidity for investment banks to either structure these instruments or hedge their own risk exposure." Table 4 of their study reports a statistically significant positive relation between larger company size and the probability of executives using derivatives, but the effect becomes either statistically insignificant or only significant at the 10% level in specifications incorporating additional covariates.

¹⁸⁹ See, e.g., Paul Oyer & Scott Schaefer, *Why Do Some Firms Give Stock Options to All Employees? An Empirical Examination of Alternative Theories*, 76 J. Fin. Econ. 99–133 (2005); Serdar Aldatmaz, Paige Ouimet, & Edward D. Van Wessop, *The Option to Quit: The Effect of Employee Stock Options on Turnover*, 127 J. Fin. Econ. 136–151 (2018); Ehan Kim & Paige Ouimet, *Broad-Based Employee Stock Ownership: Motives and Outcomes*, 69 J. Fin. Econ. 1273–1319 (2014).

¹⁹⁰ See, e.g., Kim and Ouimet (showing that small employee stock ownership plans, comprising less than 5% of shares, granted by companies with moderate employee size, increase productivity and benefit both employees and shareholders but that the effects are weaker when there are too many employees to mitigate free-riding or for large employee stock ownership plans); Xin Chang, Kangkang Fu, Angie Low & Wenrui Zhang, *Non-Executive Employee Stock Options and Corporate Innovation*, 115 J. Fin. Econ. 168 (2015) (showing a positive effect of non-executive employee stock options on corporate innovation, mainly through the risk-taking incentive, rather than the performance-based incentive); Francesco Bova, Kalin Kolev, Jacob Thomas & X. Frank Zhang, *Non-Executive Employee Ownership and Corporate Risk*, 90 Acct. Rev. 115 (2015) (showing a positive effect of non-executive stock options and a negative effect of stock holdings on corporate risk taking).

¹⁹¹ See letters from CII, Florida State Board of Administration and Public Citizen.

¹⁹² See letters from ABA, Business Roundtable, Cleary Gottlieb and McDermott.

¹⁹³ For example, Bettis, Bizjak, and Kalpathy, find in two out of three specifications in Table 4 of their study a significant positive effect of volatility on the probability of executives using derivatives in the 1996–2006 sample.

¹⁹⁴ See, e.g., Nishad Kapadia, *Tracking Down Distress Risk*, 102 J. Fin. Econ. 167 (2011).

¹⁹⁵ See, e.g., Sarah Lane & Martha Schary, *Understanding the Business Failure Rate*, 9 Contemp. Econ. Pol'y 93 (1991); See *id.*

¹⁹⁶ While EGCs may have higher company-specific risk, be smaller on average, and have more exposure to market risk, as Kapadia notes, growth companies have less exposure to aggregate distress risk than more mature companies, holding constant the effects of size and exposure to market risk.

¹⁹⁷ See letters from CII and Florida State Board of Administration.

¹⁹⁸ Officers and directors can hedge by, for example, entering into exchange-traded or over-the-counter derivative contracts. When the underlying stock is illiquid, the price of the derivative contract

policy disclosure will incur relatively higher costs of complying with Item 407(i). The costs are expected to be highest for EGCs and SRCs, which are not subject to Item 402(b)(2)(xiii).²⁰⁰ These companies will incur costs of disclosing the information required by Item 407(i) in proxy or information statements. Some commenters stated that, since EGCs and SRCs are not required to provide CD&A disclosure, they are less likely to have hedging policies in place, and implementation for these companies would impose costs that are disproportionate to the benefits to be obtained.²⁰¹ These commenters also stated that the EGCs and SRCs may not have the resources to develop hedging policies or implement compliance programs, which may involve compensation for consultants and legal counsel.²⁰² We recognize that direct, as well as indirect, costs of the disclosure requirement, which are discussed in detail below, are likely to be greater for EGCs and SRCs. We note, however, that under the final amendments, companies are not required to develop hedging practices or policies and can instead disclose the fact that they do not have practices or policies regarding hedging or state the hedging transactions are generally permitted, which may enable such companies to decrease some of these potential costs (although companies disclosing that they have no practices or policies regarding hedging may still incur some costs).

On average, we expect the direct costs of the final amendments to be relatively modest, and potentially lower than the costs would have been under the proposed amendments, especially because it should be less burdensome to provide clarity as to the scope of the company's practices or policies regarding hedging transactions. As discussed in Section III.A.3 above, in recognition of commenters' concerns about implementation challenges, the final amendments require filers to disclose their practices or policies regarding hedging transactions. To satisfy this obligation, the company will be required either to provide a fair and

accurate summary of the practices or policies that apply, including the categories of persons to which they apply and any categories of transactions that are specifically permitted or specifically disallowed, or to disclose the practices or policies in full. If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted. By reducing the complexity of the disclosure, this change from the proposal is expected to potentially reduce filer costs of preparing disclosures and investor costs of interpreting these disclosures.

While we cannot quantify these disclosure costs with precision, many of the direct costs reflect the burden associated with collection and reporting of information that we estimate for purposes of the Paperwork Reduction Act ("PRA"). For purposes of the PRA, the Commission estimated in the Proposing Release that the amendments would result in an average incremental paperwork burden of three hours per filing of a proxy or information statement in the first three years of the amendments.²⁰³ We did not receive comment on these estimates. However, because the final amendments focus on the disclosure of a company's particular practices or policies regarding hedging, we anticipate that compliance with the final amendments will be easier and more straightforward, resulting in potentially lower compliance burdens. If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted. Thus, for purposes of the PRA, the final amendments are expected to result in an average incremental paperwork burden of two hours per proxy or information statement filing in the first year that a filer is subject to the amendments and one hour per filing in subsequent years. This estimate is less than the estimated burdens of the approach in the Proposing Release, which we estimated would have been five hours per filing in the first year that a filer is subject to the amendments and two hours per filing in subsequent years that a filer is subject to the amendments.²⁰⁴

Indirect costs may also be incurred by some companies to the extent that companies adopt new, or revise existing, hedging policies in anticipation of complying with the amendments, given the public nature of the disclosure required by Item 407(i). As discussed above, these indirect costs

may be greater for companies that do not presently disclose practices or policies regarding hedging. These indirect costs could include potential costs associated with retaining compensation consultants and legal counsel, administering a hedging policy, and changes to the incentive structure within the company that may result from changes to the hedging policy. Several commenters suggested that companies may feel compelled to adopt or modify hedging policies in light of the new disclosure requirement.²⁰⁵ Such costs will be affected by the scope of hedging policies that companies choose to adopt and by company characteristics. One commenter asserted that limiting the covered persons to executive officers would lower costs and that costs for compliance and enforcement mechanisms for policies that cover all employees would vary based on the size of a company's employee base, the geographic dispersion of employees, and the nature of the company's efforts toward ensuring compliance.²⁰⁶ Some commenters also indicated that excluding non-executive employees from the scope of the final amendments would lower the burden on companies.²⁰⁷

Indirect costs may also be incurred by companies that already have optimal compensation arrangements but that make changes to compensation policies that reduce incentive alignment between shareholders and officers or directors after the final amendments. If changes in hedging policies reduce incentive alignment between shareholders and officers or directors, resulting in underinvestment in potentially value-enhancing projects, they could lead to a reduction in shareholder wealth.

The likelihood that adopting or changing hedging policies will distort the company's investment decisions may depend on the company's growth opportunities. The incentives of officers and directors to make efficient corporate investment decisions may be more important for shareholder value at companies with more growth opportunities, such as EGCs and potentially SRCs. However, the expected effect of hedging restrictions on shareholder value at such companies is unclear. On the one hand, the problem of underinvestment in risky, value-enhancing projects as a result of

²⁰⁰ Some SRCs would incur relatively lower costs of complying with the Item 407(i) disclosure. In particular, those non-EGCs that were subject to Item 402(b) prior to the 2018 SRC amendments but that newly qualified for SRC status under the amended definition might already have incurred the cost of complying with named executive officer hedging disclosure, if material, in prior years and thus may have systems in place for making such disclosures as to named executive officers, resulting in lower ongoing costs of complying with Item 407(i). See also note 159, above.

²⁰¹ See letters from ABA and SCSGP.

²⁰² *Id.*

²⁰³ See Section VII, below.

²⁰⁴ See Section VII, below.

²⁰⁵ See, e.g., letters from ABA, Cleary Gottlieb, Davis Polk, McDermott, and SCSGP.

²⁰⁶ See letter from Davis Polk.

²⁰⁷ See letters from ABA, Cleary Gottlieb, Davis Polk, and SCSGP.

excess risk aversion of executives may have a relatively greater impact on firm value at such companies. For instance, one commenter argued that executives of many EGCs and SRCs have a large portion of their personal wealth exposed to their company and therefore will be more negatively affected if they are prohibited from mitigating the exposure of their holdings through hedging.²⁰⁸ On the other hand, restrictions on hedging could strengthen the alignment of managerial and shareholder incentives by tying executives' wealth more closely to share price. The extent of the potential cost resulting from the distortion of corporate investment incentives also may depend on the likelihood that officers and directors engage in hedging transactions. As discussed above, evidence on executive hedging at small companies is mixed.²⁰⁹ These factors make it difficult to predict whether small and growth companies, such as SRCs and EGCs, will incur a larger or a smaller indirect cost, should such companies implement hedging policies after the final amendments.

To the extent that the final amendments may lead some companies to implement or revise hedging policies, the rule also could impose costs on affected employees and directors by limiting their ability to achieve optimal portfolio allocations and potentially resulting in a lower risk-adjusted performance of their holdings. In turn, restrictive hedging practices and policies may affect employees' and directors' willingness to work for such companies, which may adversely affect the ability of some companies to attract and retain employees and directors, resulting in potential costs to such companies and their shareholders. The ability or inability to engage in hedging under a company's policy may be taken into account as part of the negotiation of the total level of compensation between companies and employees or directors. It is difficult to determine the relative magnitude of these effects and whether companies will offer higher (lower) compensation in consideration of a restrictive (permissive) hedging policy.²¹⁰ This might depend, for instance, on the distribution of the bargaining power between the company and current and prospective employees and directors, as well as on the nature

of labor market conditions in a specific industry and with regard to specific occupations and types of employees.

c. Exclusion of Listed Closed-End Funds

In a change from the proposal, after consideration of public comments,²¹¹ the final amendments do not apply to listed closed-end funds.²¹² While this change reduces the overall costs of the rule, it may also reduce the overall benefits of the rule due to the potential relevance of information about the alignment of incentives of shareholders and those of employees and directors of closed-end funds.²¹³ However, we expect that the Item 407(i) disclosure would be less useful for investors in such funds compared to investors in operating companies because closed-end funds, like other registered investment companies, differ from operating companies with respect to management structure, regulatory regime, and disclosure obligations. In particular, almost all funds are externally managed, with portfolio managers generally employed and compensated by the fund's investment adviser. This attenuates the relation between incentives of fund employees and fund performance and makes the disclosure of employee hedging policies less useful for investors.

While the disclosure of hedging policies applicable to directors of listed closed-end funds might potentially be informative, since directors oversee the fund's investment advisers and other service providers, based on evaluating input from commenters,²¹⁴ we do not believe that such potential benefits are likely to be significant.

d. Disclosure in Schedule 14C

Similar to the proposal, the final amendments will require Item 407(i) disclosure in Schedule 14C, in addition to Schedule 14A. This was supported by a commenter.²¹⁵ Requiring Item 407(i) disclosure in Schedule 14C will extend the economic effects of the amendments to Section 12 registrants that do not solicit proxies from any or all security

holders but are otherwise authorized by security holders to take an action with respect to the election of directors. While this provision will increase the overall costs of the rule, it also will provide additional information to investors and promote consistency of disclosure requirements in the context of an action authorized by shareholders with respect to the election of directors.

e. Compliance Dates

As discussed above, SRCs and EGCs currently disclose less information about hedging practices or policies than other types of filers. Under the final amendments, registrants will be required to provide disclosure about whether they have practices or policies regarding hedging by employees (including officers) and directors. In a change from the proposal, after considering the concerns of some commenters about the burden of complying with the disclosure requirement for SRCs and EGCs,²¹⁶ we are adopting a delayed compliance date for these companies. SRCs and EGCs will be required to comply with the rule for fiscal years beginning on or after July 1, 2020, one year after the compliance date for the remaining filers subject to the final amendments.²¹⁷ A delayed compliance date will defer the potential benefits of the final amendments for investors in SRCs and EGCs that choose to utilize the delayed compliance date. However, a delayed compliance date is also expected to defer the costs of the final amendments for such SRCs and EGCs. We expect that deferring the compliance date by one year will allow SRCs and EGCs to observe how Item 407(i) operates in practice for other, larger and more established companies, which may incrementally reduce the costs associated with initially preparing the required disclosure.

2. Efficiency, Competition, and Capital Formation

²¹⁶ See letters from ABA and SCSGP.

²¹⁷ Based on calendar year 2017 data, we estimate that approximately 5,795 companies will be subject to the amendments, of which 2,086 are SRCs under the pre-2018 definition (including 1,349 companies that were not EGCs), 814 additional companies are newly eligible as SRCs under the amended SRC definition (including 567 companies that were not EGCs), and 1,224 are EGCs. In the aggregate, EGCs and SRCs (including companies eligible under the amended definition) are estimated to comprise 54% of the companies subject to the amendments: (1,349 SRCs that are not also EGCs + 567 companies estimated to be eligible as SRCs under the amended definition that are not also EGCs + 1,224 EGCs) = 3,140. 3,140/5,795 = 54%. See notes 158–160, above.

²¹¹ See letters from ABA, ICI and MFDF.

²¹² Similar to the proposal, other types of registered funds, including closed-end funds not listed on an exchange and open-end funds, will remain outside the scope of the Item 407(i) requirement.

²¹³ See Proposing Release, at 8499. See also Youchang Wu, Russ Wermers & Josef Zechner, *Managerial Rents vs. Shareholder Value in Delegated Portfolio Management: The Case of Closed-End Funds*, 29 Rev. Fin. Stud. 3428–3470 (2016).

²¹⁴ See letters from ABA, ICI and MFDF.

²¹⁵ See letter from ABA dated Oct. 13, 2015.

²⁰⁸ See letter from ABA.

²⁰⁹ See notes 193–199, above, and accompanying text.

²¹⁰ See also Proposing Release, at 8501 (n. 103 and accompanying text) and 8503 (n. 111 and accompanying text).

As discussed above, the final amendments may make it easier for investors to obtain information about hedging practices and policies. To the extent that the Item 407(i) disclosure yields new information, or makes it easier for investors to obtain information that is relevant for gauging the extent of incentive alignment of employees and directors with the interests of shareholders, the final amendments may facilitate better informed voting decisions. To the extent the disclosure has the ancillary effect of enabling investors to make more informed investment decisions, it may also potentially incrementally improve the efficiency of capital allocation.

The direct disclosure costs incurred by Section 12 registrants to comply with the final amendments are expected to be relatively modest.²¹⁸ While such costs may vary across companies and may have a relatively greater impact on smaller companies, after considering public comment, we continue to believe that these costs are unlikely to put any category of companies at a significant competitive disadvantage, as the Commission stated in the Proposing Release.²¹⁹ In recognition of the fact that SRCs and EGCs may benefit from observing how Item 407(i) operates in practice for other, larger and more established companies, in a change from the proposal we are adopting a delayed compliance date that provides SRCs and EGCs with an additional year to comply. We expect this accommodation to facilitate compliance with the final amendments for EGCs and SRCs, which would include smaller filers.

However, as discussed above, the effects of the final amendments may vary from company to company. We further recognize that some companies may incur indirect costs if, as a result of the final rule, they choose to implement new, or revise existing, practices or policies regarding hedging by employees and directors, as discussed above. To the extent that any such new or revised practice or policy would restrict corporate insiders from hedging, those insiders could engage in less efficient corporate investment decisions resulting in lower shareholder value, and such changes could potentially lead to additional costs for some companies. However, these potential indirect costs may be limited for some companies that find other means of promoting investment in risky but value-enhancing projects to be cost-effective.²²⁰ After considering

commenter input, although we acknowledge that smaller companies may be incrementally more affected by the costs of the new disclosure requirement, we continue to believe, consistent with what the Commission stated in the Proposing Release,²²¹ that the amendments should not have significant adverse effects on the overall competitiveness of the labor market for employees and directors, competition among U.S. companies or between U.S. companies and FPIs, or the ability of private companies to go public.

3. Reasonable Alternatives

Consistent with the statutory mandate of Section 14(j), and as proposed, the final amendments will require disclosure of hedging practices and policies pertaining to “any employees (including officers) or directors of the registrant, or any of their designees.” As an alternative, we considered limiting the required disclosure to hedging practices and policies pertaining to executive officers and directors only. Compared to the final amendments, this alternative could reduce costs for registrants that do not presently disclose practices or policies regarding hedging by non-executive employees. Compared to the final amendments, this alternative could also reduce the amount of information available to shareholders about the incentives of non-executive employees, which may be valuable to some shareholders in gauging the extent of incentive alignment, as supported by several commenters.²²²

As an alternative to requiring Item 407(i) disclosure on Schedule 14C information statements as well as Schedule 14A proxy statements, we considered requiring it only in proxy statements. This would reduce the disclosure burden on companies that do not solicit proxies from any or all security holders but are otherwise authorized by security holders to take an action with respect to the election of directors. However, requiring Item 407(i) disclosure in information statements provides consistency in hedging disclosures between proxy statements and information statements, so that the disclosure could be made to all shareholders when a company does not solicit proxies from any or all security holders but is otherwise authorized by security holders to take a corporate action with respect to the election of directors. Excluding the Item 407(i) disclosure from information statements under this alternative would

reduce the benefit of availability of information about hedging policies to shareholders in those cases.

We also considered extending the disclosure requirement to all Form 10-K filings in order to impose consistent disclosure obligations upon all registrants, irrespective of whether they file proxy or information statements. While extending the Item 407(i) requirement to companies that do not solicit proxies or information statements would not result in a more informed evaluation of corporate governance in the context of director elections, this alternative could result in potentially more informed investment decisions. However, this alternative also would increase the disclosure obligations for companies that do not solicit proxies or file information statements.

As another alternative, we considered exempting EGCs and SRCs. As discussed in Section VI.B above, EGCs and SRCs currently are not subject to Item 402(b)(2)(xiii) and a relatively smaller proportion of such companies presently discloses hedging policies. Thus, EGCs and SRCs may incur higher costs of complying with Item 407(i). Providing such companies with an exemption from Item 407(i), as suggested by some commenters,²²³ may reduce or defer costs for these entities. However, this alternative would also eliminate the potential benefits to investors in such companies, as suggested by several commenters that did not support an exemption from the proposed requirement for EGCs and SRCs.²²⁴ Because currently a relatively smaller proportion of such companies discloses hedging policies, the potential incremental informational benefits from Item 407(i) are expected to be greater for shareholders of EGCs and SRCs than for shareholders of companies presently subject to Item 402(b).

We have discussed above the tradeoffs associated with excluding listed closed-end funds from the scope of the final amendments, in a change from the proposal.²²⁵ As another alternative, we considered extending the Item 407(i) requirement to open-end registered investment companies. This alternative poses similar tradeoffs. Compared to the final amendments, it would impose costs on these companies. The disclosure also would yield minimal benefits to investors given the distinct regulatory and management structure of such funds. As discussed in the Proposing Release, the benefits are

²¹⁸ See Section VII, below.

²¹⁹ See Proposing Release, at 8504.

²²⁰ See note 179, above.

²²¹ See Proposing Release, at 8504.

²²² See letters from CII, Florida State Board of Administration and Public Citizen.

²²³ See letters from ABA and SCSGP.

²²⁴ See letters from CFA Institute, CII, Florida State Board of Administration and Public Citizen.

²²⁵ See Section III.D.3.c.i., above.

expected to be attenuated in cases of mutual funds whose shares do not have a trading market and are redeemed at the NAV; ETFs that trade on the secondary market at prices closest to the NAV; or any open-end fund shares that have a secondary trading market with low liquidity, which increases hedging costs, deterring hedging by employees and directors.²²⁶

VII. Paperwork Reduction Act

A. Background

Certain provisions of the final amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (the “PRA”).²²⁷ We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rule amendments, and we submitted these collections of information requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.²²⁸ The titles for the collections of information are:

- (1) “Regulation 14A and Schedule 14A” (OMB Control No. 3235–0059);
- (2) “Regulation 14C and Schedule 14C” (OMB Control No. 3235–0057); and
- (3) “Regulation S–K” (OMB Control No. 3235–0071).²²⁹

Regulation S–K was adopted under the Securities Act and Exchange Act; Regulations 14A and 14C and the related schedules were adopted under the Exchange Act. The regulations and schedules set forth the disclosure requirements for proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending the schedule constitute reporting and cost burdens imposed by each collection of information. 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. Compliance with the final rule will be mandatory for affected companies. Responses to the information collection will not be kept

²²⁶ See Proposing Release, at 8504. See also letters from ABA, ICI and MFDF.

²²⁷ 44 U.S.C. 3501 *et seq.*

²²⁸ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

²²⁹ The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosure requirements in Regulation S–K and is reflected in the analysis of these forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burden imposed by Regulation S–K to be a total of one hour.

confidential, and there will be no mandatory retention period for the information disclosed.

B. Summary of Information Collections

We are adopting new paragraph (i) to Item 407 of Regulation S–K to implement Section 14(j) of the Exchange Act, as added by Section 955 of the Act. As discussed in more detail above, Item 407(i), as adopted, requires disclosure of the company’s practices or policies regarding the ability of employees (including officers) or directors of the company, or their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of company equity securities that are granted to them as compensation, or that are held, directly or indirectly, by them. The company will be required either to provide a fair and accurate summary of the practices or policies that apply or to disclose the practices or policies in full. If the company does not have any such practices or policies, it must disclose that fact or state that hedging transactions are generally permitted. Pursuant to the amendments to Item 7 of Schedule 14A, this new disclosure is required in proxy or consent solicitation materials with respect to the election of directors, or information statements in the case of such corporate action authorized by the written consent of security holders.

In addition, to reduce potentially duplicative disclosure between new Item 407(i) and the existing requirement for CD&A under Item 402(b) of Regulation S–K, we are amending Item 402(b) to add an instruction providing that a company may satisfy its obligation to disclose material policies on hedging by named executive officers in the CD&A by cross-referencing the information disclosed pursuant to new Item 407(i) to the extent that the information disclosed there satisfies this CD&A disclosure requirement.²³⁰ This new instruction, like the new Item 407(i) disclosure requirement, applies to the company’s proxy or information statement with respect to the election of directors.

C. Burden and Cost Estimates Related to the Amendments

New Item 407(i) requires additional disclosure in proxy statements filed on Schedule 14A with respect to the election of directors and information

²³⁰ Instruction 6 to Item 402(b).

statements filed on Schedule 14C where such corporate action is taken by the written consents or authorizations of security holders, and thus increases the burden hour and cost estimates for each of those forms. For some filers, this may be mitigated to some extent by a minimal reduction in the burden to prepare their CD&A, as they would be permitted to instead cross reference the disclosure in Item 407(i). The amendment to the CD&A requirement under Item 402(b) would not be applicable to SRCs or EGCs because under current CD&A reporting requirements these companies are not required to provide CD&A in their Commission filings. For all other issuers, we do not expect this amendment would materially affect the disclosure burden associated with their Commission filings. We have taken this amendment into account in our estimates below.

In the Proposing Release, for purposes of the PRA, we estimated the total annual increase in the paperwork burden for all affected issuers to comply with our proposed collection of information requirements, averaged over the first three years, to be approximately 19,238 hours of in-house personnel time and approximately \$2,565,200 for the services of outside professionals.²³¹ We did not receive substantive comments on the PRA that would affect this analysis. These estimates include the time and cost of collecting and analyzing the information, preparing and reviewing disclosure, and filing the documents.

In deriving our estimates, we assumed that the information that new Item 407(i) requires to be disclosed would be readily available to the management of a company because it only requires disclosure of practices or policies they already have but does not direct them to have a practice or policy or dictate the content of such a practice or policy. Nevertheless, we used burden estimates similar to those used in the 2006 Executive Compensation Disclosure Release for updating Schedules 14A and 14C, which we believe were more extensive.²³² Since the first year of compliance with the amendment is likely to be the most burdensome because companies are not likely to have compiled this information in this manner previously, we assumed it would take five total hours per form the first year and two total hours per form in all subsequent years.

²³¹ Our estimates represented the average burden for all companies, both large and small.

²³² See the 2006 Executive Compensation Disclosure Release.

Accordingly, we estimated that the proposed amendments would increase the burden hour and cost estimates per company by an average of three total hours per year over the first three years the amendments are in effect for each Schedule 14A or Schedule 14C with respect to the election of directors.

The final amendments incorporate some changes from the proposal. In particular, the proposal would have required every company to disclose the categories of hedging transactions it permits and those it prohibits, and to specify those categories of persons who are permitted to engage in hedging transactions and those who are not. In contrast, the final amendments require disclosure of a company's practices or policies regarding hedging transactions, including the categories of persons covered and any categories of hedging transactions that are specifically permitted or specifically disallowed. A company will be required either to provide a fair and accurate summary, or to disclose the practices or policies in full. Because we anticipate that this change in emphasis may make compliance easier and more straightforward, we expect it to affect the burden hour and cost estimates per company. Accordingly, we estimate that the amendments will instead increase the burden hour and cost estimates per company by two hours per form in the first year and one hour per form in all

subsequent years. As discussed in Section III.D.4.c.ii above, in a change from the proposal, we are providing SRCs and EGCs with an additional year to comply with the amendments. Therefore, we adjust the aggregate annual average burden during the first three years of the amendments to account for the phase-in. Companies eligible for an extended compliance date will incur no burden in the first year of the amendments, two burden hours to prepare each Schedule 14A or Schedule 14C filing in the second year, and one burden hour per filing in the third year, for an average of 1.0 total hour per year over the first three years of the amendments for each Schedule 14A or 14C with respect to the election of directors.²³³ Companies that are not eligible for the extended compliance date will incur an average of 1.3 total hours per year over the first three years of the amendments for each Schedule 14A or 14C with respect to the election of directors.²³⁴

In another change from the proposal, the final rules exclude listed closed-end funds. We anticipate that this change will reduce the number of affected companies from the proposal, and the numbers in the table below reflect that reduction, as well as more recent numbers of affected companies compared with the numbers in the Proposing Release.

We recognize that the burdens may vary among individual companies based

on a number of factors, including the size and complexity of their organizations, whether they have adopted practices or policies regarding hedging, and complexity of those practices or policies.

The table below shows the average aggregate compliance burden, in hours and in costs, of the collection of information pursuant to new Item 407(i) of Regulation S-K, in the first three years of compliance with the amendments. The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a company to prepare and review the new disclosure requirements. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. For purposes of the PRA, we estimate that 75% of the burden of preparation of Schedules 14A and 14C is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of \$400 per hour. There is no change to the estimated burden of the collections of information under Regulation S-K because the burdens that this regulation imposes are reflected in our burden estimates for Schedule 14A and 14C.

TABLE 2—INCREMENTAL PAPERWORK BURDEN UNDER THE AMENDMENTS AFFECTING SCHEDULES 14A AND 14C—THREE-YEAR AVERAGE COSTS²³⁵

	Number of responses (A) ²³⁶	Incremental burden hours/form (B)	Total incremental burden hours (C) = (A) * (B)	Internal company time (D) = (C) * 0.75	External professional time (E) = (C) * 0.25	External professional costs (F) = (E) * \$400
Sch. 14A	5,586					
Filers eligible for an extended compliance date ²³⁷	5,586 * 0.54 = 3,016	1.0	3,016	2,262	754	\$301,600
Filers not eligible for an extended compliance date.	5,586 * 0.46 = 2,570	1.3	3,341	2,505.75	835.25	334,100
Sch. 14A total	5,586		6,357	4,767.75	1,589.25	635,700
Sch. 14C	569					
Filers eligible for an extended compliance date.	569 * 0.54 = 307	1.0	307.0	230.25	76.75	30,700
Filers not eligible for an extended compliance date.	569 * 0.46 = 262	1.3	340.6	255.45	85.15	34,060
Sch. 14C total	569		647.6	485.7	161.9	64,760
Sch. 14A and Sch. 14C Total	6,155		7,004.6	5,253.45	1,751.15	700,460

²³³ (0 + 2 + 1)/3 = 1.0.

²³⁴ (2 + 1 + 1)/3 = 1.3.

²³⁵ Rounding affects totals.

²³⁶ For Schedules 14A and 14C, the number of responses reflected in the table equals the three-

year average of the number of schedules filed with the Commission and currently reported by the Commission to OMB.

²³⁷ We estimate that 54% of the filers subject to the amendments will have an additional year to comply. See note 217 above. We therefore assume

that approximately 46% (100% - 54%) of the filings will be subject to the amendments in the first year. We recognize that filers that receive an additional year to comply may account for a lower or higher proportion of filings than estimated, thus these estimates are approximate.

VIII. Final Regulatory Flexibility Act Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act.²³⁸ This analysis relates to the adoption of new Item 407(i) of Regulation S-K and related amendments. An Initial Regulatory Flexibility Analysis (“IRFA”) was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Need for, and Objectives of, the Amendments

The amendments are designed to implement Section 14(j), which was added to the Exchange Act by Section 955 of the Act. A report issued by the Senate Committee on Banking, Housing, and Urban Affairs stated that Section 14(j) is intended to “allow shareholders to know if executives are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform.”²³⁹ Consistent with the mandate in Section 14(j), the amendments will provide transparency to shareholders at the time of an annual meeting, which is when directors are elected, about whether employees or directors may engage in transactions that mitigate or avoid the incentive alignment associated with equity ownership. The need for, and objectives of, the final amendments are discussed in more detail in Sections I through III above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comments on every aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive any comments explicitly addressing the IRFA. As discussed more fully above in Section III.D.4.b., comments on whether EGCs or SRCs should be subject to the proposed amendments were mixed, with four commenters opposing an exemption from the disclosure obligation for EGCs and SRCs²⁴⁰ and two commenters recommending exempting them from

the new disclosure requirement.²⁴¹ While the latter commenters believed that applying the new disclosure requirement to EGCs and SRCs would impose costs that are disproportionate to the benefits to be obtained, other commenters did not expect the new disclosure requirement to impose a significant compliance burden on EGCs and SRCs.²⁴²

C. Small Entities Subject to the Amendments

The amendments affect some companies that are small entities. The Regulatory Flexibility Act defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”²⁴³ The Commission’s rules define “small business” and “small organization” for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Exchange Act Rule 0–10(a)²⁴⁴ defines a company, other than an investment company, to be a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are currently 1,144 companies that qualify as “small entities” under the definitions set forth above.²⁴⁵ We estimate that 876 of these small entities have a class of securities registered under Section 12(b) or 12(g) and therefore will be subject to the amendments. An investment company, including a business development company, is considered to be a “small business” if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.²⁴⁶ We estimate that there are approximately 26 BDCs that will be subject to the amendments that may be considered small entities.²⁴⁷ We solicited comment in the Proposing Release on our estimates of the number of small entities affected by the proposed amendments and did not receive any comments on them. However, we have adjusted our

estimates to reflect that, unlike the proposed amendments, the final amendments will not apply to listed closed-end funds.

D. Reporting, Recordkeeping and Other Compliance Requirements

The amendments add to the proxy disclosure requirements of companies, including small entities, that file proxy or information statements with respect to the election of directors, by requiring them to provide the disclosure called for by the amendments. Specifically, new Item 407(i) requires disclosure of whether the company has adopted any practices or policies regarding the ability of any employee or director of the company or any designee of such employee or director, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions hedge or offset, or are designed to hedge or offset, any decrease in the market value of equity securities, that are granted to the employee or director by the company as compensation, or held, directly or indirectly, by the employee or director. The company will be required either to provide a fair and accurate summary of the practices or policies that apply, or to disclose the practices or policies in full. If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted. The amendments do not impose any additional recordkeeping requirements on a company.

The amendments will incrementally increase compliance costs for registrants, although we do not expect these additional costs to be significant. In addition, compliance with the amendments may require the use of professional skills, including legal skills. The amendments are discussed in detail in Section III above. We discuss the economic impact, including the estimated compliance costs and burdens, of the amendments in Sections VI and VII above.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;

²⁴¹ See letters from ABA and SCSGP.

²⁴² See letters from CFA Institute, CII and Public Citizen.

²⁴³ 5 U.S.C. 601(6).

²⁴⁴ 17 CFR 240.0–10(a).

²⁴⁵ This estimate is based on staff analysis of XBRL data submitted by filers, excluding co-registrants, with EDGAR filings of Forms 10–K filed during the calendar year of January 1, 2017 to December 31, 2017.

²⁴⁶ 17 CFR 270.0–10(a).

²⁴⁷ This estimate is based on staff analysis of Morningstar data and data submitted by filers on EDGAR that covered the period between April 1, 2018 and June 30, 2018.

²³⁸ 5 U.S.C. 603.

²³⁹ See Senate Report 111–176.

²⁴⁰ See letters from CFA Institute, CII, Florida State Board of Administration and Public Citizen.

- clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;

- use of performance rather than design standards; and
- exempting small entities from all or part of the requirements.

In a change from the proposal, the final amendments will require disclosure of any practices or policies adopted by a company regarding employees' or directors' ability to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of equity securities granted to them as compensation, or directly or indirectly held by them. By focusing on a company's existing practices or policies, we believe that the final amendments will result in a clearer, more straightforward disclosure standard that will be easier for all companies, especially small entities, to apply. Given the straightforward nature of the new disclosure, we do not believe that it is necessary to further simplify or consolidate the disclosure requirement for small entities.

We have used performance standards in connection with the amendments by requiring disclosure of the practices or policies that a company has adopted regarding hedging. The company will be required either to disclose a fair and accurate summary of the practices or policies or to disclose the practices or policies in full. The amendments do not specify any specific procedures or arrangements a company must develop to comply with the standards, or require a company to have or develop a practice or policy regarding employee and director hedging activities. If the company does not have any such practices or policies, it must disclose that fact or state that hedging transactions are generally permitted.

We considered, but have not adopted, an alternative approach of different compliance or reporting requirements that take into account the resources available to small entities. While we have not adopted different compliance or reporting requirements based on company size, we note that the change in the rule to provide for disclosure of a company's practices or policies should result in reporting that is more tailored to each company's particular circumstances and thus may have a similar effect to this alternative.

Two commenters recommended exempting EGCs and SRCs from the new

disclosure requirement, noting that these companies may not have hedging policies in place.²⁴⁸ We carefully considered these comments but are not exempting small entities from all or part of the amendments. The amendments are intended to provide transparency regarding whether the company has practices or policies regarding the ability of employees, directors, or their designees to engage in hedging transactions that will permit them to receive compensation without regard to company performance, or will permit them to mitigate or avoid the risks associated with long-term equity security ownership.²⁴⁹ We believe this transparency will be just as beneficial to shareholders of small companies as to shareholders of larger companies. By increasing transparency regarding these matters, the amendments are designed to improve the quality of information available to all shareholders, thereby promoting informed voting decisions. An exemption for small entities may interfere with the goal of enhancing the information provided by all issuers. We also note that the disclosure is expected to result in modest additional compliance costs for issuers although there could be indirect costs for some small entities, depending on their current hedging policies. Overall, we believe that the amendments, as adopted, will elicit disclosure about relevant hedging practices and policies in a manner that is tailored to each company's particular circumstances, so as to avoid creating a significant new burden for small entities.

However, in another change from the proposal, after considering the concerns of some commenters about the burden of complying with the disclosure requirement for SRCs and EGCs,²⁵⁰ we are adopting a delayed compliance date for these companies. SRCs and EGCs will be required to comply with the rule for fiscal years beginning on or after July 1, 2020, one year after the compliance date for the remaining filers subject to the final amendments. A delayed compliance date will defer the costs of the final amendments for SRCs and EGCs. We expect that a delayed compliance date will allow SRCs and EGCs, which would include smaller filers, to observe how Item 407(i) operates in practice for other, larger and more established companies, which may incrementally reduce the costs associated with initially preparing the required disclosure.

²⁴⁸ See letters from ABA and SCSGP.

²⁴⁹ See Senate Report 111-176.

²⁵⁰ See letters from ABA and SCSGP.

Statutory Authority and Text of the Amendments

The amendments contained in this release are being adopted under the authority set forth in Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and Sections 14, 23(a) and 36(a) of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Parts 229 and 240

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78 mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq.*; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

■ 2. Section 229.402 is amended by adding Instruction 6 to Item 402(b) to read as follows:

§ 229.402 (Item 402) Executive compensation.

* * * * *

(b) * * *

Instructions to Item 402(b). * * *

6. In proxy or information statements with respect to the election of directors, if the information disclosed pursuant to Item 407(i) would satisfy paragraph (b)(2)(xiii) of this Item, a registrant may refer to the information disclosed pursuant to Item 407(i).

* * * * *

■ 3. Section 229.407 is amended by adding paragraph (i) before the Instructions to Item 407 to read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(i) *Employee, officer and director hedging.* In proxy or information statements with respect to the election of directors:

(1) Describe any practices or policies that the registrant has adopted regarding the ability of employees (including officers) or directors of the registrant, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds), or otherwise engage in transactions, that hedge or offset, or are designed to hedge or offset, any decrease in the market value of registrant equity securities—

(i) Granted to the employee or director by the registrant as part of the compensation of the employee or director; or

(ii) Held, directly or indirectly, by the employee or director.

(2) A description provided pursuant to paragraph (1) shall provide a fair and accurate summary of the practices or policies that apply, including the categories of persons covered, or disclose the practices or policies in full.

(3) A description provided pursuant to paragraph (1) shall also describe any categories of hedging transactions that are specifically permitted and any categories of such transactions specifically disallowed.

(4) If the registrant does not have any such practices or policies regarding hedging, the registrant shall disclose that fact or state that the transactions described in paragraph (1) above are generally permitted.

Instructions to Item 407(i).

1. For purposes of this Item 407(i), “registrant equity securities” means those equity securities as defined in section 3(a)(11) of the Exchange Act (15 U.S.C. 78c(a)(11)) and § 240.3a11-1 of this chapter) that are issued by the registrant or by any parent or subsidiary

of the registrant or any subsidiary of any parent of the registrant.

2. The information required by this Item 407(i) will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 4. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112-106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 5. Section 240.14a-101 is amended by:

- a. Revising paragraph (b) of Item 7;
- b. Removing paragraphs (c) and (d) of Item 7;
- c. Removing the Instruction to Item 7(e) of Item 7;
- d. Redesignating paragraph (e) as paragraph (c) of Item 7;
- e. Redesignating Instruction to Item 7(f) as Instruction to Item 7 and revising it;
- f. Redesignating paragraph (f) as paragraph (d) of Item 7; and
- g. Redesignating paragraph (g) as paragraph (e) of Item 7.

The revisions read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

Schedule 14A Information

* * * * *

Item 7. Directors and Executive Officers. * * *

(b) The information required by Items 401, 404(a) and (b), 405 and 407 of Regulation S-K (§§ 229.401, 229.404(a) and (b), 229.405 and 229.407 of this chapter), other than the information required by:

(i) Paragraph (c)(3) of Item 407 of Regulation S-K (§ 229.407(c)(3) of this chapter); and

(ii) Paragraphs (e)(4) and (e)(5) of Item 407 of Regulation S-K (§§ 229.407(e)(4) and 229.407(e)(5) of this chapter) (which are required by Item 8 of this Schedule 14A).

* * * * *

Instruction to Item 7. The information disclosed pursuant to paragraphs (c) and (d) of this Item 7 will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), except to the extent that the registrant specifically incorporates that information by reference.

* * * * *

Dated: December 20, 2018.

By the Commission.

Brent J. Fields,
Secretary.

[FR Doc. 2018-28123 Filed 2-5-19; 8:45 am]

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