



FEDERAL REGISTER

Vol. 84

Monday,

No. 62

April 1, 2019

Pages 12047–12482

OFFICE OF THE FEDERAL REGISTER



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

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

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

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

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

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

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

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

How To Cite This Publication: Use the volume number and the page number. Example: 84 FR 12345.

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

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

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

General online information 202-512-1530; 1-888-293-6498

Single copies/back copies:

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

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	FRSubscriptions@nara.gov
Phone	202-741-6000

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



Contents

Federal Register

Vol. 84, No. 62

Monday, April 1, 2019

Agency for Healthcare Research and Quality

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 12251–12256

Agriculture Department

See Rural Housing Service
See Rural Utilities Service

Air Force Department

NOTICES

Meetings:
Scientific Advisory Board, 12236

Alcohol, Tobacco, Firearms, and Explosives Bureau

RULES

Removal of Expired Regulations Concerning Commerce in Firearms and Ammunition and Machine Guns, Destructive Devices, and Certain Other Firearms, 12093–12095
Separation Distances of Ammonium Nitrate and Blasting Agents from Explosives or Blasting Agents, 12095–12098

Bureau of Consumer Financial Protection

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 12234–12236

Centers for Disease Control and Prevention

NOTICES

Meetings:
Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, Etiologic and Effectiveness Research to Address Polysubstance Impaired Driving, 12256

Centers for Medicare & Medicaid Services

RULES

Medicaid Program:
Covered Outpatient Drug; Line Extension Definition; and Change to the Rebate Calculation for Line Extension Drugs, 12130–12137

NOTICES

Medicare and Medicaid Programs:
Application from the American Association for Accreditation of Ambulatory Surgery Facilities, Inc. for its Outpatient Physical Therapy and Speech Language Pathology Services Accreditation Program, 12260–12262
Medicare Program:
Meeting Announcement for the Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests, 12256–12257
Public Meeting on June 24, 2019 Regarding New and Reconsidered Clinical Diagnostic Laboratory Test Codes for the Clinical Laboratory Fee Schedule for Calendar Year 2020, 12257–12260

Civil Rights Commission

NOTICES

Meetings:
Louisiana Advisory Committee, 12193–12194

Montana Advisory Committee, 12194

Coast Guard

RULES

Safety Zone:
Missouri River, Miles 226–360, Glasgow, MO to Kansas City, MO, 12120–12122
Seafarers' Access to Maritime Facilities, 12102–12119
Special Local Regulation:
Chesapeake Bay, Between Sandy Point and Kent Island, MD, 12099–12102

PROPOSED RULES

Special Local Regulations:
Charlevoix Venetian Night Boat Parade Charlevoix, MI, 12178–12179

NOTICES

Environmental Assessments; Availability, etc.:
Proposed Construction of Railroad Bridges Across Sand Creek and Lake Pend Oreille at Sandpoint, Bonner County, ID, 12267–12268

Commerce Department

See Foreign-Trade Zones Board
See Industry and Security Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration
See National Telecommunications and Information Administration

Commodity Futures Trading Commission

RULES

Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 12074–12081
De Minimis Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans to Customers, 12450–12475
Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 12065–12073

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 12233–12234
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Daily Trade and Supporting Data Reports, 12232–12233

Comptroller of the Currency

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Funding and Liquidity Risk Management, 12325–12326
Leveraged Lending, 12326–12327
Municipal Securities Dealers and Government Securities Brokers and Dealers—Registration and Withdrawal, 12324–12325

Copyright Royalty Board

NOTICES

Distribution of 2000–2003 Cable Royalty Funds, 12295–12296

Defense Acquisition Regulations System**RULES**

- Defense Federal Acquisition Regulation Supplement:
 Consent to Subcontract, 12140–12141
 Modification of DFARS Clause Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, 12141–12142
 Repeal of Certain Defense Acquisition Laws, 12137
 Repeal of Congressional Notification for Certain Task- and Delivery-Order Contracts, 12139–12140
 Repeal of DFARS Clause Oral Attestation of Security Responsibilities, 12138–12139
 Technical Amendments, 12140

PROPOSED RULES

- Defense Federal Acquisition Regulation Supplement:
 Demonstration Project for Contractors Employing Persons with Disabilities, 12182–12187
 Nonmanufacturer Rule for 8(a) Participants, 12187–12189
 Use of Fixed-Price Contracts, 12179–12182

Defense Department

- See Air Force Department
 See Defense Acquisition Regulations System
 See Engineers Corps
 See Navy Department

RULES

- Civil Monetary Penalty Inflation Adjustment, 12098–12099

NOTICES

- Meetings:
 Defense Innovation Board, 12236–12237

Education Department**NOTICES**

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 2016/20 Baccalaureate and Beyond Full-Scale Study Panel Maintenance, 12239
 Annual Performance Report for the Gaining Early Awareness for Undergraduate Programs, 12239–12240

Employment and Training Administration**RULES**

- Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Mariana Islands (CW–1 Workers), 12380–12448

Energy Department

- See Federal Energy Regulatory Commission

RULES

- Cost Sharing; Energy Policy Act, 12047–12049

PROPOSED RULES

- Energy Conservation Program:
 Energy Conservation Standards for General Service Lamps, 12143

NOTICES

- Energy Conservation Program:
 Extension of Waiver to Dyson, Inc. from the Battery Chargers Test Procedure, 12240–12242

Engineers Corps**NOTICES**

- Environmental Impact Statements; Availability, etc.:
 Willamette Valley System Operations and Maintenance, 12237–12238

Environmental Protection Agency**NOTICES**

- Meetings:
 Human Studies Review Board, 12246–12247
 Requests for Nominations:
 Human Studies Review Board Advisory Committee, 12247–12248

Farm Credit Administration**NOTICES**

- Meetings; Sunshine Act, 12248–12249

Federal Aviation Administration**RULES**

- Statement of Policy for Authorizations to Operators of Aircraft that are Not Equipped with Automatic Dependent Surveillance-Broadcast Out Equipment, 12062–12065

PROPOSED RULES

- Airworthiness Directives:
 The Boeing Company Airplanes, 12143–12146
 Amendment of Class B and Class C Airspace:
 Miami and Fort Lauderdale, FL; Meeting, 12146–12147

Federal Energy Regulatory Commission**NOTICES**

- Combined Filings, 12242–12243, 12245–12246
 Environmental Assessments; Availability, etc.:
 Sappi North America, Inc., 12243
 License Application:
 Appalachian Power Co., 12244–12245
 Request Under Blanket Authorization:
 National Fuel Gas Supply Corp., 12243–12244

Federal Motor Carrier Safety Administration**NOTICES**

- Qualification of Drivers; Exemption Applications:
 Epilepsy and Seizure Disorders, 12317–12322

Federal Reserve System**RULES**

- Federal Reserve Policy on Payment System Risk; U.S. Branches and Agencies of Foreign Banking Organizations, 12049–12059

Federal Retirement Thrift Investment Board**NOTICES**

- Privacy Act; Systems of Records, 12249–12251

Fish and Wildlife Service**NOTICES**

- Endangered and Threatened Species:
 Recovery Permit Applications, 12270–12271
 Permit Applications:
 Foreign Endangered Species; Marine Mammals, 12268–12270

Food and Drug Administration**RULES**

- Medical Devices:
 Orthopedic Devices; Classification of Posterior Cervical Screw Systems, 12088–12093
 Medical Devices; Technical Amendment, 12083
 Microbiology Devices:
 Classification of In Vitro Diagnostic Devices for Bacillus Species Detection, 12083–12088
 Reinstatement of Color Additive Listing for Lead Acetate, 12081–12083

PROPOSED RULES

Radiological Health Regulations:

- Amendments to Records and Reports for Radiation Emitting Electronic Products; Amendments to Performance Standards for Diagnostic X-ray, Laser and Ultrasonic Products, 12147–12169

NOTICES

Issuance of Priority Review Voucher:

- Material Threat Medical Countermeasure Product, 12262

Withdrawal of Approval of 16 New Drug Applications:

- Teva Women's Health, Inc., et al., 12262–12263

Foreign-Trade Zones Board**NOTICES**

Proposed Production Activity:

- BWF America, Inc., Foreign-Trade Zone 47, Boone County, KY, 12194–12195

Geological Survey**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

- Earth Explorer User Registration Service, 12271–12272

Health and Human Services Department

See Agency for Healthcare Research and Quality

See Centers for Disease Control and Prevention

See Centers for Medicare & Medicaid Services

See Food and Drug Administration

See Health Resources and Services Administration

See National Institutes of Health

See Substance Abuse and Mental Health Services Administration

NOTICES

Findings of Research Misconduct, 12264–12265

Meetings:

- Office of Global Affairs: Stakeholder Listening Session in Preparation for the 72nd World Health Assembly, 12264

Health Resources and Services Administration**NOTICES**

Charter Renewal:

- Advisory Committee on Interdisciplinary, Community-Based Linkages, 12263–12264
- Advisory Committee on Training in Primary Care Medicine and Dentistry, 12264

Homeland Security Department

See Coast Guard

Indian Affairs Bureau**NOTICES**

Helping Expedite and Advance Responsible Tribal

- Homeownership Act Approval of Minnesota Chippewa Tribe, Minnesota, Fond du Lac Band Leasing Ordinance, 12272–12273

Indian Gaming:

- Approval of Tribal-State Class III Gaming Compact Amendment in the State of South Dakota, 12273

Industry and Security Bureau**NOTICES**

Meetings:

- Sensors and Instrumentation Technical Advisory Committee, 12196

Order Denying Export Privileges:

- Arnoldo Antonio Arredondo, 12196–12197

Mohan L. Nirala, 12197–12198

Recruitment of Members:

- Technical Advisory Committees, 12195–12196

Interior Department

See Fish and Wildlife Service

See Geological Survey

See Indian Affairs Bureau

See Land Management Bureau

See National Park Service

See Ocean Energy Management Bureau

Internal Revenue Service**PROPOSED RULES**

Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest, 12169–12170

International Trade Administration**NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:

- Advance Notification of Sunset Review, 12199–12200
- Certain Softwood Lumber Products from Canada, 12209–12227

Initiation of Administrative Reviews, 12200–12207

Initiation of Five-Year (Sunset) Reviews, 12227–12229

Opportunity to Request Administrative Review, 12207–12209

Determination in the Less-Than-Fair-Value Investigation: Mattresses from the People's Republic of China, 12198–12199

International Trade Commission**NOTICES**

Investigations; Determinations, Modifications, and Rulings, etc.:

- Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof, 12292–12293
- Certain Robotic Vacuum Cleaning Devices and Components Thereof Such as Spare Parts, 12289
- Circular Welded Carbon Quality Steel Line Pipe from China; Institution of Five-Year Reviews, 12285–12287

Crawfish Tail Meat from China; Institution of a Five-Year Review, 12289–12292

Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan; Institution of a Five-Year Review, 12282–12285

Earned Import Allowance Program: Evaluation of the Effectiveness of the Program for Certain Apparel from the Dominican Republic, Tenth Annual Review, 12287–12289

Justice Department

See Alcohol, Tobacco, Firearms, and Explosives Bureau

NOTICES

Proposed Consent Decree:

- Clean Air Act, 12293–12294

Labor Department

See Employment and Training Administration

See Occupational Safety and Health Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

- Generic Solution for Solicitation for Funding Opportunity Announcement Responses, 12294–12295

Land Management Bureau**NOTICES**

Plats of Survey:
California, 12273–12274

Library of Congress

See Copyright Royalty Board

National Highway Traffic Safety Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Reports, Forms, and Record Keeping Requirements, 12322–12323

National Institutes of Health**NOTICES**

Meetings:
Clinical Center, 12266
National Cancer Institute, 12267
National Institute of Diabetes and Digestive and Kidney Diseases, 12266
Office of the Director, 12266

National Oceanic and Atmospheric Administration**PROPOSED RULES**

Takes of Marine Mammals Incidental to Specified Activities:
Oil and Gas Activities in Cook Inlet, Alaska, 12330–12377

NOTICES

Meetings:
New England Fishery Management Council, 12230–12231
Science Advisory Board, 12230
Western Pacific Fishery Management Council; Correction, 12229–12230

National Park Service**NOTICES**

Inventory Completion:
Sam Noble Oklahoma Museum of Natural History, Norman, OK, 12274–12277
National Register of Historic Places:
Pending Nominations and Related Actions, 12277

National Telecommunications and Information Administration**NOTICES**

Meetings:
Multistakeholder Process on Promoting Software Component Transparency, 12231–12232

Navy Department**PROPOSED RULES**

Policies and Responsibilities for Implementation of the National Environmental Policy Act within the Department of the Navy, 12170–12177

NOTICES

Environmental Impact Statements; Availability, etc.:
Mariana Islands Training and Testing, 12238
Government-Owned Inventions; Available for Licensing, 12238

Nuclear Regulatory Commission**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Request for Information Regarding Recommendations 2.1, 2.3 and 9.3, of the Near Term Task Force Review of Insights from the Fukushima Dai-ichi Event, 12297–12298
Meetings; Sunshine Act, 12296–12297

Occupational Safety and Health Administration**NOTICES**

Meetings:
Whistleblower Stakeholder, 12295

Ocean Energy Management Bureau**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf, 12277–12282

Personnel Management Office**NOTICES**

Meetings:
Federal Prevailing Rate Advisory Committee; Cancellation, 12298

Postal Service**NOTICES**

Meetings; Sunshine Act, 12298

Presidential Documents**ADMINISTRATIVE ORDERS**

Federal Housing Finance Reform (Memorandum of March 27, 2019), 12477–12482

Rural Housing Service**NOTICES**

Community Facilities Technical Assistance and Training Grant for Fiscal Year 2019, 12190–12193

Rural Utilities Service**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 12193

Securities and Exchange Commission**RULES**

Adoption of Updated Electronic Data Gathering, Analysis, and Retrieval System Filer Manual, 12073–12074

NOTICES

Application:
Generation Investment Management US, LLP and Generation Investment Management, LLP, 12298–12301

Meetings; Sunshine Act, 12310–12311

Self-Regulatory Organizations; Proposed Rule Changes:

Cboe EDGX Exchange, Inc., 12301–12304

Cboe Exchange, Inc., 12308–12310

Financial Industry Regulatory Authority, Inc., 12306–12307, 12311–12316

NYSE American, LLC, 12304–12306

NYSE Arca, Inc., 12304, 12307–12308, 12310

Small Business Administration**RULES**

Civil Monetary Penalties Inflation Adjustments, 12059–12061

NOTICES

Disaster Declaration:
California, 12316–12317

**Substance Abuse and Mental Health Services
Administration****NOTICES**

Meetings:
Advisory Committee for Women's Services, 12267

Tennessee Valley Authority**NOTICES**

Agency Information Collection Activities; Proposals,
Submissions, and Approvals, 12317

Transportation Department

See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See National Highway Traffic Safety Administration

NOTICES

Meetings:
Advisory Committee on Human Trafficking, 12323

Treasury Department

See Comptroller of the Currency
See Internal Revenue Service

Veterans Affairs Department**RULES**

Release of Information from Department of Veterans Affairs
Records, 12122–12130

Separate Parts In This Issue**Part II**

Commerce Department, National Oceanic and Atmospheric
Administration, 12330–12377

Part III

Labor Department, Employment and Training
Administration, 12380–12448

Part IV

Commodity Futures Trading Commission, 12450–12475

Part V

Presidential Documents, 12477–12482

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

2 CFR	252 (3 documents)	12138,
910	12047	12140, 12141
3 CFR	Proposed Rules:	
Administrative Orders:	202	12179
Memorandums:	204	12182
Memorandum of March	215	12182
27, 2019	216	12179
	217	12179
10 CFR	219	12187
Proposed Rules:	225	12179
430	226	12182
	234	12179
12 CFR	235	12179
Ch. II	252 (2 documents)	12182,
		12187
13 CFR	50 CFR	
107	Proposed Rules:	
120	217	12330
142		
146		
14 CFR		
91		
Proposed Rules:		
39		
71		
17 CFR		
Ch. I		
1		
23		
232		
20 CFR		
655		
21 CFR		
73		
806		
866		
888		
Proposed Rules:		
1000		
1002		
1010		
1020		
1040		
1050		
26 CFR		
Proposed Rules:		
1		
27 CFR		
478		
479		
555		
32 CFR		
269		
Proposed Rules:		
775		
33 CFR		
100		
105		
165		
Proposed Rules:		
100		
38 CFR		
1		
42 CFR		
447		
48 CFR		
202		
204		
216		
225		
244		

Rules and Regulations

Federal Register

Vol. 84, No. 62

Monday, April 1, 2019

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

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

DEPARTMENT OF ENERGY

2 CFR Part 910

RIN 1991-AC13

Cost Sharing: Energy Policy Act of 2005

AGENCY: Office of Management, Department of Energy.

ACTION: Final rule; technical amendments.

SUMMARY: The Department of Energy (DOE) is publishing this final rule to amend its current regulations regarding cost share under the Energy Policy Act of 2005 (EPACT 2005). The content of these technical amendments correspond with the provisions enacted by Congress through the Department of Energy Research and Innovation Act of 2018.

DATES: The effective date of this rule is April 1, 2019.

ADDRESSES: The docket, which includes Federal Register notices 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.

A link to the docket web page can be found at <http://www.regulations.gov>. The docket web page will contain simple instructions on how to assess all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Bonnell, U.S. Department of Energy, Office of Management, at (202)-287-1747 or by email at Richard.bonnell@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. Summary of This Action
- III. Final Action
- IV. Procedural Requirements
- V. Approval of the Office of the Secretary

I. Background

Section 108 of the Department of Energy Research and Innovation Act, Public Law 115-246 (Innovation Act), amended section 988 of EPACT 2005, 42 U.S.C. 16352, instituting a two-year pilot program. This pilot program began on September 28, 2018 and will extend through September 27, 2020. It exempts a “research or development activity performed by an institution of higher education or nonprofit institution” from the requirement imposed by section 988 of EPACT 2005 that the Secretary require not less than 20 percent non-Federal cost sharing for research or development activities. Therefore, the two-year pilot program provides the opportunity for DOE to exclude mandatory cost sharing without having to execute a cost share waiver for institutions of higher education and nonprofit institutions, as was previously required by section 988 of EPACT 2005. Pursuant to the Innovation Act, DOE is modifying its regulation regarding cost share by amending the text to explicitly add the exemption for institutions of higher education and nonprofit institutions from the requirement that the Secretary requires a 20 percent non-Federal cost sharing for research or development activities.

II. Summary of This Action

Title 2 CFR 910.130 concerns the cost sharing requirements imposed by section 988 of EPACT 2005, 42 U.S.C. 16352. As a result of the change imposed by the Innovation Act, DOE amends § 910.130 in paragraph (b)(1) by removing “or” at the end of the paragraph; paragraph (b)(2) by adding “; or” at the end of the paragraph; and adding a new paragraph (b)(3) to read as set out in the regulatory text below.

III. Final Action

DOE has determined, pursuant to 5 U.S.C. 553(b)(B), that prior notice and an opportunity for public comment on this final rule are unnecessary. This rule inserts into the CFR, for the benefit of the public, the Innovation Act two-year pilot program exemption to the requirement that DOE impose a 20 percent non-Federal cost sharing for research or development activities performed by institutions of higher education and nonprofit entities. The statutory exemption is for the two-year period beginning September 28, 2018

ending September 27, 2020. DOE exercises no discretion in amending its regulations to implement this statutory directive. DOE, therefore, finds that good cause exists to waive prior notice and an opportunity to comment for this rulemaking. For the same reasons, DOE, pursuant to 5 U.S.C. 553(d)(3), finds that good cause exists for making this final rule effective upon publication in the Federal Register.

IV. Procedural Requirements

A. Review Under Executive Order 12866, “Regulatory Planning and Review”

This final rule is not a “significant regulatory action” under the criteria set out in section 3(f) of Executive Order 12866, “Regulatory Planning and Review.” 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review by the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget (“OMB”).

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. This final rule is expected to be an E.O. 13771 deregulatory action.

Additionally, on February 24, 2017, the President issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” The Order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory

reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE concludes that this final rule is consistent with the directives set forth in these executive orders. The Innovation Act amends EPACT 2005 to exempt certain entities from the 20 percent cost share requirement for a two-year period ending September 27, 2020. The changes reduce the requirements of EPACT 2005 by permitting DOE to exclude mandatory cost sharing for universities and nonprofit institutions. Therefore, this final rule is an Executive Order 13771 deregulatory action.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. The Department has made its procedures and policies available on the Office of General Counsel's website: <http://energy.gov/gc/office-general-counsel>. This rule revises the Code of Federal Regulations to incorporate, without substantive change, statutorily-imposed definitional changes affecting coverage under current energy conservation standards, applicable timelines related to certain rulemaking requirements, and

related provisions prescribed by Public Law 115-78 and Public Law 115-115, along with a separate correction to reflect the current language found in the statute. Because this is a technical amendment for which a general notice of proposed rulemaking is not required, the Regulatory Flexibility Act does not apply to this rulemaking.

D. Review Under the Paperwork Reduction Act of 1995

This rulemaking imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

E. Review Under the National Environmental Policy Act of 1969

In this rule, DOE is incorporating requirements prescribed by the Innovation Act. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule is strictly procedural and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A6 under 10 CFR part 1021, subpart D, which applies to procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Review Under Executive Order 13132, "Federalism"

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has determined that this rule does not limit the policymaking discretion of the States. No further

action is required by Executive Order 13132.

G. Review Under Executive Order 12988, "Civil Justice Reform"

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected

officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at <http://www.gc.doe.gov>). This final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements under the Unfunded Mandates Reform Act do not apply.

I. Review Under the Treasury and General Government Appropriations Act, 1999

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

J. Review Under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights”

The Department has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), that this rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (February 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded

that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This final rule, which incorporates recently-enacted statutory provisions into DOE’s regulations, would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

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

List of Subjects in 2 CFR Part 910

Accounting, Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements.

Signed in Washington, DC, on March 26, 2019.

John R. Bashista,

Director, Office of Acquisition Management, Department of Energy.

S. Keith Hamilton,

Deputy Associate Administrator, Acquisition and Project Management, National Nuclear Security Administration.

For the reasons set forth in the preamble, DOE hereby amends chapter IX, subchapter B, of title 2 of the Code of Federal Regulations as set forth below:

PART 910—UNIFORM ADMINISTRATION REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 910 continues to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*; 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.*; 2 CFR part 200.

- 2. Section 910.130 is amended by:
- a. Removing the word “or” at the end of paragraph (b)(1).
 - b. Removing the period at the end of paragraph (b)(2) and adding in its place “; or”.
 - c. Adding paragraph (b)(3).

The addition reads as follows:

§ 910.130 Cost sharing (EPACT).

* * * * *

(b) * * *

(3) The research or development activity is to be performed by an institution of higher education or nonprofit institution (as defined in section 4 of the Stevenson–Wydler Technology Innovation Act of 1980 (15 U.S.C. 3703)) during the two-year period ending September 27, 2020.

* * * * *

[FR Doc. 2019–06263 Filed 3–29–19; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

[Docket No. OP–1589]

Federal Reserve Policy on Payment System Risk; U.S. Branches and Agencies of Foreign Banking Organizations

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Policy statement.

SUMMARY: The Board of Governors of the Federal Reserve System (“Board”) has approved changes to part II of the

Federal Reserve Policy on Payment System Risk (“PSR policy”) related to procedures for determining the net debit cap and maximum daylight overdraft capacity of a U.S. branch or agency of a foreign banking organization (“FBO”). The changes remove references to the Strength of Support Assessment (“SOSA”) ranking; remove references to FBOs’ financial holding company (“FHC”) status; and adopt alternative methods for determining an FBO’s eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity.

DATES: The changes are effective April 1, 2020.

FOR FURTHER INFORMATION CONTACT:

Jeffrey Walker, Deputy Associate Director (202–721–4559); Jason Hinkle, Manager (202–912–7805); Alex So, Senior Financial Institution and Policy Analyst (202–452–2230); Brajan Kola, Senior Financial Institution and Policy Analyst (202–736–5683), Division of Reserve Bank Operations and Payment Systems; or Evan Winerman, Senior Counsel (202–872–7578), Legal Division, Board of Governors of the Federal Reserve System. For users of Telecommunications Device for the Deaf (TDD) only, please call 202–263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

On December 14, 2017, the Board requested comment on potential changes to Part II of the PSR policy, which establishes the maximum levels of daylight overdrafts that depository institutions (“institutions”) may incur in their Federal Reserve accounts.¹ Under Part II of the PSR policy, an FBO’s SOSA ranking—which assesses an FBO’s ability to provide financial, liquidity, and management support to its U.S. operations—can affect an FBO’s daylight overdraft capacity. Similarly, an FBO’s status as an FHC can affect its daylight overdraft capacity. As described further below, the Board proposed to (1) remove references in the PSR policy to SOSA rankings and FHC status and (2) adopt alternative methods for determining an FBO’s daylight overdraft capacity.

A. Current Use of SOSA Ranking and FHC Status in the PSR Policy

1. Net Debit Caps

An institution’s net debit cap is the maximum value of uncollateralized daylight overdrafts that the institution can incur in its Federal Reserve account.

The PSR policy generally requires that an institution be “financially healthy” to be eligible for a positive net debit cap.² To that end, the *Guide to the Federal Reserve’s Payment System Risk Policy* (“Guide”)³ clarifies that most FBOs with a SOSA ranking of 3 or a U.S. Operations Supervisory Composite Rating of marginal or unsatisfactory do not qualify for a positive net debit cap.⁴

Assuming that an institution qualifies for a positive net debit cap, the size of its net debit cap equals the institution’s “capital measure” multiplied by its “cap multiple.”⁵ As described further below, an institution’s capital measure is a number derived (under most circumstances) from the size of its capital base. An institution’s cap multiple is determined by the institution’s “cap category,” which generally reflects, among other things, the institution’s financial condition. An institution with a higher capital measure or a higher cap category (and thus a higher cap multiple) will qualify for a higher net debit cap than an institution with a lower capital measure or lower cap category.

An FBO’s SOSA ranking can affect both its cap category and its capital measure. An FBO’s status as an FHC can affect its capital measure.⁶

(a) Cap Categories and Cap Multiples

Under Section II.D.2 of the PSR policy, an institution’s “cap category” is one of six classifications—high, above average, average, de minimis, exempt-from-filing, and zero. In order to establish a cap category of high, above average, or average, an institution must perform a self-assessment of its own creditworthiness, intraday funds management and control, customer

credit policies and controls, and operating controls and contingency procedures. Other cap categories do not require a self-assessment.⁷ Each cap category corresponds to a “cap multiple.”⁸ As noted above, an institution’s net debit cap generally equals its capital measure multiplied by its cap multiple.

An FBO’s SOSA ranking can affect its cap category (and thus its cap multiple). As noted above, an institution that wishes to establish a net debit cap category of high, above average, or average must perform a self-assessment of, among other things, its own creditworthiness. Under Part II.D.2.a of the PSR policy, “[t]he assessment of creditworthiness is based on the institution’s supervisory rating and Prompt Corrective Action (PCA) designation.” Part VII.A of the Guide includes a matrix for assessing domestic institutions’ creditworthiness that incorporates an institution’s supervisory rating and PCA designation. Because FBOs do not receive PCA designations, however, Part VII.A of the Guide includes a separate matrix for assessing FBO creditworthiness that incorporates an FBO’s U.S. Operations Supervisory Composite Rating and—in lieu of a PCA designation—SOSA ranking.⁹

Similarly, while an FBO is not required to perform a self-assessment if it requests a cap category of de minimis or wishes to be assigned a cap category of exempt-from-filing by the Reserve Bank, the Reserve Banks rely on the minimum standards set by the creditworthiness matrix when they evaluate FBO requests for any cap category greater than zero. Accordingly, the Reserve Banks generally do not allow FBOs to qualify for a positive net debit cap, including the de minimis or exempt-from-filing cap category, if the FBO has a SOSA ranking of 3 or a U.S.

² See Part II.D.1 of the PSR policy.

³ The Guide to the Federal Reserve’s Payment System Risk Policy (the Guide) contains detailed information on the steps necessary for institutions to comply with the Federal Reserve’s intraday credit policies.

⁴ Section VI.A.1 of the Guide states that most SOSA 3-ranked institutions do not qualify for a positive net debit cap, though it clarifies that “[i]n limited circumstances, a Reserve Bank may grant a net debit cap or extend intraday credit to a financially healthy SOSA 3-ranked FBO.” Separately, Table VII–2 of the Guide states that SOSA 3-ranked FBOs and FBOs that receive a U.S. Operations Supervisory Composite Rating of marginal or unsatisfactory have “below standard” creditworthiness, and Table VII–3 of the Guide states that institutions with below standard creditworthiness cannot incur daylight overdrafts.

⁵ See Part II.D.1 of the PSR policy. All net debit caps are granted at the discretion of the institution’s administrative Reserve Bank, which is the Reserve Bank that is responsible for managing an institution’s account relationship with the Federal Reserve.

⁶ In contrast, the FHC status of a domestic bank holding company does not affect its capital measure.

⁷ An institution that meets reasonable safety and soundness standards can request a de minimis cap category, without performing a self-assessment, by submitting a board of directors resolution to its administrative Reserve Bank. An institution that only rarely incurs daylight overdrafts in its Federal Reserve account that exceed the lesser of \$10 million or 20 percent of its capital measure can be assigned an “exempt-from-filing” cap category without performing a self-assessment or filing a board of directors resolution with its administrative Reserve Bank.

⁸ Under Section II.D.1 of the PSR policy, the cap multiple for the “high” category is 2.25, for the “above average” category is 1.875, for the “average” category is 1.125, for the “de minimis” category is 0.4, for the “exempt-from-filing” category is 0.2 or \$10 million, and for the “zero” category is 0. Note that the net debit cap for the exempt-from-filing category is equal to the lesser of \$10 million or 0.2 multiplied by the capital measure.

⁹ Under Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. 1831o, PCA designations apply only to insured depository institutions.

Operations Supervisory Composite Rating of marginal or unsatisfactory.

In certain situations, the Reserve Banks require institutions to perform a full assessment of their creditworthiness instead of using the relevant self-assessment matrix (e.g., when an institution has experienced a significant development that may materially affect its financial condition). The Guide includes procedures for full assessments of creditworthiness.

(b) Capital Measures

Under Section II.D.3 of the PSR policy, an institution's "capital measure" is a number derived (under most circumstances) from the size of its capital base. The determination of the capital measure, however, differs between domestic institutions and FBOs. A domestic institution's capital measure equals 100 percent of the institution's risk-based capital. Conversely, an FBO's capital measure (also called "U.S. capital equivalency")¹⁰ equals a percentage of (under most circumstances) the FBO's worldwide capital base¹¹ ranging from 5 percent to 35 percent, with the exact percentage depending on (1) the FBO's SOSA ranking and (2) whether the FBO is an FHC. Specifically, the capital measure of an FBO that is an FHC is 35 percent of its capital; an FBO that is not an FHC and has a SOSA ranking of 1 is 25 percent of its capital; and an FBO that is not an FHC and has a SOSA ranking of 2 is 10 percent of its capital. The capital measure of an FBO that is not an FHC and has a SOSA ranking of 3 equals 5 percent of its "net due to related depository institutions" (although, as noted above, FBOs with a SOSA ranking of 3 generally do not qualify for a positive net debit cap).¹²

2. Maximum Daylight Overdraft Capacity

Section II.E of the PSR policy allows certain institutions with self-assessed net debit caps to pledge collateral to their administrative Reserve Bank to secure daylight overdraft capacity in

excess of their net debit caps. An institution's maximum daylight overdraft capacity ("max cap") equals its net debit cap plus its additional collateralized capacity. Section II.E of the PSR policy states that max caps are "intended to provide extra liquidity through the pledge of collateral by the few institutions that might otherwise be constrained from participating in risk-reducing payment system initiatives."

Institutions that wish to obtain a max cap must generally provide (1) documentation of the business need for collateralized capacity and (2) an annual board of directors' resolution approving any collateralized capacity. Under Section II.E.2 of the PSR policy, however, an FBO that has a SOSA ranking of 1 or is an FHC may request a streamlined procedure for obtaining a max cap.¹³ Such an FBO is not required to document its business need for collateralized capacity, nor is it required to obtain a board of directors' resolution approving collateralized capacity, as long as the FBO requests a max cap that is 100 percent or less of the FBO's worldwide capital multiplied by its self-assessed cap multiple.¹⁴

B. Proposed Changes

The Board proposed to remove references to the SOSA ranking in the PSR policy. The SOSA ranking was originally established for supervisory purposes, but Federal Reserve supervisory staff now have more timely access to information regarding FBO parent banks, home-country accounting practices and financial systems, and international supervisory and regulatory developments.¹⁵ The Federal Reserve currently uses SOSA rankings only in setting guidelines related to FBO access to Reserve Bank intraday credit and the discount window.¹⁶ The Board

explained in the proposal that providing SOSA rankings for these purposes is an inefficient use of the Federal Reserve's supervisory resources. The Board proposed that the Federal Reserve would continue to provide SOSA rankings until the Board removes references to SOSA rankings in the PSR policy.

The Board also proposed to remove references to FBOs' FHC status in the PSR policy. The Board explained in the proposal that, when it incorporated FHC status into the PSR policy, it believed that an FBO's status as an FHC indicated that the FBO was financially and managerially strong. The Board further explained that it now recognizes the limitations of FHC status in measuring an FBO's health—in particular, FBOs can maintain nominal FHC status (though with reduced ability to use their FHC powers) even when they are out of compliance with the requirement that they remain well capitalized. Accordingly, the Board explained that it no longer believes an FBO's status as an FHC should increase the FBO's capital measure or allow the FBO to request a streamlined procedure to obtain a max cap.

The Board proposed alternative methods for determining an FBO's eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain a max cap. The Board requested comment on all aspects of the proposal, including whether FBOs would require a transition period to adjust to the proposed changes.

1. Net Debit Cap Eligibility

The Board proposed that many undercapitalized FBOs, and all significantly or critically undercapitalized FBOs, would have "below standard" creditworthiness and on that basis would generally be ineligible for a positive net debit cap. To assess whether it is undercapitalized, significantly undercapitalized, or critically undercapitalized, an FBO would compare the Regulation H ratios for total risk-based capital, tier 1 risk-based capital, common equity tier 1 risk-based capital, and leverage to the equivalent ratios that the FBO has calculated under its home-country standards or on a pro forma basis. Currently, SOSA-3 ranked institutions have "below standard" creditworthiness

window loans. See <https://www.frbdiscountwindow.org/en/Pages/General-Information/The-Discount-Window.aspx>. The Reserve Banks will adjust their standards for determining FBO access to primary credit before the SOSA ranking is discontinued on January 1, 2020.

¹⁰ The term "U.S. capital equivalency" is used in this context to refer to the particular capital measure used to calculate net debit caps and does not necessarily represent an appropriate capital measure for supervisory or other purposes.

¹¹ FBOs that wish to establish a non-zero net debit cap must report their worldwide capital on the Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks (FR 2225). The instructions for FR 2225 explain how FBOs should calculate their worldwide capital. See <https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDZ1kLYTc+ZpEQ==>.

¹² An FBO reports its "net due to related depository institutions" on the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002).

¹³ Even under the streamlined procedure, the administrative Reserve Bank retains the right to assess an FBO's financial and supervisory information, including the FBO's ability to manage intraday credit.

¹⁴ As described above, for example, the capital measure of an FBO that is not an FHC and has a SOSA ranking of 1 is currently 25 percent of worldwide capital. The net debit cap of such an FBO equals its capital measure times the cap multiple that corresponds to its cap category. The streamlined max cap procedure therefore allows the FBO to request additional collateralized capacity of 75 percent of worldwide capital times its cap multiple. If the FBO requests a max cap in excess of 100 percent of worldwide capital times its cap multiple, the FBO would be ineligible for the streamlined max cap procedure.

¹⁵ See SR 17-13 (Dec. 7, 2017) <https://www.federalreserve.gov/supervisionreg/srletters/sr1713.pdf> (explaining why the Board intends to eliminate the SOSA ranking).

¹⁶ In addition to the PSR policy's use of SOSA rankings, the Reserve Banks use SOSA rankings to determine whether an FBO can receive discount

and are generally ineligible for a positive net debit cap.¹⁷

2. Creditworthiness Self-Assessment

The Board proposed that an FBO's creditworthiness self-assessment would generally be based on the FBO's U.S. Operations Supervisory Composite Rating and (in lieu of the FBO's SOSA ranking) the PCA designation that would apply to the FBO if it were subject to the Board's Regulation H (an "equivalent PCA designation").¹⁸ The Board noted that replacing the SOSA ranking with an equivalent PCA designation would align the creditworthiness self-assessment for FBOs with the existing creditworthiness self-assessment for domestic institutions, which is based on an institution's PCA designation and supervisory rating. The Board proposed to implement this change by incorporating FBO creditworthiness self-assessments into the Guide's existing matrix for assessing domestic institutions' creditworthiness.¹⁹

The Board proposed that an FBO that is not based in a country that has implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision²⁰ (a "Basel jurisdiction") would be required to perform a full assessment of its creditworthiness instead of using the matrix approach to assessing creditworthiness.²¹

3. Capital Measures

The Board proposed that the capital measure of an FBO would equal 10 percent of its worldwide capital, in lieu of the current tiered system in which an FBO's capital measure depends on its

¹⁷ See n. 4, *supra*. The PSR policy and the Guide would continue to provide that FBOs that have U.S. Operations Supervisory Composite Ratings of "marginal" or "unsatisfactory" have "below standard" creditworthiness and are generally ineligible for a positive net debit cap.

¹⁸ See 12 CFR 208.43(b).

¹⁹ See Table VII-1 of the Guide.

²⁰ The proposal referred in a number of places to jurisdictions that adhere to the Basel Capital Accords (BCA)" or "adhere to BCA-based standards, while the amendments adopted in this **Federal Register** notice instead refer to jurisdictions that have implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision. The Board does not intend for this change to have any substantive effect.

²¹ The requirement to perform a full assessment of creditworthiness would apply to FBOs based in non-Basel jurisdictions that request any net debit cap greater than the exempt-from-filing category, including FBOs that request a *de minimis* cap category. Additionally, a Reserve Bank could request that an FBO based in a non-Basel jurisdiction perform a full assessment of creditworthiness before assigning the FBO an exempt-from-filing cap category.

SOSA ranking and FHC status. The Board explained in the proposal that it believed it was unnecessary to replace the SOSA ranking with an alternative supervisory rating in the capital measure calculation, noting that (1) including a point-in-time supervisory rating such as SOSA is less important than in the past because the Reserve Banks now receive, on an ongoing basis, better supervisory information regarding FBOs and (2) other elements of the net debit cap calculation already consider an FBO's supervisory ratings and overall financial condition.

4. Max Caps

The Board proposed that an FBO that is well capitalized could request the streamlined procedure for obtaining a max cap. Currently, the PSR policy allows SOSA-1 ranked FBOs and FBOs that are FHCs to request the streamlined procedure. The Board explained in the proposal that it believed it would not be appropriate to substitute another supervisory rating for the SOSA-1 ranking in determining FBO eligibility for the streamlined max cap procedure, because non-SOSA supervisory ratings focus only on the U.S. operations of FBOs.

II. Discussion of Public Comments

The Board received one responsive comment, from an association of international banks. The commenter did not object to removing references to the SOSA rankings and FHC status from the PSR policy, nor did the commenter object to incorporating equivalent PCA designations into the PSR policy. The commenter believed, however, that the Board should not implement these changes in a manner that reduces FBOs' current net debit caps. The commenter also argued that, when an FBO determines its equivalent PCA designation, the FBO should be able to rely on home-country standards for the leverage measure component of that determination. Finally, the commenter requested that the Board delay the effective date of the proposed changes by at least 12 months from the date of publication in the **Federal Register**.

For the reasons set forth below, the Board has adopted the changes substantially as proposed. However, the Board has (1) replaced the term "equivalent PCA designation" with "FBO PSR capital category" and (2) clarified the manner in which an FBO will determine its FBO PSR capital category.

The changes will be effective on April 1, 2020.

A. Reductions in FBO Capital Measures/ Net Debit Caps

The commenter raised a number of concerns regarding the Board's proposal to set the capital measure of all FBOs at 10 percent of an FBO's worldwide capital.

1. Effects on U.S.-Dollar Clearing Activities of FBOs

The commenter argued that the proposal to set the capital measures of all FBOs at 10 percent of an FBO's worldwide capital would reduce FBOs' net debit caps and would negatively affect FBOs' U.S.-dollar clearing activity. The commenter suggested that the Board may have underestimated the proposal's effects on FBOs by assuming that payment levels from 2003 to 2007 would be predictive of future payment levels and that reserve levels will revert to those from 2003 to 2007, stating that "if events prove contrary to the [Board's] assumption the results could significantly alter the analysis and related policy conclusions." The commenter further suggested that lower net debit caps might cause an FBO to "throttle" payments during the day (*i.e.*, restrict and delay funds transfers until sufficient funds are available) to ensure that it stays within its net debit cap, which would diminish liquidity. Finally, the commenter argued that relying on collateral to cover intraday exposure to a Reserve Bank would be costly to an FBO and might result in (1) increased transaction costs to customers and (2) an increase in "systemic operational risk" in the event of constraints on the availability of "sufficiently high-quality liquid assets."

The Board has evaluated FBOs' intraday credit usage under a wide range of scenarios, including the current high reserves environment (2015–present), an extreme stress environment (2007–2009), and a low reserves environment (2003–2007). The Board's analysis indicates that most FBOs would retain sufficient daylight overdraft capacity even when reserves are low and liquidity pressures are high. For example, during the 2007–09 financial crisis, when the use of intraday credit spiked amid the market turmoil near the end of 2008, 51 of 58 FBOs with a positive net debit cap used overdraft capacity, the highest average cap utilization was 65 percent, and only 7 FBOs had an average cap utilization greater than 25 percent.²² During the same period, 1 of 27 FBOs that currently maintain a cap category higher than

²² In this context, average cap utilization equals an institution's average daily peak daylight overdraft divided by the FBO's net debit cap.

exempt-from-filing²³ regularly incurred daylight overdrafts that would have exceeded its projected net debit cap under the single-rate capital measure calculation that the Board is adopting, 7 of 27 incurred daylight overdrafts that would have exceeded their projected net debit caps in limited instances, and 19 of 27 never incurred daylight overdrafts that would have exceeded their projected caps.²⁴ Accordingly, the Board believes that the projected net debit caps would have provided most FBOs with sufficient capacity during the financial crisis.

Similarly, between 2003 and 2007, when FBOs generally maintained lower reserves, 51 of 57 FBOs with a positive net debit cap used overdraft capacity, the highest average cap utilization was 44 percent, and only 7 FBOs had an average cap utilization greater than 25 percent. During the same period, 2 of 27 FBOs that currently maintain a cap category higher than exempt-from-filing regularly incurred daylight overdrafts that would have exceeded their projected net debit caps under the single-rate capital measure calculation that the Board is adopting, 5 of 27 incurred daylight overdrafts that would have exceeded their projected net debit caps in limited instances, and 20 of 27 never incurred daylight overdrafts that would have exceeded their projected caps.²⁵ Accordingly, the Board believes that the projected net debit caps would have provided most FBOs with sufficient capacity during the low reserves environment from 2003–2007.²⁶

The Board recognizes that setting the capital measures of all FBOs at 10

percent of an FBO's worldwide capital may increase the instances in which FBOs need additional daylight overdraft capacity, but the Board believes that FBOs' projected net debit caps would be better tailored to their actual usage of intraday credit. Additionally, as the Board noted in the proposal, an FBO with a de minimis cap could also request a higher net debit cap by applying for a self-assessed cap.²⁷ Similarly, an FBO with a self-assessed cap could apply for a max cap in order to obtain additional collateralized capacity. While the Board recognizes that relying on collateralized overdrafts might be more operationally complex for FBOs than relying on uncollateralized overdrafts, the Board notes that the Reserve Banks allow account holders to post a wide array of collateral of varying degrees of liquidity, including various types of loans.²⁸ Importantly, the Board also notes that relying on collateralized intraday credit would reduce the credit risk that the Reserve Banks incur when they provide intraday credit to FBOs.

2. National Treatment Considerations

The commenter further argued that the proposal to set the capital measures of all FBOs at 10 percent of an FBO's worldwide capital is inconsistent with the principle of national treatment. Under the principle of national treatment, FBOs operating in the United States should be, generally, treated no less favorably than similarly situated U.S. banking organizations.²⁹

The commenter argued that because a U.S. branch is an office of a foreign bank, it can draw on the global resources of the foreign bank to support its liabilities, including intraday credit that it receives from a Reserve Bank. As

described in the proposal, however, FBOs that incur daylight overdrafts present special legal risks to the Reserve Banks because of differences in insolvency laws in the various FBOs' home countries. In particular, the proposal quoted a 2001 **Federal Register** notice in which the Board explained that insolvent FBOs posed a heightened risk to the Reserve Banks because “[t]he insolvent party’s national law . . . may permit the liquidator to subordinate other parties’ claims (such as by permitting the home country tax authorities to have first priority in bankruptcy), may reclassify or impose a stay on the right the nondefaulting party has to collateral pledged by the defaulting party in support of a particular transaction, or may require a separate proceeding to be initiated against the head office in addition to any proceeding against the branch.”³⁰ The 2001 **Federal Register** notice further stated that “[i]t is not practicable for the Federal Reserve to undertake and keep current extensive analysis of the legal risks presented by the insolvency law(s) applicable to each FBO with a Federal Reserve account in order to quantify precisely the legal risk that the Federal Reserve incurs by providing intraday credit to that institution. It is reasonable, however, for the Federal Reserve to recognize that FBOs generally present additional legal risks to the payments system and, accordingly, limit its exposure to these institutions.”³¹

The Board continues to believe that FBOs may pose heightened risks to the Reserve Banks relative to domestic institutions, and that it is reasonable to calculate an FBO's capital measure as a fraction of its worldwide capital, notwithstanding that the capital measure of a domestic institution generally equals 100 percent of the institution's risk-based capital. The Board also notes that, although Federal Reserve supervisors have gained access to new internal and external resources since 2002 (when the Board adopted the current capital measure calculation) that allow the Federal Reserve to better monitor FBOs on an ongoing basis, the Board's authority over FBOs generally extends only to FBOs' U.S. operations. As a result, Federal Reserve supervisors have less insight into the financial health of FBOs compared to domestic bank holding companies, for which the Board serves as the global supervisory authority. Nevertheless, as discussed above, the Board believes that FBOs'

²³ Most FBOs with a cap category of exempt-from-filing receive the maximum net debit cap of \$10 million and would not be affected by the changes to the FBO capital measure calculation that the Board is adopting in the notice.

²⁴ In this context, “regularly incurred daylight overdrafts that would have exceeded its projected net debit cap” means that an FBO's daylight overdrafts would have exceeded its projected net debit cap, on average, more than once per two-week reserve maintenance period (“RMP”) over the period; “limited instances” means that an FBO's daylight overdrafts would have exceeded its projected net debit cap, on average, less than once per every six two-week RMPs over the period. Data current as of Q4 2018.

²⁵ Data current as of Q4 2018.

²⁶ The projected net debit caps under the single-rate capital measure calculation that the Board is adopting would also provide FBOs with sufficient capacity in the current high-reserves environment. Since 2015, none of the 27 FBOs that currently maintain a cap category higher than exempt-from-filing have regularly incurred daylight overdrafts that would have exceeded their projected net debit caps, 1 of 27 incurred daylight overdrafts that would have exceeded its projected net debit caps in limited instances, and 26 of 27 never incurred daylight overdrafts that would have exceeded their projected caps.

²⁷ As noted above, most FBOs with a cap category of exempt-from-filing receive the maximum net debit cap of \$10 million and would not be affected by the changes to the FBO capital measure calculation that the Board is adopting in this notice.

²⁸ See the Federal Reserve's *Discount Window Margins and Collateral Guidelines*, <https://www.frbdiscountwindow.org/en/Pages/Collateral/Discount%20Window%20Margins%20and%20Collateral%20Guidelines.aspx>. These margin and collateral guidelines apply to discount window loans and intraday credit under the PSR policy. Currently, more than half of the collateral posted at the Reserve Banks are loans, none of which would qualify as high-quality liquid assets for purposes of the Federal banking regulators' rules establishing a liquidity coverage ratio for banking organizations. See, e.g., 12 CFR 249.20 (Board regulation establishing high-quality liquid asset criteria).

²⁹ See, e.g., International Banking Act of 1978, Public Law 95–369, 12 U.S.C. 3101 *et seq.*; S. Rep. No. 95–1073 (Aug. 8, 1978) (legislative history of the International Banking Act of 1978); Gramm-Leach-Bliley Act of 1999, Public Law 106–102, section 141, 12 U.S.C. 3106(c); Dodd-Frank Act, Public Law 111–203, section 165(b)(2), 12 U.S.C. 5365(b)(2).

³⁰ 82 FR at 58769 (quoting 66 FR 30205, 30206 (Aug. 6, 2001)).

³¹ *Id.*

projected net debit caps would be well tailored to FBOs' actual usage of intraday credit and would not constrain most FBOs' U.S. operations under a wide range of scenarios.

The Board further notes that, as discussed in the proposal, FBO net debit caps are currently large when compared to the net debit caps of peer domestic institutions. For example, the average net debit cap of an FBO with between \$1 billion and \$10 billion in U.S.-based assets is \$3.9 billion, while the average net debit cap of a domestic institution with between \$1 billion and \$10 billion in assets is \$209 million; the average net debit cap of an FBO with between \$10 billion and \$50 billion in U.S.-based assets is \$7.7 billion, while the average net debit cap of a domestic institution with between \$10 billion and \$50 billion in assets is \$1.4 billion; and the average net debit cap of an FBO with between \$50 billion and \$150 billion in U.S.-based assets is \$24.5 billion, while the average net debit cap of a domestic institution with between \$50 billion and \$150 billion in assets is \$11.3 billion.³² After the changes adopted in this **Federal Register** notice take effect, the average net debit cap of an FBO with between \$1 billion and \$10 billion would be \$1.4 billion, the average net debit cap of an FBO with between \$10 billion and \$50 billion in U.S.-based assets would be \$2.8 billion, and the average net debit cap of an FBO with between \$50 billion and \$150 billion in U.S.-based assets would be \$7.7 billion.³³ As discussed above, the Board's analysis indicates that these projected net debit caps would provide most FBOs with sufficient daylight overdraft capacity even when reserves are low and liquidity pressures are high.³⁴

3. Other Concerns About Reducing FBO Net Debit Caps

The commenter raised a number of other concerns regarding the proposal to set the capital measures of all FBOs at 10 percent of an FBO's worldwide capital. The commenter argued that the proposal would effectively penalize

³² The Board excluded institutions with a cap category of exempt-from-filing from these comparisons because these institutions are limited to a \$10 million net debit cap. No FBO currently has U.S.-based assets above \$150 billion. Data current as of Q4 2018.

³³ The Board recognizes that, based on certain FBOs' business models, the volume and value of payments flowing through an FBO with a particular level of U.S.-based assets may be higher than that of a domestic institution with a similar level of assets.

³⁴ As the Board further explained above, certain FBOs may request additional daylight overdraft capacity by applying for a self-assessed cap and/or a max cap.

those FBOs that, under the current, tiered system for determining FBO capital measures, "are considered to present the lesser risk to the Federal Reserve." The Board notes that, even after the changes to the capital measure calculation take effect, FBOs that are more creditworthy will continue to be eligible for more daylight overdraft capacity than FBOs that are less creditworthy—specifically, an FBO's cap category will continue to be based, in part, on the FBO's creditworthiness, which (as described above) will be determined based on the FBO's U.S. Operations Supervisory Composite Rating and its FBO PSR capital category. The Board also emphasizes that the intent of this policy change is not to penalize FBOs or constrain FBOs' U.S. operations. Rather, the Board believes that FBOs may pose heightened risks to the Reserve Banks relative to domestic institutions, and that it is prudent to manage these risks by limiting FBOs' net debit caps to levels that are better tailored to FBOs' actual usage of intraday credit.

The commenter also argued that the proposal does not consider the protections that the Reserve Banks receive under federal and state laws that "ringfence" FBO assets for the benefit of third-party creditors. Federal and state laws require that U.S. branches and agencies of foreign banks pledge assets in segregated accounts that are intended to benefit the creditors of such branches and agencies.³⁵ Publicly reported data show that U.S. branches and agencies of foreign banks generally pledge assets equal only to a small percentage of their liabilities in such segregated accounts.³⁶ For example, only 2 of 44 FBOs with a positive net debit cap have pledged sufficient assets to cover all of their liabilities to nonrelated parties, while 36

³⁵ For example, an uninsured New York state-licensed branch is required to deposit an amount of high-quality assets in a segregated account that is pledged to the state to cover the cost of the branch's liquidation and to repay creditors. N.Y. Banking Law § 202-b(1); 3 NYCRR 51. The amount of the required deposit is the greater of (1) \$2 million or (2) one percent of average total liabilities of the branch or agency for the previous month, subject to certain caps for well-rated foreign banking corporations. 3 NYCRR 322.1. The New York Superintendent of Financial Services may also require a New York state branch to maintain additional assets relative to some percentage of liabilities if the Superintendent deems it necessary or desirable for the maintenance of a sound financial condition, the protection of depositors and the public interest, and to maintain public confidence in the branch. N.Y. Banking Law § 202-b(1). *See also* 12 U.S.C. 3102(g); 12 CFR 28.15 and 28.20.

³⁶ *See* Reporting Form FFIEC 002, "Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks," Schedule RAL, Items S.1 and S.2.

of these FBOs have pledged assets equal to less than 10 percent of their liabilities to nonrelated parties.³⁷ Similarly, only 1 of 27 FBOs that currently maintain a cap category higher than exempt-from-filing³⁸ has pledged sufficient assets to cover its net debit cap, 6 have pledged assets that would cover between 10 percent and 60 percent of their net debit caps, and 20 have pledged assets that would cover less than 10 percent of their net debit caps.³⁹ Accordingly, if an FBO becomes insolvent during a period in which a Reserve Bank has extended intraday credit to that FBO, the pledged assets of the FBO's U.S. branches and agencies would very likely be insufficient to repay the Reserve Banks and other unsecured creditors.

The Board recognizes that, in some jurisdictions, a U.S. supervisory authority (or a receiver appointed by a U.S. supervisory authority) that liquidates a U.S. branch or agency of an insolvent foreign bank may take possession of all assets of the foreign bank—including non-branch assets of the foreign bank—located in the jurisdiction of that supervisory authority.⁴⁰ These provisions may expand the pool of assets available to repay the creditors of a U.S. branch or agency if the foreign bank maintains other assets in the United States (if the branch is federally licensed) or in the state in which the branch is located (if the branch is state-licensed). The Board notes, however, that it is uncertain whether available assets will be sufficient to repay creditors when a supervisory authority or receiver takes possession of such U.S. branches and agencies.

Finally, the commenter argued that there is no compelling reason to reduce FBO net debit caps at this time. The commenter noted, in this regard, that the special legal risks that FBOs pose to the Reserve Banks have not changed since 2001, when the Board established the current method for calculating FBO capital measures. The commenter also noted that U.S. and foreign regulators have improved their supervision and regulation of foreign banks and their U.S. branches since 2001, suggesting that these efforts have enhanced foreign banks' resiliency and resolvability and should provide the Reserve Banks with more comfort that U.S. branches are creditworthy. The Board recognizes that

³⁷ Data current as of Q4 2018.

³⁸ The Board has excluded institutions with a cap category of exempt-from-filing from this analysis because such institutions' net debit caps are limited to a maximum of \$10 million.

³⁹ Data current as of Q4 2018.

⁴⁰ *See, e.g.*, 12 U.S.C. 3102(j)(1); N.Y. Banking Law section 606(4)(a).

foreign banks (including U.S. branches of foreign banks) are—like U.S.-chartered institutions—subject to more robust oversight than they were in 2001.⁴¹ The Board also appreciates that intraday credit helps to facilitate payments by Reserve Bank account holders and can promote the smooth functioning of the payment system. Nevertheless, because intraday credit to FBOs (relative to domestic institutions) may pose heightened risks to the Reserve Banks, the Board believes that the Reserve Banks should tailor FBO net debit caps more closely to FBOs' actual usage of intraday credit and should not provide unnecessarily large net debit caps to FBOs. Setting the capital measures of all FBOs at 10 percent of an FBO's worldwide capital would better tailor FBO net debit caps to FBOs' actual usage of intraday credit.

B. Use of Home-Country Leverage Ratio

Under Regulation H, a bank's PCA designation is determined by four capital measures: Total risk-based capital, tier 1 risk-based capital, common equity tier 1 risk-based capital, and leverage.⁴² The leverage measure utilizes two ratios: The leverage ratio ("U.S. leverage ratio") and the supplementary leverage ratio ("SLR"). The key difference between the two ratios is that the U.S. leverage ratio calculation incorporates only on-balance-sheet activity, while the SLR calculation incorporates both on-balance-sheet assets and certain off-balance-sheet exposures.⁴³ Under Regulation H, banks must meet a minimum U.S. leverage ratio of 4 or 5 percent to qualify as, respectively, adequately capitalized or well capitalized.⁴⁴ Regulation H also requires that certain banks meet additional SLR standards to qualify as adequately or well capitalized.⁴⁵ Finally, Regulation H

establishes leverage measures for the undercapitalized and significantly undercapitalized PCA categories.⁴⁶

The commenter argued that "in determining an FBO's equivalent PCA designation, reference should be made only to the [SLR] and not to the U.S. leverage ratio, and, consistent with that approach, the leverage measure under the PCA regime should be calibrated by reference to the home country leverage ratio." The commenter noted that under Regulation H, "PCA categories apply various combinations of the U.S. leverage ratio and the U.S. supplementary ratio, whereas the corresponding measure for FBOs" from Basel jurisdictions is the SLR. The commenter therefore argued that, for purposes of calculating an FBO's equivalent PCA designation, the leverage measure should be based solely on the FBO's leverage ratio as calculated under home-country standards ("home-country leverage ratio")—*i.e.*, that the U.S. leverage ratio, as distinct from the SLR, should have "no relevance to the determination." The commenter also suggested that an FBO should be able to qualify as well capitalized or adequately capitalized if it meets its home country's 3 percent leverage ratio expectation (assuming the FBO also meets the relevant risk-based capital ratios in Regulation H).

FBOs currently report their tier 1 capital and total consolidated assets to the Federal Reserve on the Capital and Asset Report for Foreign Banking Organizations (FR Y-7Q). The Board recognizes, however, that it might be burdensome for an FBO to calculate a functional equivalent to the U.S. leverage ratio due to differences between home-country accounting standards and U.S. accounting standards. Additionally, the Board recognizes that, because of definitional ambiguities in Regulation H, it might be difficult for an FBO to determine the precise SLR standards to which it is subject.

Accordingly, the Board is clarifying the manner in which an FBO will determine its FBO PSR capital

217.2, and 217.402 (definition of GSIB); 12 CFR 208.43(b)(1)(iv)(B) and 208.43(b)(2)(iv)(B) (Regulation H SLR standards). The Board has issued a proposal to change the 6 percent SLR requirement for banks that are subsidiaries of GSIBs to equal 3 percent plus 50 percent of the GSIB risk-based surcharge applicable to such a bank's top-tier holding company. 83 FR 17317 (April 19, 2018).

⁴⁶ Under Regulation H, a bank is deemed to be undercapitalized if its U.S. leverage ratio is less than 4 percent or, if applicable, its SLR is less than 3 percent. A bank is deemed to be significantly undercapitalized if its U.S. leverage ratio is less than 3 percent, *i.e.*, more than 100 basis points lower than the U.S. leverage ratio needed to qualify as adequately capitalized.

category.⁴⁷ The four PSR capital categories for FBOs will be "highly capitalized," "sufficiently capitalized," "undercapitalized," and "intraday credit ineligible." To assess whether it is highly capitalized or sufficiently capitalized, an FBO would compare its risk-based capital ratios to the corresponding ratios in Regulation H for, respectively, well-capitalized and adequately capitalized banks. Additionally, an FBO would need a home-country leverage ratio of 4 percent or 3 percent to qualify as, respectively, highly capitalized or sufficiently capitalized. Under Regulation H, a bank must meet a minimum U.S. leverage ratio of 5 percent to qualify as well capitalized, which is 100 basis points higher than the 4 percent U.S. leverage ratio required to qualify as adequately capitalized. Similarly, in order for an FBO to be considered highly capitalized for purposes of the PSR policy, it will need to meet a home-country leverage ratio (which, as noted above, corresponds to the SLR) of 4 percent, which is 100 basis points higher than the 3 percent home-country leverage ratio needed to be considered sufficiently capitalized. The Board believes that this approach will treat FBOs and U.S. institutions equivalently.

To determine whether its FBO PSR capital category is undercapitalized, an FBO would compare its risk-based capital ratios to the corresponding ratios in Regulation H. Additionally, an FBO would be deemed undercapitalized if its home-country leverage ratio is less than 3 percent. Some undercapitalized FBOs with supervisory composite ratings of "strong" or "satisfactory" may qualify for positive net debit caps.

Finally, to determine whether its FBO PSR capital category is "intraday credit ineligible," an FBO would compare its risk-based capital ratios to the corresponding Regulation H ratios for significantly undercapitalized banks. Stated differently, an FBO with risk-based capital thresholds below the levels required to qualify as undercapitalized will be deemed ineligible for intraday credit. Additionally, an FBO will be deemed ineligible for intraday credit if its home-country leverage ratio is less than 2 percent.⁴⁸

⁴⁷ As noted above, the Board is replacing the term "equivalent PCA designation" with "FBO PSR capital category." An FBO not based in a Basel jurisdiction would be required to perform a full assessment of its creditworthiness instead of using the matrix approach to assessing creditworthiness.

⁴⁸ Under Regulation H, a bank is deemed to be significantly undercapitalized if its U.S. leverage ratio is less than 3 percent (*i.e.*, more than 100 basis

⁴¹ See, e.g., Dodd-Frank Act, Public Law 111-203, section 165, 12 U.S.C. 5365 (requiring enhanced supervision and prudential standards for certain bank holding companies, including certain FBOs).

⁴² The Board's Regulation H applies to state member banks. The Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) have promulgated functionally identical PCA regulations applicable to OCC-regulated and FDIC-regulated institutions, respectively. See 12 CFR part 6 (OCC); 12 CFR part 324, subpart H (FDIC).

⁴³ See 12 CFR 208.41(h) and (j); 12 CFR 217.10(b)(4) and (c)(4).

⁴⁴ 12 CFR 208.43(b)(2)(iv)(A) and (b)(1)(iv)(A).

⁴⁵ Specifically, a bank that qualifies as an "advanced approaches bank" must meet a minimum SLR of 3 percent to qualify as adequately capitalized and a bank that is a subsidiary of a global systemically important bank holding company (GSIB) must maintain an SLR of at least 6 percent to qualify as well capitalized. See 12 CFR 208.41(a) and 217.100(b)(1) (definition of "advanced approaches bank"); 12 CFR 208.41(g),

The following table illustrates the capital ratios that an FBO will use to determine its FBO PSR capital category.⁴⁹

FBO PSR capital category	Total risk-based capital (%)	Tier 1 risk-based capital (%)	Common equity (%)	Home-country leverage ratio (%)
Highly capitalized	10	8	6.5	4
Sufficiently capitalized	8	6	4.5	3
Undercapitalized	<8	<6	<4.5	2
Intraday credit ineligible	<6	<4	<3	<2

As noted above, the Board proposed to incorporate FBO creditworthiness self-assessments into the Guide's

existing matrix for assessing domestic institutions' creditworthiness. The

revised creditworthiness self-assessment matrix will appear as follows:

Domestic capital category/ FBO PSR capital category	Supervisory composite rating ⁵⁰			
	Strong	Satisfactory	Fair	Marginal or unsatisfactory
<i>Well capitalized/Highly capitalized</i>	Excellent	Very good	Adequate	Below standard.
<i>Adequately capitalized/Sufficiently capitalized</i>	Very good	Very good	Adequate	Below standard.
<i>Undercapitalized</i>	** 51	** 52	Below standard ...	Below standard.
<i>Significantly or critically undercapitalized/Intraday credit ineligible.</i>	Below standard ...	Below standard ...	Below standard ...	Below standard.

Relatedly, as discussed above, the Board proposed that a well-capitalized FBO would be eligible to request the streamlined max cap procedure. The amendments adopted in this notice use the new nomenclature discussed above and instead provide that a *highly* capitalized FBO will be eligible to request the streamlined max cap procedure.

C. Delay in Effective Date

The commenter requested that the Board delay the effective date of any changes to the PSR policy by at least 12 months. The Board believes that a transition period would help FBOs adjust to these changes. Accordingly, the changes will be effective on April 1, 2020. The Federal Reserve will continue to provide SOSA rankings until that date.

III. Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act ("RFA") (5 U.S.C. 601 et seq.) to address concerns related to the effects of agency rules on small entities, and the Board is sensitive to the impact its rules may impose on small entities. The RFA requires agencies either to

provide a final regulatory flexibility analysis with a final rule or to certify that the final rule will not have a significant economic impact on a substantial number of small entities. In this case, the relevant provisions of the PSR policy apply to all FBOs that maintain accounts at Federal Reserve Banks. While the Board does not believe that the changes adopted in this notice would have a significant impact on small entities, and regardless of whether the RFA applies to the PSR policy per se, the Board has nevertheless prepared the following Final Regulatory Flexibility analysis in accordance with 5 U.S.C. 604.

1. *Statement of the need for, and objectives of, the rule.* As discussed above, the Board is removing references to the SOSA ranking and FBOs' FHC status in the PSR policy. Discontinuing the SOSA ranking will streamline the Federal Reserve's FBO supervision program by eliminating the need for Federal Reserve supervisors to provide supervisory rankings that only serve a purpose for Reserve Bank credit decisions. Removing references to FHC status in the PSR policy will align the policy with the Board's view that an

FBO's status as an FHC is not a suitable factor for determining the FBO's eligibility for intraday credit.

2. *Description of comments.* The Board did not receive any comments on the Initial Regulatory Flexibility analysis from members of the public or from the Chief Counsel for Advocacy of the Small Business Administration ("SBA").

3. *Small entities affected by the proposed rule.* Pursuant to regulations issued by the SBA (13 CFR 121.201), a "small entity" includes an entity that engages in commercial banking and has assets of \$550 million or less (NAICS code 522110). Forty-one FBOs that maintain Federal Reserve accounts are small entities. Six of those FBOs maintain positive net debit caps.⁵³

4. *Projected reporting, recordkeeping, and other compliance requirements.* The changes to the PSR policy will alter the procedures by which FBOs obtain intraday credit from the Reserve Banks. The most important new requirement is that an FBO will need to determine an FBO PSR capital category, based on its worldwide capital ratios, to establish its

points lower than the 4 percent U.S. leverage ratio required to qualify as adequately capitalized). Under the PSR policy, a significantly undercapitalized institution is ineligible for intraday credit. The Board believes that deeming an FBO ineligible for intraday credit if its home-country leverage ratio is less than 2 percent—which would be more than 100 basis points lower than the 3 percent home-country leverage ratio needed to qualify as sufficiently capitalized—would treat FBOs and U.S. institutions equivalently.

⁴⁹ The risk-based capital ratios in the table are based on the ratios currently codified in Regulation H and will change correspondingly with any future revisions to Regulation H.

⁵⁰ Supervisory composite ratings, such as the Uniform Bank Rating System (CAMELS), are generally assigned on a scale from 1 to 5, with 1 being the strongest rating. Thus, for the purposes of the Creditworthiness Matrix, a supervisory rating of 1 is considered Strong; a rating of 2 is considered

Satisfactory; a rating of 3 is considered Fair; and so on.

⁵¹ Institutions that fall into this category should perform a full assessment of creditworthiness. A full assessment of creditworthiness includes an assessment of capital adequacy, key performance measures (including asset quality, earnings performance, and liquidity), and the condition of affiliated institutions.

⁵² *Id.*

⁵³ Data current as of Q4 2018.

creditworthiness under the PSR policy. Additionally, an FBO will need to determine that it is highly capitalized, based on worldwide capital ratios, in order to qualify for a streamlined procedure for requesting collateralized intraday credit.

The Board does not believe that it will be burdensome for an FBO to calculate its FBO PSR capital category or determine whether it is highly capitalized, nor does it believe that FBO employees will need any specialized professional skills to prepare such calculations. The Board's FR Y-7Q report currently requires that FBOs with total consolidated assets of \$50 billion or more report the numerators and denominators needed to calculate all of the risk-based capital ratios in the FBO PSR capital category determination. The FR Y-7Q report also requires that FBOs with total consolidated assets below \$50 billion report the numerators and denominators needed to calculate all ratios in the FBO PSR capital category determination except the common equity tier 1 capital ratio. FBOs with total consolidated assets below \$50 billion that are based in Basel jurisdictions already calculate their common equity tier 1 capital ratios under home-country standards. Additionally, as discussed above, the Board has clarified that the leverage measure component of the FBO PSR capital category will be based solely on the FBO's leverage ratio as calculated under home-country standards.

5. *Steps taken to minimize economic impact and discussion of significant alternatives.* The Board does not believe that alternatives to these changes would better accomplish the objectives of limiting credit risk to the Reserve Banks while minimizing any economic impact on small entities. The Board believes, as described above, that the revised procedures will allow FBOs to maintain net debit caps that are well tailored to FBOs' actual usage of intraday credit and will not constrain most FBOs' U.S. operations under a wide range of scenarios.

While one alternative would be to continue providing SOSA rankings to FBOs and leave the PSR policy in its present form, the Board believes that Federal Reserve supervisory resources should be allocated to other matters. Similarly, the Board could continue to allow FBOs that are FHCs to qualify for higher levels of intraday credit than FBOs that are not FHCs, but (as described above) the Board does not believe that an FBO's status as an FHC should determine the FBO's eligibility for intraday credit.

In two places—specifically, in the capital measure calculation process and in the eligibility criteria for a streamlined max cap procedure—the Board has deleted references to SOSA without replacing those references with an alternative supervisory rating. As described above, the Board believes that it is unnecessary to substitute another supervisory rating in either area.⁵⁴

Finally, the Board has replaced SOSA rankings in the creditworthiness self-assessment matrix with the FBO PSR capital category. This change will require an FBO to calculate its FBO PSR capital category using worldwide capital ratios. Alternatively, the Board could have simply deleted the SOSA ranking and provided that an FBO's creditworthiness would depend solely on its U.S. operations supervisory composite rating. The Board believes, however, that using the FBO PSR capital category in conjunction with an FBO's supervisory ratings will better protect the Reserve Banks from credit risk, because the FBO PSR capital category will provide insight into an FBO's worldwide financial profile and its ability to support its U.S. branches and agencies. As discussed above, the Board has clarified that an FBO will calculate the leverage measure component of the FBO PSR capital category under home-country standards.

IV. Competitive Impact Analysis

The Board conducts a competitive impact analysis when it considers a rule or policy change that may have a substantial effect on payment system participants. Specifically, the Board determines whether there would be a direct or material adverse effect on the ability of other service providers to compete with the Federal Reserve due to differing legal powers or due to the Federal Reserve's dominant market position deriving from such legal differences.⁵⁵ The Board did not receive any comments regarding its competitive impact analysis in the proposal.

The Board believes that the modifications to the PSR policy will have no adverse effect on the ability of other service providers to compete with the Reserve Banks in providing similar services. While the Board expects that the modifications will reduce net debit caps for many FBOs, the Board does not believe this will have a significant effect on FBOs because (as explained above) the Board believes that most FBOs would retain access to sufficient amounts of Reserve Bank intraday credit. Accordingly, the Board not

expect the modifications will have a significant effect on FBOs' use of Federal Reserve Bank services. Additionally, the proposed modifications will have no effect on intraday credit access for domestic institutions, which comprise the vast majority of Reserve Bank account holders.

V. Paperwork Reduction Act

Certain provisions of the PSR policy contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").⁵⁶ In accordance with the requirements of the PRA, the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The Board has reviewed the amendments to the PSR policy adopted in this notice under the authority delegated to the Board by OMB. The amendments require revisions to the Annual Report of Net Debit Cap (FR 2226; OMB No. 7100-0217). In addition, as permitted by the PRA, the Board proposes to extend for three years, with revision, the Annual Report of Net Debit Cap (FR 2226; OMB No. 7100-0217). The Board received no comments on the PRA analysis in the proposal. The Board has a continuing interest in the public's opinions of collections of information. At any time, commenters may submit comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to Nuha Elmaghribi, Federal Reserve Board Clearance Officer, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551. A copy of the comments may also be submitted to the OMB desk officer: By mail to U.S. Office of Management and Budget, 725 17th Street NW, # 10235, Washington, DC 20503; by facsimile to (202) 395-5806; or by email to: oir_submission@omb.eop.gov, Attention, Federal Banking Agency Desk Officer.

Proposed Revision, With Extension for Three Years, of the Following Information Collection:

Title of Information Collection: Annual Report of Net Debit Cap.

Agency Form Number: FR 2226.

OMB Control Number: 7100-0217.

Frequency of Response: Annually.

Respondents: Depository institutions' board of directors.

⁵⁴ See sections I.B.3 and I.B.4, *supra*.

⁵⁵ Federal Reserve Regulatory Service, 9-1558.

⁵⁶ 44 U.S.C. 3501-3521.

Abstract: Federal Reserve Banks collect these data annually to provide information that is essential for their administration of the PSR policy. The reporting panel includes all financially healthy depository institutions with access to the discount window. The Report of Net Debit Cap comprises three resolutions, which are filed by a depository institution's board of directors depending on its needs. The first resolution is used to establish a de minimis net debit cap and the second resolution is used to establish a self-assessed net debit cap.⁵⁷ The third resolution is used to establish simultaneously a self-assessed net debit cap and maximum daylight overdraft capacity.

Under the PSR policy, an FBO's SOSA ranking can affect its eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. Additionally, an FBO's status as an FHC can affect the size of its net debit cap and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The amendments to the PSR policy adopted in this notice (1) remove references to the SOSA ranking, (2) remove references to FBOs' FHC status, and (3) adopt alternative methods for determining an FBO's eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The amendments will increase the estimated average hours per response for FR 2226 self-assessment and de minimis respondents that are FBOs by half an hour.

Estimated number of respondents: De Minimis Cap: Non-FBOs, 893 respondents and FBOs, 18 respondents; Self-Assessment Cap: Non-FBOs, 106 respondents and FBOs, 9 respondents; and Maximum Daylight Overdraft Capacity, 2 respondents.

Estimated average hours per response: De Minimis Cap—Non-FBOs, 1 hour and FBOs, 1.5 hour; Self-Assessment Cap—Non-FBOs, 1 hour and FBOs, 1.5 hours, and Maximum Daylight Overdraft Capacity, 1 hour.

Estimated annual burden hours: De Minimis Cap: Non-FBOs, 893 hours and

FBOs, 27 hours; Self-Assessment Cap: Non-FBOs, 106 hours and FBOs, 13.5 hours; and Maximum Daylight Overdraft Capacity, 2 hours.

VI. Federal Reserve Policy on Payment System Risk

Revisions to Section II.D of the PSR Policy

Section II.D of the PSR policy is revised as follows:

D. Net debit caps

* * * * *

2. Cap Categories

* * * * *

a. Self-Assessed

In order to establish a net debit cap category of high, above average, or average, an institution must perform a self-assessment of its own creditworthiness, intraday funds management and control, customer credit policies and controls, and operating controls and contingency procedures.⁶¹ For domestic institutions, the assessment of creditworthiness is based on the institution's supervisory rating and Prompt Corrective Action (PCA) designation.⁶² For U.S. branches and agencies of FBOs that are based in jurisdictions that have implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision, the assessment of creditworthiness is based on the institution's supervisory rating and its FBO PSR capital category.⁶³ An

⁶¹ This assessment should be done on an individual-institution basis, treating as separate entities each commercial bank, each Edge corporation (and its branches), each thrift institution, and so on. An exception is made in the case of U.S. branches and agencies of FBOs. Because these entities have no existence separate from the FBO, all the U.S. offices of FBOs (excluding U.S.-chartered bank subsidiaries and U.S.-chartered Edge subsidiaries) should be treated as a consolidated family relying on the FBO's capital.

⁶² An insured depository institution is (1) "well capitalized" if it significantly exceeds the required minimum level for each relevant capital measure, (2) "adequately capitalized" if it meets the required minimum level for each relevant capital measure, (3) "undercapitalized" if it fails to meet the required minimum level for any relevant capital measure, (4) "significantly undercapitalized" if it is significantly below the required minimum level for any relevant capital measure, or (5) "critically undercapitalized" if it fails to meet any leverage limit (the ratio of tangible equity to total assets) specified by the appropriate federal banking agency, in consultation with the FDIC, or any other relevant capital measure established by the agency to determine when an institution is critically undercapitalized (12 U.S.C. 1831o).

⁶³ The four FBO PSR capital categories for FBOs are "highly capitalized," "sufficiently capitalized," "undercapitalized," and "intraday credit ineligible." To determine whether it is highly

institution may perform a full assessment of its creditworthiness in certain limited circumstances—for example, if its condition has changed significantly since its last examination or if it possesses additional substantive information regarding its financial condition. Additionally, U.S. branches and agencies of FBOs based in jurisdictions that have not implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision are required to perform a full assessment of creditworthiness to determine their ratings for the creditworthiness component. An institution performing a self-assessment must also evaluate its intraday funds-management procedures and its procedures for evaluating the financial condition of and establishing intraday credit limits for its customers. Finally, the institution must evaluate its operating controls and contingency procedures to determine if they are sufficient to prevent losses due to fraud or system failures. The Guide includes a detailed explanation of the self-assessment process. * * *

* * * * *

b. De Minimis

Many institutions incur relatively small overdrafts and thus pose little risk to the Federal Reserve. To ease the burden on these small overdrafters of engaging in the self-assessment process and to ease the burden on the Federal Reserve of administering caps, the Board allows institutions that meet reasonable safety and soundness standards to incur de minimis amounts of daylight overdrafts without performing a self-assessment.⁶⁷ An

capitalized or sufficiently capitalized, an FBO should compare its risk-based capital ratios to the corresponding ratios in Regulation H for well-capitalized and adequately capitalized banks. 12 CFR 208.43(b). Additionally, an FBO must have a leverage ratio of 4 percent or 3 percent (calculated under home-country standards) to qualify as, respectively, highly capitalized or sufficiently capitalized. To determine whether it is undercapitalized, an FBO would compare its risk-based capital ratios to the corresponding ratios in Regulation H. Additionally, an FBO would be deemed undercapitalized if its home-country leverage ratio is less than 3 percent. Finally, to determine whether it is intraday credit ineligible, an FBO should compare its risk-based capital ratios to the corresponding ratios in Regulation H for significantly undercapitalized banks. Additionally, an FBO would be deemed intraday credit ineligible if its home-country leverage ratio is less than 2 percent.

⁶⁷ U.S. branches and agencies of FBOs that are based in jurisdictions that have not implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision are required to perform a full assessment of creditworthiness to determine whether they meet reasonable safety and soundness

⁵⁷ Institutions use these two resolutions to establish a capacity for daylight overdrafts above the lesser of \$10 million or 20 percent of the institution's capital measure. Financially healthy U.S. chartered institutions that rarely incur daylight overdrafts in excess of the lesser of \$10 million or 20 percent of the institution's capital measure do not need to file board of directors' resolutions or self-assessments with their Reserve Bank.

institution may incur daylight overdrafts of up to 40 percent of its capital measure if the institution submits a board of directors resolution.

* * *
* * * * *

c. Exempt-From-Filing

Institutions that only rarely incur daylight overdrafts in their Federal Reserve accounts that exceed the lesser of \$10 million or 20 percent of their capital measure are excused from performing self-assessments and filing board of directors resolutions with their Reserve Banks.⁶⁸ This dual test of dollar amount and percent of capital measure is designed to limit the filing exemption to institutions that create only low-dollar risks to the Reserve Banks and that incur small overdrafts relative to their capital measure. * * *

* * * * *

3. Capital Measure

* * * * *

b. U.S. Branches and Agencies for Foreign Banks

For U.S. branches and agencies of foreign banks, net debit caps on daylight overdrafts in Federal Reserve accounts are calculated by applying the cap multiples for each cap category to the FBO's U.S. capital equivalency measure.⁶⁹ U.S. capital equivalency is equal to 10 percent of worldwide capital for FBOs.⁷⁰

standards. These FBOs must submit an assessment of creditworthiness with their board of directors resolution requesting a de minimis cap category. U.S. branches and agencies of FBOs that are based in jurisdictions that have implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision are not required to complete an assessment of creditworthiness, but Reserve Banks will assess such an FBO's creditworthiness based on the FBO's supervisory rating and its FBO PSR capital category.

⁶⁸The Reserve Bank may require U.S. branches and agencies of FBOs that are based in jurisdictions that have not implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision to perform a full assessment of creditworthiness to determine whether the FBO meets reasonable safety and soundness standards. U.S. branches and agencies of FBOs that are based in jurisdictions that have implemented capital standards substantially consistent with those established by the Basel Committee on Banking Supervision will not be required to complete an assessment of creditworthiness, but Reserve Banks will assess such an FBO's creditworthiness based on the FBO's supervisory rating and the FBO PSR capital category.

⁶⁹The term "U.S. capital equivalency" is used in this context to refer to the particular measure calculate net debit caps and does not necessarily represent an appropriate for supervisory or other purposes.

⁷⁰FBOs that wish to establish a non-zero net debit cap must report their worldwide capital on the Annual Daylight Overdraft Capital Report for U.S.

An FBO that is highly capitalized⁷¹ may be eligible for a streamlined procedure (see section II.E.) for obtaining additional collateralized intraday credit under the maximum daylight overdraft capacity provision.

* * * * *

Revisions to Section II.E of the PSR Policy

The Board will revise Section II.E of the PSR policy as follows:

E. Maximum Daylight Overdraft Capacity

* * * * *

1. General Procedure

An institution with a self-assessed net debit cap that wishes to expand its daylight overdraft capacity by pledging collateral should consult with its administrative Reserve Bank. The Reserve Bank will work with an institution that requests additional daylight overdraft capacity to determine the appropriate maximum daylight overdraft capacity level. In considering the institution's request, the Reserve Bank will evaluate the institution's rationale for requesting additional daylight overdraft capacity as well as its financial and supervisory information. The financial and supervisory information considered may include, but is not limited to, capital and liquidity ratios, the composition of balance sheet assets, and CAMELS or other supervisory ratings and assessments. An institution approved for a maximum daylight overdraft capacity level must submit at least once in each twelve-month period a board of directors resolution indicating its board's approval of that level. * * *

* * * * *

2. Streamlined Procedure for Certain FBOs

An FBO that is highly capitalized⁷² and has a self-assessed net debit cap may request from its Reserve Bank a streamlined procedure to obtain a maximum daylight overdraft capacity. These FBOs are not required to provide documentation of the business need or obtain the board of directors' resolution for collateralized capacity in an amount that exceeds its current net debit cap (which is based on 10 percent worldwide capital times its cap multiple), as long as the requested total

Branches and Agencies of Foreign Banks (FR 2225). The instructions for FR explain how FBOs should calculate their worldwide capital. See <https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYj+5BzDZ1kLYTc+ZpEQ==>.

⁷¹ See n. 63, *supra*.

⁷² See n. 63, *supra*.

capacity is 100 percent or less of worldwide capital times a self-assessed cap multiple.⁷⁶ In order to ensure that intraday liquidity risk is managed appropriately and that the FBO will be able to repay daylight overdrafts, eligible FBOs under the streamlined procedure will be subject to initial and periodic reviews of liquidity plans that are analogous to the liquidity reviews undergone by U.S. institutions.⁷⁷ If an eligible FBO requests capacity in excess of 100 percent of worldwide capital times the self-assessed cap multiple, it would be subject to the general procedure.

* * * * *

By order of the Board of Governors of the Federal Reserve System, March 26, 2019.

Ann E. Misback,
Secretary of the Board.

[FR Doc. 2019-06063 Filed 3-29-19; 8:45 am]

BILLING CODE 6210-01-P

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 107, 120, 142, and 146

RIN 3245-AH03

Civil Monetary Penalties Inflation Adjustments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to adjust for inflation the amount of certain civil monetary penalties that are within the jurisdiction of the agency. These adjustments comply with the requirement in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, to make annual adjustments to the penalties. The rule also makes a technical amendment to ensure that a reference to the penalty amount imposed on SBA Supervised Lenders for failure to file reports is consistent with current and future adjustments.

DATES: *Effective Date:* This rule is effective April 1, 2019.

⁷⁶ For example, an FBO that is well capitalized is eligible for uncollateralized capacity of 10 percent of worldwide capital times the cap multiple. The streamlined max cap procedure would provide such an institution with additional collateralized capacity of 90 percent of worldwide capital times the cap multiple. As noted above, FBOs report their worldwide capital on the Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks (FR 2225).

⁷⁷ The liquidity reviews will be conducted by the administrative Reserve Bank, in consultation with each FBO's home country supervisor.

FOR FURTHER INFORMATION CONTACT:
Arlene Embrey, 202-205-6976, or at
arlene.embrey@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Inflation Adjustment Improvements Act), Public Law 114-74, 129 Stat. 584, was enacted. This Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890 (the 1990 Inflation Adjustment Act), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect (hereinafter, both collectively referred to as “the Act”). The Act required agencies to issue a final rule by August 1, 2016, to adjust the level of civil monetary penalties with an initial “catch-up” adjustment, and to annually adjust these monetary penalties for inflation by January 15 of each subsequent year. The Act also authorizes agencies to implement the annual adjustments without regard to the requirements for public notice and comment or delayed effective date under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B) and (d)(3), respectively.

In addition, based on the definition of a “civil monetary penalty” in the 1990 Inflation Adjustment Act, agencies are to make adjustments only to the civil penalties that (i) are for a specific monetary amount as provided by Federal law or have a maximum amount provided for by Federal law; (ii) are assessed or enforced by an agency; and (iii) are enforced or assessed in an administrative proceeding or a civil action in the Federal courts. Therefore, penalties that are stated as a percentage of an indeterminate amount or as a function of a violation (penalties that encompass actual damages incurred) are not to be adjusted.

On May 19, 2016, SBA published its initial adjustments to the civil monetary penalties, including an initial “catch-up” adjustment. 81 FR 31489. These adjusted penalties became effective on August 1, 2016. SBA published its most recent annual adjustments to the monetary penalties in the **Federal Register** on February 21, 2018 (83 FR 7361), with an immediate effective date. This rule will establish the penalty amounts required to be adjusted in 2019.

The formula for calculating the annual adjustments is based on the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October preceding the adjustment, and

specifically on the change between the October CPI-U preceding the date of adjustment and the prior year’s CPI-U. Based on this methodology, the 2019 civil monetary penalty adjustment formula is October 2018 CPI-U (252.885)/October 2017 CPI-U (246.663) = 1.02522. See, OMB memorandum, M-19-04, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, (December 14, 2018).

II. Civil Money Penalties Adjusted by This Rule

This rule makes adjustments to civil monetary penalties authorized by the Small Business Act, the Small Business Investment Act of 1958 (SBIAct), the Program Fraud Civil Remedies Act, and the Byrd Amendment to the Federal Regulation of Lobbying Act. These penalties and the implementing regulations are discussed below.

1. 13 CFR 107.665—Civil Penalties

SBA licenses, regulates and provides financial assistance to financial entities called small business investment companies (SBICs). Pursuant to section 315 of the SBIAct, 15 U.S.C. 687g, SBA may impose a penalty on any SBIC for each day that it fails to comply with SBA’s regulations or directives governing the filing of regular or special reports. The penalty for non-compliance is incorporated in § 107.665 of the SBIC program regulations.

This rule amends § 107.665 to adjust the current civil penalty from \$259 to \$266 per day of failure to file. The current civil penalty of \$259 was multiplied by the multiplier of 1.02522 to reach a product of \$266, rounded to the nearest dollar.

2. 13 CFR 120.465—Civil Penalty for Late Submission of Required Reports

According to the regulations at § 120.465, any SBA Supervised Lender, as defined in 13 CFR 120.10, that violates a regulation or written directive issued by the SBA Administrator regarding the filing of any regular or special report is subject to the civil penalty amount stated in § 120.465(b) for each day the lender fails to file the report, unless the SBA Supervised Lender can show that there is reasonable cause for its failure to file. This penalty is authorized by section 23(j)(1) of the Small Business Act, 15 U.S.C. 650(j)(1).

This rule amends § 120.465(b) to adjust the current civil penalty from \$6,460 to \$6,623 per day of failure to file. The current civil penalty of \$6,460 was multiplied by the multiplier of

1.02522 to reach a product of \$6,623, rounded to the nearest dollar.

3. 13 CFR 120.1500—Types of Enforcement Actions—SBA Lenders

Currently, the regulation in 13 CFR 120.1500(c)(4), references the penalty amount in § 120.465 and identifies it as \$5,000. However, due to multiple inflation adjustments the amount has increased, and after publication of this rule, it will be further increased to \$6,623. To resolve the inconsistency between §§ 120.1500 and 120.465, and to avoid future confusion, SBA is amending § 120.1500(c)(4) to remove the reference to the amount of the penalty.

4. 13 CFR 142.1—Overview of Regulations

SBA has promulgated regulations at 13 CFR part 142 to implement the civil penalties authorized by the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801–3812. Under the current regulations at § 142.1(b), a person who submits, or causes to be submitted, a false claim or a false statement to SBA is subject to a civil penalty of not more than \$11,181, for each statement or claim. The adjusted civil penalty amount was calculated by multiplying the current civil penalty of \$11,181 by the multiplier of 1.02522 to reach a product of \$11,463, rounded to the nearest dollar.

5. 13 CFR 146.400—Penalties

SBA’s regulations at 13 CFR part 146 govern lobbying activities by recipients of federal financial assistance. These regulations implement the authority in 31 U.S.C. 1352 to impose penalties on any recipient that fails to comply with certain requirements in the part. Specifically, under § 146.400(a) and (b), penalties may be imposed on those who make prohibited expenditures or fail to file the required disclosure forms or to amend such forms, if necessary.

This rule amends § 146.400(a) and (b) to adjust the current civil penalty amounts to “not less than \$20,134 and not more than \$201,340.” The current civil penalty amounts of \$19,639 and \$196,387 were multiplied by the multiplier of 1.02522 to reach a product of \$20,134 and \$201,340, respectively, rounded to the nearest dollar.

This rule also amends § 146.400(e) to adjust the civil penalty that may be imposed for a first-time violation of § 146.400(a) and (b) to a maximum of \$20,134, and for second and subsequent offenses, to “not less than \$20,134 and not more than \$201,340.” The current civil penalty amounts of \$19,639 and \$196,387 were multiplied by the multiplier of 1.02522 to reach a product

of \$20,134 and \$201,340 respectively, rounded to the nearest dollar.

III. Justification for Final Rule

The Act provides that agencies shall annually adjust civil monetary penalties for inflation notwithstanding Section 553 of the APA. The Act also provides a non-discretionary cost-of-living formula for adjusting the annual civil monetary penalties. For these reasons, the requirements in sections 553(b) and (c) of the APA relating to notice and comment are inapplicable.

IV. Justification for Immediate Effective Date

Section 553(d) of the APA requires agencies to publish their rules at least 30 days before their effective dates, except if the agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest. By expressly exempting this rule from section 553, the Act has provided SBA with the good cause justification for this rule to become effective on the date it is published in the **Federal Register**.

Compliance With Executive Orders 12866, 12988, 13132, 13771, and the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget has determined that this final rule is not a significant regulatory action under Executive Order 12866. This is also not a major rule under the Congressional Review Act, 5 U.S.C. 801.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that the rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this final rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771

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

Paperwork Reduction Act

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements.

Regulatory Flexibility Act (RFA)

The RFA requires agencies to consider the effect of their regulatory actions on small entities, including small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of such small entities. However, the RFA requires such analysis only where notice and comment rulemaking are required. As stated above, SBA has express statutory authority to issue this rule without regard to the notice and comment requirement of the Administrative Procedure Act. Since notice and comment is not required before this rule is issued, SBA is not required to prepare a regulatory analysis.

List of Subjects

13 CFR Part 107

Investment companies, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 120

Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 142

Administrative practice and procedure, Claims, Fraud, Penalties.

13 CFR Part 146

Government contracts, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, SBA amends 13 CFR parts 107, 120, 142, and 146 as follows:

PART 107—SMALL BUSINESS INVESTMENT COMPANIES

■ 1. The authority citation for part 107 continues to read as follows:

Authority: 15 U.S.C. 681, 683, 687(c), 687b, 687d, 687g, 687m.

§ 107.665 [Amended]

■ 2. In § 107.665, remove “\$259” and add in its place “\$266”.

PART 120—BUSINESS LOANS

■ 3. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3) and 7, and 697(a) and (e); Pub. L. 111–5, 123 Stat. 115, Pub. L. 111–240, 124 Stat. 2504.

§ 120.465 [Amended]

■ 4. In § 120.465, amend paragraph (b) by removing “\$6,460” and adding in its place “\$6,623”.

§ 120.1500 [Amended]

■ 5. In § 120.1500, amend paragraph (c)(4) by removing the words “of not more than \$5,000 a day”.

PART 142—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

■ 6. The authority citation for part 142 continues to read as follows:

Authority: 15 U.S.C. 634(b); 31 U.S.C. 3803(g)(2).

§ 142.1 [Amended]

■ 7. In § 142.1, amend paragraph (b) by removing “\$11,181” and adding in its place “\$11,463”.

PART 146—NEW RESTRICTIONS ON LOBBYING

■ 8. The authority citation for part 146 continues to read as follows:

Authority: Section 319, Pub. L. 101–121 (31 U.S.C. 1352); 15 U.S.C. 634(b)(6).

§ 146.400 [Amended]

■ 9. In § 146.400, amend paragraphs (a), (b), and (e) by removing “\$19,639” wherever it appears and adding in its place “\$20,134” and by removing “\$196,387” and adding in its place “\$201,340”.

Dated: March 25, 2019.

Linda E. McMahon,
Administrator.

[FR Doc. 2019–06260 Filed 3–29–19; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 91**

[Docket No. FAA-2019-0239]

Statement of Policy for Authorizations to Operators of Aircraft That are Not Equipped With Automatic Dependent Surveillance-Broadcast (ADS-B) Out Equipment**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Policy statement.

SUMMARY: This action establishes the FAA's policy for issuing air traffic control (ATC) authorizations to persons seeking to operate aircraft that are not equipped with Automatic Dependent Surveillance-Broadcast (ADS-B) Out equipment in ADS-B airspace after January 1, 2020.

DATES: The policy described herein will be effective January 2, 2020.

FOR FURTHER INFORMATION CONTACT: For technical information concerning this action, contact David E. Gray, Surveillance and Broadcast Group Manager, Air Traffic Organization at (202) 267-3615.

SUPPLEMENTARY INFORMATION:**Authority for This Action**

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

The ADS-B Out equipage and performance requirements were promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103, Sovereignty and use of airspace, and Subpart III, Section 44701, General requirements. Under section 40103, the FAA is charged with prescribing regulations on the flight of aircraft (including regulations on safe altitudes) for navigating, protecting, and identifying aircraft, and the efficient use of the navigable airspace. Under section 44701, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce.

Under § 91.225(g) of Title 14 of the Code of Federal Regulations (14 CFR), which was issued in accordance with the FAA's statutory authority in sections

40103 and 44701, the FAA may issue authorizations allowing certain operators to deviate from the ADS-B Out equipage requirements of § 91.225. This policy statement is within the scope of the FAA's authority and provides guidance to operators on how ATC in its operational management of the national airspace system (NAS) intends to exercise its discretion to issue authorizations to operators of aircraft that are not equipped with ADS-B Out equipment.

I. Background

In 2010, the FAA issued a final rule prescribing equipage requirements and performance standards for ADS-B Out equipment on aircraft operating in certain airspace after January 1, 2020.¹ ADS-B Out equipment is an advanced surveillance technology that combines an aircraft's positioning source, aircraft avionics, and a ground infrastructure to create an accurate surveillance interface between aircraft and air traffic control (ATC). Use of ADS-B Out will move ATC from a radar-based system to an aircraft location system based on satellite-derived position and velocity.

Aircraft equipped with ADS-B Out equipment are able to continually broadcast information, such as identification, current position, altitude, and velocity, through an onboard transmitter, which can be received by ADS-B ground stations and by other aircraft appropriately equipped to receive this information. ADS-B Out provides air traffic controllers with real-time position information that is, in most cases, more accurate than the information available with current radar-based systems. With more accurate information, ATC will be able to position and separate aircraft with improved precision and timing. With specific and limited exceptions, ADS-B Out equipage requirements and performance standards apply to all aircraft operating in certain U.S. airspace.² Therefore, these requirements

¹ Final Rule, Automatic Dependent Surveillance-Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC), 75 FR 30160 (May 28, 2010).

² ADS-B Out airspace consists of (1) Class A, B, and C airspace areas (within the United States and from the coastline of the United States out to 12 nautical miles), (2) the airspace within the Mode C veil (within 30 nautical miles of an airport listed in appendix D, section 1 of part 91) from the surface upward to 10,000 feet MSL, (3) above the ceiling and within the lateral boundaries of a Class B or Class C airspace area designated for an airport upward to 10,000 feet MSL, (4) Class E airspace within the 48 contiguous states and the District of Columbia at and above 10,000 feet MSL, excluding the airspace at and below 2,500 feet above the surface, and (5) Class E airspace at and above 3,000 feet MSL over the Gulf of Mexico from the coastline

are applicable to operations conducted by both domestic and foreign operators. The surveillance provided by ADS-B Out will enhance ATC's ability to surveil and separate aircraft so that efficiency and capacity will increase beyond current levels to meet the predicted demand for ATC services while continually maintaining safety. To obtain the efficiency and capacity benefits that can be realized with ADS-B Out, all aircraft must be equipped with ADS-B Out equipment when operating in rule airspace.

Section 91.225 of Title 14 of the Code of Federal Regulations (CFR) prescribes the ADS-B Out equipment and use requirements, and § 91.227 prescribes the ADS-B Out equipment performance requirements. After January 1, 2020, unless otherwise authorized by ATC, all aircraft operating in the airspace identified in § 91.225 must comply with the ADS-B Out equipage and performance requirements.³ The FAA adopted a provision in § 91.225(g), however, that allows persons to request authorization from ATC to operate in ADS-B Out airspace with aircraft that do not meet the ADS-B Out requirements. Section 91.225(g) addresses two types of aircraft that may not meet the ADS-B Out requirements: Aircraft with inoperative ADS-B Out equipment and aircraft that have not been equipped with ADS-B Out equipment. This notice announces the FAA's policy for handling requests for authorization from operators of aircraft that are not equipped with ADS-B Out equipment.

Under § 91.225(g), for the operation of aircraft that are not equipped with ADS-B Out equipment, the operator must make the request for an authorized deviation at least 1 hour before the proposed operation to the ATC facility with jurisdiction over the airspace. The provision in § 91.225(g) gives ATC the flexibility to address deviation requests from non-equipped aircraft on a case-by-case basis.⁴ In addition, in order to assist operators in making a decision whether to equip with ADS-B Out equipment, the preamble explained that ATC might not be able to grant

of the United States out to 12 nautical miles. For purposes of § 91.225, the United States includes Puerto Rico and the U.S. possessions. 14 CFR 1.1.

³ These requirements apply to all aircraft operating in ADS-B Out airspace including foreign-registered aircraft.

⁴ See Notice of Proposed Rulemaking, Automatic Dependent Surveillance-Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC), 72 FR 56947, 56957-56959 (Oct. 5, 2007) (explaining that an operator may request an ATC authorization to operate in the airspace and the FAA will address the requests on a case-by-case basis).

authorizations for a variety of reasons, including but not limited to workload, runway configurations, air traffic flows, and weather conditions.⁵ The ADS-B Out final rule contemplated that those operators with a need to operate regularly in airspace where ADS-B Out is required would equip, and that an exception for per-operation authorizations was designed to accommodate unforeseen or rare circumstances.

II. Discussion of the Policy

After January 1, 2020, unless otherwise authorized by ATC, all aircraft operating in the airspace identified in § 91.225 must comply with the ADS-B Out equipage and performance requirements. Nothing in this notice shall be deemed to modify or alter those requirements established in the 2010 final rule. The purpose of this notice is only to announce publicly how ATC will manage § 91.225(g) and issue authorizations to operators of aircraft that have not equipped with ADS-B Out equipment.

In this notice, the FAA establishes: (1) A general policy that would apply to all operators of non-equipped aircraft seeking authorization to operate in ADS-B Out airspace; (2) specific policies for handling authorization requests from scheduled operators; (3) policies for other than scheduled operations at capacity constrained airports; (4) guidance on the provision of air traffic services to non-equipped aircraft that have failed to obtain an authorization to operate in ADS-B Out airspace; and (5) plans for implementation of the authorization policy.

A. General Policy

In accordance with the ADS-B Out final rule, the FAA anticipates that operators who intend to operate routinely in ADS-B Out airspace have been taking the necessary steps to equip aircraft with ADS-B Out equipment to ensure there is no disruption to their operations. The regulatory provision for issuing authorizations to operators of non-equipped aircraft addresses rare instances in which an operator who does not routinely operate in ADS-B Out airspace has a need to do so. As contemplated in the ADS-B Out rulemaking, the per-operation authorizations were not intended to support routine and regular operations of non-equipped aircraft in ADS-B Out airspace.

To that point, the FAA has not planned nor does it plan to expend a significant amount of its limited budgetary resources to establish a new system to issue authorizations for the small number of operators of non-equipped aircraft seeking occasional access to ADS-B Out airspace. The FAA anticipates that the need to obtain authorizations under § 91.225(g) will quickly diminish over time as universal equipage grows. Likewise, the FAA does not intend to divert ATC facility resources from other critical functions that directly support air traffic controllers performing their duties in order to prioritize and manage authorizations for operators of non-equipped aircraft. Notably, as plans to divest radar begin to take effect, the authorization policy will necessarily evolve as accommodation of non-equipped aircraft in ADS-B Out airspace becomes more complicated.

Under the 2010 ADS-B Out rulemaking, the FAA determined that, to the maximum extent possible, operators of equipped aircraft should not be penalized or have their ATC services affected by operators who choose not to equip their aircraft with ADS-B Out equipment. Therefore, an ATC authorization allowing an operator to deviate from the equipage requirements of § 91.225 must be requested and obtained prior to the operation. Consistent with the rule's requirement that an operator request an authorization at least 1 hour prior to the operation, the policy will preclude an operator from requesting and the FAA from issuing in-flight authorizations to operators of non-equipped aircraft. Additionally, in view of the resource issues identified earlier, the FAA will not accept requests for authorizations by telephone to ATC facilities.

B. Policy for Scheduled Operations in ADS-B Out Airspace

Consistent with the rule, scheduled operators may request an authorization to deviate from the ADS-B Out equipage requirements. However, as previously noted, the rule requires an operator to make an authorization request at least 1 hour before each proposed operation to the ATC facility that has jurisdiction over the airspace. Given the express language of the regulation, the rule as written was not intended to accommodate scheduled operators who are transiting ADS-B Out airspace under the jurisdiction of multiple ATC facilities on a routine or regular basis. Therefore, as discussed in this section and consistent with the statements in the NPRM indicating that not all requests for authorization will be

granted, the FAA will not issue daily or routine authorizations for scheduled operations. While ATC will consider requests from scheduled operators, it is very unlikely to issue an authorization to a scheduled operator on more than an occasional basis and is most likely to issue an authorization when a compelling or unanticipated need to deviate from the ADS-B Out equipage requirements exists.

The FAA's policy for handling authorization requests from scheduled operators is consistent with the per-operation, facility-level relief established in the rule and with the general policy discussed above, which supports the issuance of authorizations only for limited operations in ADS-B Out airspace. A scheduled operator offers in advance of the operation the departure location, departure time, and arrival location.⁶

The preamble to the final rule made it apparent that no operator is guaranteed an ATC authorization to deviate from ADS-B Out equipage requirements. Because ATC may not be able to grant every authorization request, it would be detrimental for an operator to make its scheduled operations into ADS-B Out airspace dependent solely on obtaining an ATC authorization to deviate from the equipage requirements of § 91.225. Relying solely on an ATC authorization—which may not be granted—to operate a non-equipped aircraft in ADS-B Out airspace would put the operator's scheduled operations in jeopardy.

Furthermore, the final rule that promulgated § 91.225 was issued on May 28, 2010. Therefore, scheduled operators have known for over eight years that authorization requests under § 91.225(g) will be handled on a case-by-case basis. Likewise, since 2010, air carriers and commercial operators conducting scheduled operations have known which airspace and airports will require them to use aircraft equipped with ADS-B Out equipment. Because with very limited exceptions scheduled operations take place almost wholly within ADS-B Out airspace (*i.e.*, over 10,000 feet and at airports located within Class B and C airspace), these operators—understanding that authorizations were not guaranteed to

⁶ Section 110.2 of 14 CFR defines a scheduled operation as any common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance of the departure location, departure time, and arrival location. It does not include any passenger-carrying operation that is conducted as a public charter operation under part 380 of this chapter.

⁵ Final Rule, 75 FR at 30167; NPRM, 72 FR at 66959

be issued in all instances—should have planned to equip any aircraft routinely used in scheduled operations. Therefore, while a scheduled operator may request a deviation from the ADS-B Out equipage requirements on a per-operation basis in accordance with § 91.225(g), it is unlikely that the FAA will issue repeated authorizations to deviate from ADS-B Out equipage requirements.⁷ Accordingly, operators who conduct routine and regular operations into ADS-B Out airspace should be taking the necessary steps to equip their aircraft with ADS-B Out equipment to ensure their scheduled operations are not disrupted.

The FAA notes that, for scheduled operations into slot controlled and slot facilitated airports subject to minimum usage requirements,⁸ this policy makes it even more critical for operators to adjust their fleets to ensure they are using ADS-B Out equipped aircraft for any scheduled operations.⁹

C. Policy for Operations Other Than Scheduled Operations in ADS-B Out Airspace

Operators who are not conducting scheduled operations (“unscheduled operators”)¹⁰ and are seeking to operate non-equipped aircraft in rule airspace may request ATC authorizations consistent with § 91.225(g). However, operators should be aware that requests for authorization to operate aircraft that are not equipped with ADS-B Out equipment might not be accommodated for a variety of reasons. The FAA notes that many commercial operators currently conduct regular but unscheduled operations in ADS-B Out airspace. In accordance with the requirements of the ADS-B Out rulemaking, these operators, like scheduled operators, should be equipping their aircraft rather than relying on repeated ATC authorizations

⁷ Scheduled operators with a compelling or unanticipated need to enter ADS-B Out airspace with a non-equipped aircraft will be considered differently under this policy.

⁸ Section 93.213(2) of 14 CFR defines “slot” as the “operational authority to conduct one IFR landing or takeoff operation each day during a specific hour or 30-minute period at one of the High Density Traffic Airports, as specified in subpart K of [part 93].”

⁹ Pursuant to § 93.227 of 14 CFR and FAA orders, an operator’s slots at an airport may be subject to withdrawal if the operator does not utilize the slot at least 80 percent of the time over the time-frame authorized by the FAA.

¹⁰ For purposes of this notice, an “unscheduled operator” means an operator conducting an operation that does not meet the definition of scheduled operation as defined in 14 CFR 110.2. These operations include other commercial operations (e.g. part 135 operations) as well as general aviation operations conducted under part 91.

to enter ADS-B Out airspace. Under the rule, the FAA determined that, to the maximum extent possible, operators of equipped aircraft should not be penalized or have their ATC services affected by operators who choose not to equip their aircraft with ADS-B Out equipment. Therefore, under the policy, ATC will make determinations as necessary to ensure equipped operators are not adversely impacted and that efficiency of operations is maintained.

Consistent with this principle, it will be difficult for unscheduled operators conducting operations at capacity constrained airports to obtain authorizations. Given the complex and dynamic nature of operations within this airspace, it is unlikely that ATC will prioritize authorization requests for unequipped aircraft over providing air traffic services to aircraft equipped with ADS-B Out equipment. Unscheduled operators with a need to access this airspace on more than an occasional basis should equip with ADS-B Out to ensure no disruption to operations.

For purposes of this notice, a capacity constrained airport is an airport that is operating at 85% capacity or greater. Based on FAA’s current analysis, this includes the following airports: Boston Logan International Airport (BOS); Charlotte Douglas International Airport (CLT); Chicago O’Hare International Airport (ORD); Dallas/Fort Worth International Airport (DFW); Hartsfield-Jackson Atlanta International Airport (ATL); John F. Kennedy International Airport (JFK); LaGuardia Airport (LGA); Los Angeles International Airport (LAX); McCarran International Airport (LAS); Philadelphia International Airport (PHL); Ronald Reagan Washington National Airport (DCA); San Diego International Airport (SAN); San Francisco International Airport (SFO); and Seattle-Tacoma International Airport (SEA).

These airports are where demand is consistently at 85% capacity or greater, and operations are often constrained. For that reason, it is far more likely that the FAA will deny rather than issue authorization requests from unscheduled operators to operate non-equipped aircraft at these airports. The FAA advises that unscheduled operators with a pressing or routine need to access ADS-B Out airspace near these airports should take the appropriate steps to equip before January 2020 in order to ensure that their operations are not disrupted.

For ADS-B Out airspace outside capacity constrained airports, the FAA reiterates that ATC might not issue a requested authorization. For this reason, the only way to ensure seamless access

to ADS-B Out airspace is to equip pursuant to §§ 91.225 and 91.227.

D. Continued Provision of ATC Services to Non-Equipped Aircraft

ATC is responsible for providing services to aircraft to enable the safe and efficient operation of the NAS. Therefore, under the authorization policy, ATC will continue to provide air traffic services to all aircraft operating within its airspace, including those aircraft that have not equipped with ADS-B Out equipment and have not obtained proper authorizations under § 91.225(g). The FAA notes, however, that the provision of air traffic services to a non-equipped operator whose filed flight plan transits ADS-B Out airspace will not constitute authorization under § 91.225(g). Although ATC will be able to observe that an aircraft is not equipped with ADS-B Out equipment, ATC will not be responsible for determining whether non-equipped aircraft operating in the NAS are properly authorized to operate in ADS-B Out airspace.¹¹ The provision of air traffic services is separate from and will not constitute an authorization to deviate from the ADS-B Out equipage requirements while operating in that airspace. The non-equipped operator, as always, will have the responsibility to ensure compliance with the regulations,¹² which includes obtaining a preflight authorization in accordance with § 91.225(g).

E. Implementation

The FAA’s Air Traffic Organization is responsible for issuing the preflight authorizations under § 91.225(g). The FAA’s Aviation Safety Organization is responsible for providing post-flight oversight of the operations. Any operator who operates a non-equipped aircraft in ADS-B Out airspace without obtaining a preflight authorization in accordance with § 91.225(g)(2) will be presumed to have violated the regulations.¹³ The Administrator is

¹¹ The FAA notes that, if an ATC facility within capacity constrained airspace has determined that it will not issue authorizations at a given time on a given day, non-equipped aircraft operating in that airspace will be presumed to have acted in non-compliance with § 91.225. Notwithstanding the presumed non-compliance, ATC will provide air traffic services to the aircraft. As noted, the provision of services will not overcome the operator’s failure to obtain an authorization.

¹² It is the pilot’s responsibility to comply with the applicable requirements of Title 14 of the Code of Federal Regulations. Receiving ATC services or an ATC clearance does not relieve a pilot of his or her responsibility to comply with the regulations.

¹³ The FAA acknowledges that, in certain circumstances, an operator of a non-equipped aircraft who had not planned to enter rule airspace and, therefore, did not seek a preflight

authorized to assess sanctions for such violations pursuant to the FAA's statutory authority. General guidance applicable to FAA sanction determinations is in FAA Order 2150.3C, FAA Compliance and Enforcement Program, Chapter 9.¹⁴

The FAA continues to develop the process and system for requesting authorizations.¹⁵ The system under development will issue or deny an authorization consistent with the policy set forth in this document.¹⁶ An operator of a non-equipped aircraft will not be allowed to operate in ADS-B Out airspace without a preflight authorization obtained through the system. If an operator obtains an authorization through the system to enter certain ADS-B Out airspace, the operator will be presumed to have complied with the requirements of § 91.225(g) with respect to that ADS-B Out airspace. Having a system that issues trackable authorizations and denials to the operator will also enable the FAA to provide proper oversight to ensure compliance.

F. Summary

After January 1, 2020, unless otherwise authorized by ATC, all aircraft operating in the airspace

authorization, may receive an in-flight clearance that would place the aircraft in airspace for which ADS-B Out equipage is required. Because ATC needs the flexibility to address real-time conditions in the NAS (e.g., adverse weather conditions), ATC may elect to provide a clearance into ADS-B airspace. The FAA advises that the pilot should accept the clearance and immediately advise ATC of the lack of authorization. The FAA will normally not take enforcement action for non-equipage in these circumstances.

¹⁴ Order 2150.3C applies to the compliance and enforcement programs and activities of all FAA offices that have statutory and regulatory compliance and enforcement responsibilities.

¹⁵ The FAA notes that simply obtaining a preflight clearance from ATC under another regulatory requirement will not satisfy the requirement for a preflight authorization to deviate from § 91.225(g). For example, if ATC has provided the operator of a non-equipped aircraft a pre-departure ATC clearance under § 91.173 (ATC clearance and flight plan required), that clearance would not constitute an authorization to operate the non-equipped aircraft in the ADS-B Out airspace. Likewise, a preflight authorization to operate a non-equipped aircraft in ADS-B Out airspace would not constitute an ATC clearance for entering Class B airspace. If an operator plans to operate a non-equipped aircraft in airspace that requires ADS-B Out and an ATC clearance, the responsibility is on that operator to obtain both a preflight authorization pursuant to § 91.225(g)(2) and an ATC clearance.

¹⁶ This policy will not result in additional costs to operators affected by the 2010 ADS-B Out rule establishing equipage and performance requirements that apply to all aircraft operating in certain U.S. airspace. The FAA determined these aircraft will equip in order to operate in ADS-B Out airspace. These costs are summarized in the final rule (75 FR 30160) and detailed in the Final Regulatory Impact Analysis available in the docket (FAA-2007-29305).

identified in § 91.225 must be equipped with ADS-B Out equipment. Pursuant to § 91.225(g), however, persons may request authorization from ATC to operate in ADS-B airspace with aircraft that do not transmit ADS-B Out.

To operate in ADS-B airspace, an operator who has chosen not to equip with ADS-B Out equipment must obtain a preflight authorization in accordance with § 91.225(g). The operator has the responsibility to obtain a preflight authorization from ATC for all ADS-B Out airspace on the planned flight path. For the reasons explained above, however, the FAA will be very unlikely to issue routine and regular authorizations to scheduled operators seeking to operate non-equipped aircraft in rule airspace. Likewise, although unscheduled operators may request authorizations for airspace at capacity constrained airports, issuance of an authorization may prove difficult to obtain.

The FAA continues to develop the specific mechanisms that would be used to issue authorizations to operators of aircraft that are not equipped with ADS-B Out equipment.

Issued in Washington, DC, on March 26, 2019.

Teri L. Bristol,

Chief Operating Officer, Air Traffic Organization.

[FR Doc. 2019-06184 Filed 3-29-19; 8:45 am]

BILLING CODE 4910-13-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

[3038-AE85]

Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Interim final rule; request for comments.

SUMMARY: The United Kingdom (“UK”) has provided formal notice of its intention to withdraw from the European Union (“EU”). The withdrawal may happen as soon as April 12, 2019 and may transpire without a negotiated agreement between the UK and EU (“No-deal Brexit”). To the extent there is a No-deal Brexit, affected swap dealers (“SDs”) and major swap participants (“MSPs”) may need to effect legal transfers of uncleared swaps that were entered into before the relevant compliance dates under the

CFTC Margin Rule or Prudential Margin Rule (each, as defined herein) and that are not now subject to such rules, in whole or in part. The Commodity Futures Trading Commission (“Commission” or “CFTC”) is adopting, and invites comments on, an interim final rule amending its margin requirements for uncleared swaps for SDs and MSPs for which there is no prudential regulator (“CFTC Margin Rule”) such that the date used for purposes of determining whether an uncleared swap was entered into prior to an applicable compliance date will not change under the CFTC Margin Rule if the swap is transferred, and thereby amended, in accordance with the terms of the interim final rule in respect of any such transfer, including that the transfer be made solely in connection with a party to the swap's planning for or response to a No-deal Brexit. The interim final rule is designed to allow an uncleared swap to retain its legacy status under the CFTC Margin Rule or Prudential Margin Rule when so transferred.

DATES: *Effective Date:* This rule is effective April 1, 2019.

Comment Date: Comments must be received on or before May 31, 2019. Comments submitted by mail will be accepted as timely if they are postmarked on or before this comment due date.

ADDRESSES: You may submit comments, identified by RIN 3038-AE85, by any of the following methods:

- *CFTC Comments Portal:* <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW, Washington, DC 20581.

- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

Instructions: All submissions received must include the agency name and RIN number for this rulemaking. For additional details on submitting comments, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Matthew Kulkin, Director, 202-418-5213, mkulkin@cftc.gov; Frank Fisanich, Chief Counsel, 202-418-5949,

ffisanich@cftc.gov; or Jacob Chachkin, Special Counsel, 202–418–5496, *jchachkin@cftc.gov*, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. The CFTC Margin Rule

Section 731 of the Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) ¹ added a new section 4s to the Commodity Exchange Act (“CEA”) ² setting forth various requirements for SDs and MSPs. Section 4s(e) of the CEA directs the Commission to adopt rules establishing minimum initial and variation margin requirements on all swaps ³ that are (i) entered into by an SD or MSP for which there is no Prudential Regulator ⁴ (collectively, “covered swap entities” or “CSEs”) and (ii) not cleared by a registered derivatives clearing organization (“uncleared swaps”).⁵ To offset the greater risk to the SD or MSP ⁶ and the financial system arising from the use of uncleared swaps, these requirements must (i) help ensure the safety and soundness of the SD or MSP and (ii) be appropriate for the risk

associated with the uncleared swaps held as an SD or MSP.⁷

To this end, the Commission promulgated the CFTC Margin Rule in January 2016,⁸ establishing requirements for a CSE to collect and post initial margin ⁹ and variation margin ¹⁰ for uncleared swaps. These requirements vary based on the type of counterparty to such swaps and the location of the CSE and its counterparty.¹¹ These requirements also generally apply only to uncleared swaps entered into on or after the compliance date applicable to a particular CSE and its counterparty (“covered swap”).¹² An

⁷ 7 U.S.C. 6s(e)(3)(A).

⁸ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission’s regulations. 17 CFR 23.150 through 23.159, 23.161. In May 2016, the Commission amended the CFTC Margin Rule to add Commission regulation 23.160, providing rules on its cross border application. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016). 17 CFR 23.160.

⁹ Initial margin, as defined in Commission regulation 23.151 (17 CFR 23.151), is the collateral (calculated as provided by § 23.154 of the Commission’s regulations) that is collected or posted in connection with one or more uncleared swaps. Initial margin is intended to secure potential future exposure following default of a counterparty (*i.e.*, adverse changes in the value of an uncleared swap that may arise during the period of time when it is being closed out), while variation margin is provided from one counterparty to the other in consideration of changes that have occurred in the mark-to-market value of the uncleared swap. *See* CFTC Margin Rule, 81 FR at 664 and 683.

¹⁰ Variation margin, as defined in Commission regulation 23.151 (17 CFR 23.151), is the collateral provided by a party to its counterparty to meet the performance of its obligation under one or more uncleared swaps between the parties as a result of a change in the value of such obligations since the trade was executed or the last time such collateral was provided.

¹¹ *See* Commission regulations 23.152 and 23.153, 17 CFR 23.152 and 23.153. For example, the CFTC Margin Rule does not require a CSE to collect margin from, or post margin to, a counterparty that is neither a swap entity nor a financial end user (each as defined in 17 CFR 23.151). Pursuant to section 2(e) of the CEA, 7 U.S.C. 2(e), each counterparty to an uncleared swap must be an eligible contract participant (“ECP”), as defined in section 1a(18) of the CEA, 7 U.S.C. 1a(18). *See* Commission regulation 23.160 on the cross-border application of the CFTC Margin Rule. 17 CFR 23.160.

¹² Pursuant to Commission regulation 23.161, compliance dates for the CFTC Margin Rule are staggered such that CSEs must come into compliance in a series of phases over four years. The first phase affected CSEs and their counterparties, each with the largest aggregate outstanding notional amounts of uncleared swaps and certain other financial products. These CSEs began complying with both the initial and variation margin requirements of the CFTC Margin Rule on September 1, 2016. The second phase began March 1, 2017, and required CSEs to comply with the variation margin requirements of Commission regulation 23.153 with all relevant counterparties not covered in the first phase. *See* 17 CFR 23.161.

uncleared swap entered into prior to a CSE’s applicable compliance date for a particular counterparty (“legacy swap”) is generally not subject to the margin requirements in the CFTC Margin Rule.¹³

To the extent that more than one uncleared swap is executed between a CSE and its covered counterparty, the CFTC Margin Rule permits the netting of required margin amounts of each swap under certain circumstances.¹⁴ In particular, the CFTC Margin Rule, subject to certain limitations, permits a CSE to calculate initial margin and variation margin, respectively, on an aggregate net basis across uncleared swaps that are executed under the same eligible master netting agreement (“EMNA”).¹⁵ Moreover, the CFTC Margin Rule permits swap counterparties to identify one or more separate netting portfolios (*i.e.*, a specified group of uncleared swaps the margin obligations of which will be netted only against each other) under the same EMNA, including having separate netting portfolios for covered swaps and legacy swaps.¹⁶ A netting portfolio that contains only legacy swaps is not subject to the initial and variation margin requirements set out in the CFTC Margin Rule.¹⁷ However, if a netting portfolio contains any covered swaps, the entire netting portfolio (including all legacy swaps) is subject to such requirements.¹⁸

A legacy swap may lose its legacy treatment under the CFTC Margin Rule, causing it to become a covered swap and causing any netting portfolio in which it is included to be subject to the requirements of the CFTC Margin Rule. For reasons discussed in the CFTC Margin Rule, the Commission elected not to extend the meaning of legacy swaps to include (1) legacy swaps that

On each September 1 thereafter ending with September 1, 2020, CSEs must comply with the initial margin requirements with counterparties with successively lesser outstanding notional amounts.

¹³ *See* CFTC Margin Rule, 81 FR at 651 and Commission regulation 23.161. 17 CFR 23.161.

¹⁴ *See* CFTC Margin Rule, 81 FR at 651 and Commission regulations 23.152(c) and 23.153(d). 17 CFR 23.152(c) and 23.153(d).

¹⁵ *Id.* The term EMNA is defined in Commission regulation 23.151. 17 CFR 23.151. Generally, an EMNA creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following certain specified permitted stays. For example, an International Swaps and Derivatives Association form Master Agreement may be an EMNA, if it meets the specified requirements in the EMNA definition.

¹⁶ *See* CFTC Margin Rule, 81 FR at 651 and Commission regulations 23.152(c)(2)(ii) and 23.153(d)(2)(ii). 17 CFR 23.152(c)(2)(ii) and 23.153(d)(2)(ii).

¹⁷ *Id.*

¹⁸ *Id.*

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

² 7 U.S.C. 1 *et seq.*

³ For the definition of swap, *see* section 1a(47) of the CEA and Commission regulation 1.3. 7 U.S.C. 1a(47) and 17 CFR 1.3. It includes, among other things, an interest rate swap, commodity swap, credit default swap, and currency swap.

⁴ *See* 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable Prudential Regulator. 7 U.S.C. 6s(e)(1)(A). *See also* 7 U.S.C. 1a(39) (defining the term “Prudential Regulator” to include the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Farm Credit Administration, and the Federal Housing Finance Agency). The definition further specifies the entities for which these agencies act as Prudential Regulators. The Prudential Regulators published final margin requirements in November 2015. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (“Prudential Margin Rule”). The Prudential Rule is similar to the CFTC Margin Rule, including with respect to the CFTC’s phasing-in of margin requirements, as discussed herein.

⁵ *See* 7 U.S.C. 6s(e)(2)(B)(ii). In Commission regulation 23.151, the Commission further defined this statutory language to mean all swaps that are not cleared by a registered derivatives clearing organization or a derivatives clearing organization that the Commission has exempted from registration as provided under the CEA. 17 CFR 23.151.

⁶ For the definitions of SD and MSP, *see* section 1a of the CEA and Commission regulation 1.3. 7 U.S.C. 1a and 17 CFR 1.3.

are amended in a material or nonmaterial manner; (2) novations of legacy swaps; and (3) new swaps that result from portfolio compression of legacy swaps.¹⁹ Therefore, and as relevant here, a legacy swap that is amended after the applicable compliance date may become a covered swap subject to the initial and variation margin requirements in the CFTC Margin Rule. In that case, netting portfolios that were intended to contain only legacy swaps and, thus, not be subject to the CFTC Margin Rule may become so subject.

B. Brexit and Transfers of Uncleared Swaps

The UK has provided formal notice of its intention to withdraw from the EU (“Brexit”). The withdrawal may occur as soon as April 12, 2019.²⁰ Financial entities, including CSEs in the UK,²¹ face uncertainty about the applicable regulatory framework they will operate within after such withdrawal, especially a UK exit from the EU absent a negotiated agreement (a “Withdrawal Agreement”) on the specific terms of the UK’s exit (a “No-deal Brexit”).²² These firms have been mindful that one consequence of a No-deal Brexit would be an inability of the firms, if located in the UK, to continue providing investment services in the EU under the current passporting regime. As a result, they might not be in a position to perform certain operations in relation to swaps they presently have with EU clients. In order to address this situation, these firms could attempt to transfer their swaps to a related establishment in an EU Member State,

which in turn would benefit from the passporting regime,²³ or to another related entity outside of the EU.

Similarly, EU financial entities, including CSEs, may also be directly affected by a No-deal Brexit if, for example, they have entered into uncleared swaps with financial entities located in the UK. They might face UK counterparties that request to transfer their swaps to an affiliate or other related establishment as discussed above or might themselves desire to transfer such swaps (e.g., to a U.K. entity) in response to a No-deal Brexit.

In addition, financial entities, including CSEs, regardless of their location may also be affected by a No-deal Brexit and choose to engage in various reorganizations or consolidations of their swaps business in planning for or responding to such an event.²⁴

Each of the transfers and reorganizations described above would require the amendment of transferred swaps. As discussed above, to the extent that these swaps are legacy swaps and a CSE is either a remaining party or a transferee of such swaps, these amendments may cause the swaps to lose their legacy status, thereby converting them into covered swaps and causing them and any uncleared swaps in the same netting portfolio to become subject to the applicable margin requirements of the CFTC Margin Rule. If these requirements were to apply to such swaps following a No-Deal Brexit, the change in the status of the swaps could cause CSEs and other market

participants to incur significant costs, potentially in a short period of time following a No-deal Brexit, due to the additional requirement to post variation and possibly initial margin. This could cause disruptions or have unanticipated negative consequences for affected market participants and swap markets that could, for example, create cash flow or liquidity concerns for some swap counterparties.

II. Interim Final Rule

The Commission is issuing this interim final rule (this “Interim Final Rule”) in order to maintain the status quo for legacy swaps with respect to the CFTC Margin Rule to the extent any amendments thereto are made solely to transfer such swaps in response to a No-deal Brexit, as discussed above, and otherwise pursuant to the requirements of this Interim Final Rule.²⁵ Specifically, this Interim Final Rule amends Commission regulation 23.161²⁶ to provide that in a No-Deal Brexit, subject to certain conditions,²⁷ a legacy swap may be transferred and amended without revising the date (“swap date”) used for purposes of determining whether such uncleared swap was entered into prior to the applicable compliance date under the CFTC Margin Rule. By preserving the swap date and limiting the transferees of each party to its margin affiliate,²⁸ or a

²⁵ The Commission notes that the Prudential Regulators and the European Supervisory Authorities (“ESAs”) have provided or proposed similar relief for certain swaps subject to their respective margin requirements. See Margin and Capital Requirements for Covered Swap Entities, 84 FR 9940 (Mar. 19, 2019) and ESAs Propose to Amend Bilateral Margin Requirements to Assist Brexit Preparations for OTC Derivative Contracts (November 29, 2018), at <https://www.esma.europa.eu/press-news/esma-news/esas-propose-amend-bilateral-margin-requirements-assist-brexit-preparations-otc> (visited February 21, 2019). In addition, certain EU Member states are providing related relief. See British Banks Are Getting a Last-Minute Break From the EU (February 20, 2018), at <https://www.bloomberg.com/news/articles/2019-02-20/brexit-fears-drive-eu-nations-to-look-for-london-banks> (visited February 21, 2019).

²⁶ 17 CFR 23.161.

²⁷ See 17 CFR 23.161(d)(2).

²⁸ As defined in Commission regulation 23.151 (17 CFR 23.151), a company is a margin affiliate of another company if: (1) Either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards, (2) Both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards, or (3) For a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied.

Under Commission regulation 23.161, 17 CFR 23.161, a margin affiliate’s relevant swaps are

¹⁹ See CFTC Margin Rule, 81 FR at 675. The Commission notes that certain limited relief has been given from this standard. See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 83 FR 60341 (Nov. 26, 2018) and CFTC Staff Letter No. 17–52 (Oct. 27, 2017), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/17-52.pdf>.

²⁰ See Special meeting of the European Council (Art. 50) (21 March 2019)—Conclusions, at <https://data.consilium.europa.eu/doc/document/XT-20004-2019-INIT/en/pdf> (visited March 22, 2019).

²¹ In many instances, these firms made a strategic decision decades ago to use a UK establishment as their base of operations to provide financial services to customers across the EU, consistent with the EU’s system of cross-border authorizations to engage in regulated financial activities (known as “passporting”).

²² See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf (visited February 21, 2019). The Commission notes that if a No-deal Brexit occurs, it will be as a result of political events beyond the control of the parties to the legacy swap and not driven by U.S. regulatory policy.

²³ In recent months, for example, some financial entities have initiated processes under which a UK court sanctions a bulk transfer of their business, including derivatives, from the balance sheets of their UK establishments to a different location established by the dealer in another EU Member State. See, e.g., Barclays Bank plc Part VII Business transfer to Barclays Bank Ireland plc (2019) EWHC 129 (Ch), at <http://www.bailii.org/ew/cases/EWHC/Ch/2019/129.pdf> (visited February 21, 2019); “Two Banks Begin Moving Swaps out of London, Pre-Brexit,” Risk.net (November 30, 2018), at <https://www.risk.net/derivatives/6168671/banks-begin-moving-swaps-out-of-london-pre-brexit> (visited February 21, 2019); “UBS Wins Approval for €32bn Brexit Swaps Transfer,” Risk.net (February 6, 2019), at <https://www.risk.net/derivatives/6367306/ubs-wins-approval-for-eu32bn-brexit-swaps-transfer> (visited February 21, 2019).

²⁴ As discussed later in this SUPPLEMENTARY INFORMATION, the Commission has designed this Interim Final Rule to recognize the need for flexibility on the part of financial entities as they attempt to work through the unanticipated effects of a No-deal Brexit. For example, this Interim Final Rule, subject to its requirements, is designed to allow CSEs who, as a result of a No-deal Brexit, make a strategic decision to refrain from opening a new EU establishment post-withdrawal, to pull their UK uncleared swap portfolios to related entities outside of the EU, or to otherwise restructure their swaps business as they deem appropriate.

branch or other authorized form of establishment²⁹ of the party (an “Eligible Transferee”), the Interim Final Rule allows an uncleared swap to retain its legacy status under the CFTC Margin Rule or Prudential Margin Rule when transferred.³⁰

To be effective, the Commission believes this Interim Final Rule must cover all the different scenarios that would trigger the need for a CSE or its counterparty to participate in amending an uncleared swap in order to “relocate” the swap in preparation for or in response to a No-deal Brexit. However, to benefit from the treatment of this amendment, the financial entity must arrange to make the amendments to the uncleared swap solely for the purpose of transferring the uncleared swap to an Eligible Transferee once the UK has withdrawn from the EU, as further discussed herein.³¹ This purpose test also contains a requirement that the transfer be made in connection with the entity’s planning for the possibility of a No-deal Brexit, or the entity’s response to such event.³²

For compliance purposes, this Interim Final Rule makes one distinction between a transfer initiated by the

included in determining the applicable compliance date for the CSE and counterparty under Commission regulation 23.161, 17 CFR 23.161, and thus the compliance date of a CSE and its margin affiliates facing the same counterparty (or its margin affiliates) should generally be the same.

²⁹The text of this Interim Final Rule is intended to be flexible as to the nature of the legal establishment of the financial entity to which a legacy swap is transferred so long as that financial entity is the party or a margin affiliate of that party to the swap. *See* § 23.161(d)(2)(ii). The Commission’s references to an establishment of a financial entity is intended to be flexible as to whether the relationship of the financial entity to the business unit is due to an affiliation between separately-incorporated entities, branching of a single business entity in different jurisdictions, or some other form of business establishment through which an arm of the financial entity may be legally authorized to conduct business in that location. A financial entity may, for example, use its establishment in the EU to take on uncleared swap portfolios from its swap dealing affiliate in the UK. In a different case, the financial entity’s establishments in the EU and the UK may both be branches of the same financial entity. Alternatively, there may be yet a different relationship due to the structure of the specific financial entity involved. On the other hand, the financial entity may not move its operations in any way, but it may have existing portfolios of uncleared swaps facing counterparties who are themselves relocating out of or into the UK, to an affiliate, or a branch, or some other type of form of establishment of the party outside of or in the UK.

³⁰The Commission notes that to the extent that the parties to a transferred legacy swap are subject to the Prudential Margin Rule in addition to the CFTC Margin Rule, the legacy swap may become subject to the margin requirements of the Prudential Margin Rule notwithstanding this Interim Final Rule.

³¹ *See* § 23.161(d)(2)(ii).

³² *Id.*

financial entity standing as the CSE at the completion of the transaction, versus a transfer initiated by the CSE’s counterparty. For the latter, the transferor must make a representation to the CSE that the transferee is an Eligible Transferee, and the transfer was made solely in connection with the transferor’s planning for or response to a No-deal Brexit.³³

The Interim Final Rule is designed to permit only such amendments as financial entities find necessary to relocate uncleared swap portfolios under the purpose test. These changes may be carried out using any of the methods typically employed for effecting uncleared swap transfers, including industry protocols, contractual amendments, or contractual tear-up and replacement. To the extent they would otherwise trigger margin requirements, judicially-supervised changes that result in an uncleared swap being booked at or held by a related establishment, including by means of the court-sanctioned process available under Part VII of the UK’s Financial Services and Markets Act of 2000, are similarly within the scope of this Interim Final Rule.

However, the Commission does not believe the relief being provided for relocation purposes should be expansively applied to encompass economic changes to a legacy swap. Accordingly, the benefits of this Interim Final Rule are unavailable if the amendments to an uncleared swap modify the payment amount calculation methods, the maturity date, or the notional amount of the uncleared swap.³⁴ Thus, for example, if the day count convention of an uncleared swap changes as a consequence of re-locating a uncleared interest rate swap several time zones away from the UK, the parties to the swap would not be changing the payment amount calculation methods. On the other hand, a change to one of the payment amount calculation economic factors (e.g., an interest rate margin or base rate) would be a change outside the scope of this Interim Final Rule and could trigger

³³ *See* § 23.161(d)(2)(ii)(B).

³⁴ *See* 17 CFR 23.161(d)(2)(iii). The Commission does not intend that this Interim Final Rule provide an opportunity for parties to renegotiate the economic terms of their legacy swaps, but rather is providing the Interim Final Rule solely to allow a party to a legacy swap to transfer the swap to an Eligible Transferee in connection with the transferor’s planning for the possibility of a No-deal Brexit, or its response to such event. *See* § 23.161(d)(2)(ii). If any amendment to a legacy swap does not meet this purpose test in the Interim Final Rule, the legacy swap would not be eligible for the relief provided by it.

application of the CFTC’s margin requirements.

The Commission also seeks to establish a reasonable period of time for the necessary work to achieve the transfers to be performed. The Interim Final Rule permits transfers for a period of one year after a UK withdrawal.³⁵ The 1-year period commences at the point at which the law of the EU ceases to apply in the UK pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the UK and EU pursuant to Article 50(2).³⁶ If the present withdrawal date is extended, and withdrawal later occurs at the end of that extension without a Withdrawal Agreement, this Interim Final Rule’s 1-year period would begin at that time.³⁷ The Commission contemplates that, if the withdrawal date is extended, financial entities may negotiate and document their desired transfers during the intervening period, under terms that delay consummation of any transfer until withdrawal takes place without an agreement and this Interim Final Rule’s substantive provisions are thereby triggered.

The Commission believes that this Interim Final Rule would be most effective if the timeframe allowed takes into account the timeframe under corresponding EU legislation. The ESAs have submitted novation amendments for their margin rules in proposed form to the European Commission, but the relief that would be afforded thereby has not yet been finalized under the EU process.³⁸ The ESAs’ draft Regulatory Technical Standards provides relief for one year after the amendments are finalized by official publication, after parliamentary approval. If the EU amendments are not yet finalized at the time of a UK withdrawal, affected financial entities may delay consummation of their uncleared swap transfers until the ESA’s proposed amendments apply. The Commission anticipates some transferring financial entities will operate under both sets of

³⁵ *See* § 23.161(d)(2)(iv) and (v).

³⁶ *See* § 23.161(d)(2)(iv). For an overview of the process by which an EU Member State may withdraw from the EU, *see* the European Parliament Briefing, Article 50 TEU: Withdrawal of a Member State from the EU (February 2016), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (visited February 21, 2019).

³⁷ *Id.*

³⁸ *See* Final Report on EMIR RTS on the novation of bilateral contracts not subject to bilateral margins, ESAs 2018 25 (November 27, 2018), at <https://eiopa.europa.eu/Publications/Reports/ESAs%202018%2025%20-%20Final%20Report%20-%20Bilateral%20margin%20%28novation%29.pdf> (visited February 21, 2019).

regulations and will accordingly seek to coordinate their transfer operations for compliance purposes under both sets of amendments. To facilitate this, this Interim Final Rule has a “tacking” provision that will extend the provided 1-year period by the amount of any additional time available under the ESAs’ 1-year period.³⁹

III. Public Participation

The Commission is issuing this Interim Final Rule to revise Commission regulation 23.161 to address certain concerns relating to a No-deal Brexit, as discussed above. This approach enables these regulatory changes to take effect sooner than would be possible with the publication of a notice of proposed rulemaking in advance. Nonetheless, the Commission welcomes public comments from interested persons regarding any aspect of the changes made by this Interim Final Rule as well as on the following specific questions.

(1) This Interim Final Rule permits certain amendments to uncleared swaps without changing their swap date in order to facilitate the transfer of uncleared swaps in response to a No-deal Brexit. As explained above, the Commission seeks to encompass changes through a variety of methods, including industry protocols, contractual amendments, transfers permitted by judicial proceedings, and contractual tear-up and replacement. What, if any, additional clarification in the rule as to types of permissible amendments should the Commission provide? What specifically should be added or clarified, and why is it necessary in order to achieve the Commission’s policy objectives in the context of a No-deal Brexit?

(2) This Interim Final Rule only accommodates transfers to an Eligible Transferee. The Commission does not intend the relief provided by this Interim Final Rule to provide an opportunity for financial entities to seek out a new dealer relationship and retain legacy swap treatment. However, the Commission requests comment on whether there may be financial entities that are unable to arrange a transfer of legacy swaps unless the transfer is to an entity that is not an Eligible Transferee and are thus not covered under the terms of this Interim Final Rule. Commenters should provide descriptions of the factual circumstances, including the frequency of its occurrence.

(3) This Interim Final Rule is intended to limit relief to only those amendments to legacy swaps that satisfy

the purpose test in this Interim Final Rule (*i.e.*, that are made to transfer them to an Eligible Transferee in connection with the transferor’s planning for the possibility of a No-deal Brexit, or its response to such event). Should any of the conditions be modified or should other conditions be included to achieve this limitation?

All comments must be submitted in English, or if not, accompanied by an English translation. Please refer to the **ADDRESSES** section above. Except as described herein regarding confidential business information, all comments are considered part of the public record and will be posted as received to <https://comments.cftc.gov> for public inspection. The information made available online includes personal identifying information (such as name and address) which is voluntarily submitted by the commenter. You should submit only information that you wish to make available publicly.

If you want to submit material that you consider to be confidential business information as part of your comment, but do not want it to be posted online, you must submit your comment by mail or hand delivery/courier and include a petition for confidential treatment as described in § 145.9 of the Commission’s regulations.⁴⁰

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the rulemaking record and will be considered as required under the Administrative Procedure Act (“APA”)⁴¹ and other applicable laws, and may be accessible under the Freedom of Information Act.⁴²

IV. Related Matters

A. Administrative Procedure Act

The APA generally requires federal agencies to publish a notice of proposed rulemaking and provide an opportunity for public comment before issuing a new rule.⁴³ However, an agency may issue a new rule without a pre-publication public comment period when it for “good cause” finds that prior notice and comment is “impracticable, unnecessary, or contrary

to the public interest.”⁴⁴ The Commission has determined that there is good cause to find that a pre-publication comment period is impracticable and contrary to the public interest here. The UK’s exit may occur on April 12, 2019, or soon thereafter, and the Interim Final Rule addresses a potential impact of a No-deal Brexit. The Interim Final Rule facilitates the ability of financial entities with uncleared swaps to relocate existing swap portfolios over to an Eligible Transferee, without causing the swap dates of legacy swaps in their portfolios to change. As such, this Interim Final Rule benefits financial entities by removing an impediment to the transfer, and allowing them to maintain the status quo, of certain of their legacy swaps. The Interim Final Rule does not impose any requirements or mandatory burden on any financial entity, including CSEs.

The Commission believes that the public interest is best served by making this Interim Final Rule effective as soon as possible as a result of the potential timing of events in the UK. The Commission believes that issuing this Interim Final Rule will provide the certainty necessary to facilitate the industry’s efforts to begin arranging their transfers immediately upon a No-deal Brexit. In addition, the Commission believes that providing a notice and comment period prior to issuance of this Interim Final Rule is impracticable given the potential need for relief to begin on April 12, 2019. For these reasons, the Commission’s implementation of this rule as an Interim Final Rule, with provision for post-promulgation public comment, is in accordance with section 553(b) of the APA.⁴⁵

Similarly, for the same reasons set forth above under the discussion of section 553(b)(B) of the APA, the Commission, for good cause, finds that no transitional period, after publication in the **Federal Register**, is necessary before the amendment to § 23.161 made by this Interim Final Rule becomes effective. Accordingly, this Interim Final Rule shall be effective immediately upon publication in the **Federal Register**.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act⁴⁶ requires federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities

³⁹ 17 CFR 145.9.

⁴¹ 5 U.S.C. 553 *et seq.*

⁴² 5 U.S.C. 552.

⁴³ See 5 U.S.C. 553(b).

⁴⁴ See 5 U.S.C. 553(b)(3)(B).

⁴⁵ 5 U.S.C. 553(b)(B); 553(d)(3).

⁴⁶ 5 U.S.C. 601 *et seq.*

³⁹ See § 23.161(d)(2)(v).

and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. Because, as discussed above, the Commission is not required to publish a notice of proposed rulemaking for this rule, a regulatory flexibility analysis is not required.⁴⁷

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”) ⁴⁸ imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (“OMB”) control number.

The Commission believes that this Interim Final Rule does not affect the current recordkeeping or information collection requirements in a significant manner. However, by requiring that in certain transfers of legacy swaps the transferor makes certain representations to a CSE that is a party to the swap, this Interim Final Rule modifies a collection of information for which the Commission has previously received a control number from OMB. The title for this collection of information is “Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, OMB control number 3038–0088,” ⁴⁹ which is currently in force with its control number having been provided by OMB. Collection 3038–0088 already includes requirements for creating and maintaining swap trading relationship documentation, and this Interim Final Rule would require only that an additional standard representation be added to that documentation if amendments are entered into, and the Commission estimates that the burden change required by this Interim Final Rule is de minimis. Nevertheless, the Commission will, by separate action, publish in the **Federal Register** a notice and request for comment on the amended PRA burden associated with the Interim Final Rule, and submit to OMB an information collection request to amend the information collection, in

accordance with 44 U.S.C. 3507(c) and 5 CFR 1320.10.

D. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) considerations.

This Interim Final Rule provides that an amendment to transfer a legacy swap, subject to certain limitations, and solely in planning for or responding to a No-deal Brexit will not cause its swap date to change.⁵⁰ The purpose of this Interim Final Rule is to allow market participants to maintain the status quo of their legacy swaps with respect to the CFTC Margin Rule or Prudential Margin Rule when so transferred.

The baseline against which the benefits and costs associated with this Interim Final Rule is compared is the uncleared swaps markets as they exist today.⁵¹ With this as the baseline for this Interim Final Rule, the following are the benefits and costs of this Interim Final Rule.

1. Benefits

As described above, this Interim Final Rule allows legacy swaps to maintain

⁵⁰ The Commission notes that in a Brexit with a Withdrawal Agreement or where there is no Brexit this Interim Final Rule does not provide any relief. In these cases, there are no costs and benefits other than the costs of requiring parties to read and understand this Interim Final Rule.

⁵¹ The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving United States firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of this Interim Final Rule on all activity subject to it, whether by virtue of the activity’s physical location in the United States or by virtue of the activity’s connection with or effect on United States commerce under CEA section 2(i). In particular, the Commission notes that some persons affected by this rulemaking are located outside of the United States.

their swap date, notwithstanding that they are transferred and amended as provided in the rule text to this release in connection with a No-deal Brexit, so that they can maintain their legacy status with respect to the CFTC Margin Rule or Prudential Margin Rule, as applicable. This Interim Final Rule provides certainty to CSEs and their counterparties about the treatment of certain of their legacy swaps and any applicable netting arrangements in light of amendments to legacy swaps that may be made in connection with their transfer in a No-deal Brexit. In addition, the Interim Final Rule can be expected to benefit the parties to the affected legacy swaps by allowing them to maintain the existing margin status for the legacy swaps. Without this Interim Final Rule, the imposition of margin requirements on these legacy swaps and swaps in the same netting portfolio could have negative consequences for some of the affected parties, which could include, for example, changing the cash flow and liquidity characteristics of those parties.

2. Costs

Because this Interim Final Rule does not require market participants to take any action, the Commission believes that this Interim Final Rule will not impose any additional required costs on market participants. Nevertheless, some market participants that elect to rely on this Interim Final Rule may incur legal costs to include the representations required by it in their transfer documentation.

3. Section 15(a) Considerations

In light of the foregoing, the CFTC has evaluated the costs and benefits of this Interim Final Rule pursuant to the five considerations identified in section 15(a) of the CEA as follows:

(a) Protection of Market Participants and the Public

As noted above, this Interim Final Rule will allow market participants, subject to certain limitations, to transfer their legacy swaps in connection with a No-deal Brexit without being disadvantaged under the CFTC Margin Rule. As such, this Interim Final Rule should give affected market participants more flexibility in negotiating the transfer of their legacy swaps but it is unclear whether or not participants who might use this Interim Final Rule are better protected by facing the new counterparty or not relative to their current counterparty. If this Interim Final Rule were not adopted and some of these legacy swaps and swaps in the same netting portfolio became subject to

⁴⁷ See 5 U.S.C. 603(a).

⁴⁸ 44 U.S.C. 3501 *et seq.*

⁴⁹ See OMB Control No. 3038–0088, <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0055#> (last visited June 12, 2018).

the CFTC Margin Rule's margin requirements and, thus, required more collateral to be posted by counterparties, there would be a reduction in counterparty credit risk in the financial system overall. However, as noted above, the imposition of such margin requirements on these swaps could negatively impact the cash flow and liquidity characteristics of those parties.

(b) Efficiency, Competitiveness, and Financial Integrity of Markets

Absent this Interim Final Rule, market participants that transfer their legacy swaps in a No-deal Brexit may thereafter be required to comply with the applicable margin requirements of the CFTC Margin Rule for such swaps, and may be placed at a competitive disadvantage as compared to those market participants that do not transfer their legacy swaps in a No-deal Brexit. Therefore, this Interim Final Rule may increase the competitiveness of the uncleared swaps markets. In addition, providing the relief may increase efficiency by reducing the impact of a No-deal Brexit by allowing the parties to undertake swap transfers without having to establish new margining arrangements that were not contemplated for the legacy swaps.

(c) Price Discovery

The Commission has not identified an impact on price discovery as a result of this Interim Final Rule. To the extent that a transfer of a legacy swap in accordance with the conditions of this Interim Final Rule triggers a real-time public reporting obligation of pricing information under part 43 of the Commission's rules,⁵² such rules require that transfers of swaps carry a notation so that the public will be aware that the swap is not a new swap and can consider the reported pricing information of such swap accordingly.⁵³

(d) Sound Risk Management

The Commission has not identified a significant impact on sound risk management as a result of this Interim Final Rule. The Commission notes that without this Interim Final Rule, some market participants may have to pay and collect margin on certain legacy swaps, which may lower the overall credit risk in the financial system.

However, as discussed above, these are legacy swaps that were not intended to be covered by the CFTC Margin Rule and, but for a No-deal Brexit, would not be amended pursuant to the terms of the Interim Final Rule. Further, the Commission notes that a market participant might be facing a counterparty with better or worse credit standing as a result of the transfers. Inasmuch as there is no collateral required to be posted as collateral in these transactions to mitigate credit risk, there may be a change in the credit risk for some of these legacy swaps when the counterparties change.

(e) Other Public Interest Considerations

The Commission has not identified an impact on other public interest considerations as a result of this Interim Final Rule.

4. Request for Comments on Cost-Benefit Considerations

The Commission invites public comment on its cost-benefit considerations, including the section 15(a) factors described herein. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed amendments with their comment letters.

D. Antitrust Laws

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4(c)(b) of the CEA), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.⁵⁴

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether this Interim Final Rule implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered this Interim Final Rule to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether this Interim Final Rule is

anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that this Interim Final Rule is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting this Interim Final Rule.

List of Subjects in 17 CFR Part 23

Capital and margin requirements, Major swap participants, Swap dealers, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b-1.6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111-203, 124 Stat. 1641 (2010).

■ 2. In § 23.161, revise paragraph (d) to read as follows:

§ 23.161 Compliance dates.

* * * * *

(d) For purposes of determining whether an uncleared swap was entered into prior to the applicable compliance date under this section, a covered swap entity may disregard:

(1) Amendments to the uncleared swap that were entered into solely to comply with the requirements of 12 CFR part 47; 12 CFR part 252, subpart I; or 12 CFR part 382, as applicable; or

(2) Amendments to the uncleared swap that were entered into in compliance with each of the following conditions:

(i) The law of the European Union ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a withdrawal agreement between the United Kingdom and the European Union pursuant to Article 50(2) thereof; and

(ii) Solely in connection with a party to the swap's planning for or response to the event described in paragraph (d)(2)(i) of this section, one or both parties to the swap transfers the swap to its margin affiliate, or a branch or other

⁵² See paragraph 1(ii) of the definition of "publicly reportable swap transaction" in § 43.2, 17 CFR 43.2.

⁵³ See Table A1 to Appendix A to Part 43. The data field in such table labeled "Price-forming continuation data" requires an indication of whether a publicly reportable swap transaction is a post-execution event that affects the price of such transaction, including whether the event was a transfer or novation.

⁵⁴ 7 U.S.C. 19(b).

authorized form of establishment of the transferor, and the parties make no other transfers of the swap; and

(A) A covered swap entity is a transferee from a party to the swap; or

(B) A covered swap entity is a remaining party to the swap, and the transferor represents to the covered swap entity that the transferee is a margin affiliate, or a branch or other authorized form of establishment of the transferor, and the transfer was made solely in connection with the transferor's planning for or response to the event described in paragraph (d)(2)(i) of this section; and

(iii) The amendments do not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap; and

(iv) The amendments take effect no earlier than the date of the event described in paragraph (d)(2)(i) of this section transpires; and

(v) The amendments take effect no later than:

(A) The date that is one year after the date of the event described in paragraph (d)(2)(i) of this section; or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (EU) No. 2016/2251, as amended.

Issued in Washington, DC, on March 26, 2019, by the Commission.

Christopher Kirkpatrick,
Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

As we well know at the CFTC, trading markets crave certainty. Thus, market regulators have a responsibility to avoid creating market apprehension and doubt, whenever possible.

At a time of heightened market uncertainty caused by Brexit, this Commission has worked over the past several weeks to bring clarity to participants in global derivatives markets by a series of separate actions and statements with its regulatory counterparts in London, Brussels and Singapore.

Four weeks ago, the Commission and the Bank of England, including the Prudential Regulation Authority and the Financial Conduct Authority, issued a statement regarding derivatives trading and clearing activities between the United Kingdom and the United States after the UK's withdrawal from the European Union.

The statement assured market participants of the continuity of derivatives trading and clearing activities between the UK and U.S., after the UK's withdrawal from the EU.

Today the Commission takes another important step to bring certainty to the global derivatives markets.

Consistent with actions already taken by U.S. prudential regulators, we are providing regulatory certainty regarding the transfer of uncleared legacy swaps to facilitate global swaps market participants' needs in the event that the UK withdraws from the EU without a negotiated withdrawal agreement.

Soon the Commission and the Financial Conduct Authority intend to sign two memoranda of understanding related to the UK's withdrawal from the EU.

The two signed MOUs will update existing MOUs originally signed in 2016 and 2013 to provide for continued supervisory cooperation with respect to certain firms in the derivatives and the alternative investment fund industry.

The signing of these supervisory MOUs with the FCA will ensure continuity in effective cross-border oversight of derivatives markets and participants.

These measures will help support financial stability and the sound functioning of financial markets. They also will give confidence to market participants about their ability to trade and manage risk through these markets.

I compliment the DSIO staff for putting together this interim final rule and request for comment.

I commend them for their many hours of hard work, the quality of the results and their thoughtfulness and engagement throughout.

I also am grateful to my fellow Commissioners for their commitment and engagement in these critical actions.

Appendix 3—Statement of Commissioner Brian D. Quintenz

I support today's interim final rule providing relief from the Commission's uncleared margin requirements¹ for legacy swaps transferred to counterparties outside of the UK, in the case of a British exit from the European Union in the absence of a withdrawal agreement ("No-deal Brexit").

I believe the rule will provide necessary legal certainty to market participants as they consider how they will respond to the possibility of a No-deal Brexit. I believe it is correct for the rule to exempt a legacy swap from the Commission's uncleared margin requirements if the swap is amended due to a No-deal Brexit. When the Commission issued margin regulations for uncleared swaps in 2016, the Commission adopted a compliance timetable such that swaps entered into prior to a particular compliance

¹ Commission regulations 23.150 through 23.161 (17 CFR 23.150 through 23.161).

date would not be subject to the new margin requirements.² An event such as a No-deal Brexit, one that is outside of counterparties' control, should not cause counterparties to bear the costs and operational challenges of margining a swap that the Commission had previously exempted. I note that last year, the Commission similarly granted relief to a legacy swap that is amended to comply with the "Qualified Financial Contracts" rules issued by the U.S. prudential regulators in 2017.³

I would like to thank the CFTC staff for having coordinated with the U.S. prudential regulators on this matter to ensure that their interim final rule⁴ and ours are consistent. I look forward to supporting any future efforts by the CFTC to assist derivatives market participants address complications arising from Brexit.

Appendix 4—Statement of Commissioner Dan M. Berkovitz

I am voting in favor of the Interim Final Rule ("IFR"), which provides relief from certain margin requirements for certain legacy swap transfers in case of a "No-deal Brexit."

Although we do not yet know the date of the United Kingdom's withdrawal from the European Union ("EU"), the form it will take, or whether it will even take place, market participants worldwide are preparing for Brexit. The Commission is committed to working with our domestic and international partners to facilitate regulatory continuity and provide stability to the derivatives markets if and when Brexit occurs. Today's action is a continuation of that effort.

I commend the Chairman and Commission staff for their efforts to address these and other Brexit-related cross-border issues. I note in particular that these actions are all taken pursuant to, and are consistent with, the existing regulations and guidance in place at the CFTC governing cross-border activities.

The IFR will maintain the legacy status of swaps that were executed prior to the relevant compliance dates for the CFTC swap margin rule if those swaps are legally transferred solely as a result of a No-deal Brexit. The transfer of these swaps to affiliates outside the United Kingdom would be needed so that the swaps can continue to be properly serviced under EU law.

A No-deal Brexit would be the result of political events beyond the control or anticipation of the parties at the time they first entered into the legacy swaps in question. Under these circumstances, if the

² Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636, 674–677 (Jan. 6, 2016) (new regulation 23.161).

³ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 83 FR 60341, 60344 (Nov. 26, 2018) (new regulation 23.161(d)).

⁴ Margin and Capital Requirements for Covered Swap Entities, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corp., Farm Credit Administration, and the Federal Housing Finance Agency, March 15, 2019, <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190315a.htm>.

CFTC's margin rules were applied, the transfer of these legacy swaps could entail significant expenses, which could impede such transfers. The failure to effectively and efficiently accomplish these transfers could introduce new systemic risks globally.

The IFR release makes clear that legacy swap transfers get relief solely if they are undertaken in connection with a No-deal Brexit. The release also makes clear that the IFR does not create an opportunity for the parties to renegotiate the economic terms of legacy swaps. Swaps that are amended or renegotiated, other than to the extent permitted by the IFR, would still be subject to the CFTC margin rules. These limitations are important as they prevent abuse of the flexibility provided by the IFR.

[FR Doc. 2019-06103 Filed 3-29-19; 8:45 am]

BILLING CODE 6351-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-10615; 34-85296; 39-2525; IC-33398]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the "Commission") adopted revisions to the Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR") Filer Manual ("EDGAR Filer Manual" or "Filer Manual") and related rules. The EDGAR system is scheduled to be upgraded on March 11, 2019.

DATES: Effective April 1, 2019. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the **Federal Register** as of April 1, 2019.

FOR FURTHER INFORMATION CONTACT: In the Division of Trading and Markets, for questions concerning Form ATS-N, contact Michael R. Broderick at (202) 551-5058. In the Office of Municipal Securities, for questions regarding Forms MA, MA-A and MA-I, contact Ahmed A. Abonamah at (202) 551-3887. In the Division of Corporation Finance, for questions concerning Forms 1-A and DOS, contact Heather Mackintosh at (202) 551-8111. In the Division of Investment Management, for question concerning Form N-PORT XML, contact Heather Fernandez at (202) 551-6708. In the Division of Economic and Risk Analysis, for questions concerning Inline XBRL submission requirements, contact Mike Willis at (202) 551-6627.

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

The revisions to the Filer Manual reflect changes within Volume II, entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," (Version 50) (March 2019). The updated manual is incorporated by reference into the Code of Federal Regulations.

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

The EDGAR System and Filer Manual will be updated in Release 19.1 and reflect the changes described below.

EDGAR introduces changes associated with the adoption of Inline eXtensible Business Reporting Language ("Inline XBRL") requirements for the submission of operating company financial information and fund risk/return summaries.³ The EDGAR system is updated to implement changes that expand the submission form types that are permitted to include Inline XBRL submissions. Accordingly, the following additional submission form types permit the primary document to be in Inline XBRL format: S-1, S-1/A, S-1MEF, S-3, S-3/A, S-3ASR, S-3D, S-3DPOS, S-3MEF, S-4, S-4/A, S-4EF, S-4MEF, S-4 POS, S-11, S-11/A, S-11MEF, F-1, F-1/A, F-1MEF, F-3, F-3/A, F-3ASR, F-3D, F-3DPOS, F-3MEF, F-4, F-4/A, F-4EF, F-4MEF, F-4 POS, F-10, F-10/A, F-10EF, F-10POS, N-1A, N-1A/A, 485APOS, 485BPOS, 485BXT, and 497. The EDGAR system also is updated to allow more than one Inline XBRL file attachment per submission to be pre-validated, submitted, validated, accepted, rendered, and viewed. In

¹ We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on December 14, 2018. See Release No. 33-10585 (December 14, 2018) [83 FR 66100].

² See Rule 301 of Regulation S-T (17 CFR 232.301).

³ See Release No. 33-10514 (June 28, 2018) [83 FR 40846].

addition, given the termination of the Voluntary XBRL program, the EDGAR Filer Manual and the EDGAR system are updated to remove and no longer permit submissions having EX-100 Voluntary XBRL attachments. Also, the EDGAR Filer Manual updates instructions regarding the layout specifications for Risk Return Summary Information submissions tagged with Inline XBRL. Finally, the revised EDGAR Filer Manual clarifies how EDGAR processes submissions that contain Inline XBRL presentations that do not pass validation. Please refer to Chapter 5 (Constructing Attached Documents and Document Types), Chapter 6 (Interactive Data), and Appendix E (Automated Conformance Rules for EDGAR Data Fields) of the EDGAR Filer Manual, Volume II: "EDGAR Filing."

EDGAR Release 19.1 updates Item 2 for submission form types 1-A, 1-A/A, 1-A POS, DOS, and DOS/A to clarify that filers subject to Section 13 or 15(d) of the Securities Exchange Act of 1934 are no longer ineligible to use the form. Please refer to Chapter 8 (Preparing and Transmitting Online Submissions) of the EDGAR Filer Manual, Volume II: "EDGAR Filing."

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

In EDGAR Release 18.4, EDGAR was updated to accept submissions of Form ATS-N and its related EDGAR submission types. In EDGAR Release 19.1, the EDGAR Filer Manual is revised to provide clarifying information for filers regarding the processing of Form ATS-N submissions. Please refer to Chapter 8 (Preparing and Transmitting Online Submissions) of the EDGAR Filer Manual, Volume II: "EDGAR Filing."

EDGAR Release 19.1 also introduces changes to the "EDGAR Form N-PORT XML Technical Specification" document, which is available on the SEC's public website at <https://www.sec.gov/info/edgar/tech-specs>.

In EDGAR Release 19.1, the EDGAR system is upgraded to support the 2019 GAAP, 2019 EXCH, 2019 Currency and 2019 SRT Taxonomies. Please see <https://www.sec.gov/info/edgar/edgartaxonomies.shtml> for a complete listing of supported standard taxonomies.

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

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

Since the Filer Manual and the corresponding rule and form amendments relate solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (“APA”).⁴ It follows that the requirements of the Regulatory Flexibility Act⁵ do not apply.

The effective date for the updated Filer Manual and the related rule and form amendments is April 1, 2019. In accordance with the APA,⁶ we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with these system upgrades.

Statutory Basis

We are adopting the amendments to Regulation S–T under the authority in Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,⁷ Sections 3, 12, 13, 14, 15, 15B, 23, and 35A of the Securities Exchange Act of 1934,⁸ Section 319 of the Trust Indenture Act of 1939,⁹ and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.¹⁰

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

⁴ 5 U.S.C. 553(b)(A).

⁵ 5 U.S.C. 601–612.

⁶ 5 U.S.C. 553(d)(3).

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

⁸ 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78o–4, 78w, and 78ll.

⁹ 15 U.S.C. 77sss.

¹⁰ 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

Text of the Amendments

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

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

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

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

* * * * *

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

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: “General Information,” Version 32 (December 2018). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: “EDGAR Filing,” Version 50 (March 2019). Additional provisions applicable to Form N–SAR filers are set forth in the EDGAR Filer Manual, Volume III: “N–SAR Supplement,” Version 6 (January 2017). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. The EDGAR Filer Manual is available for website viewing and printing; the address for the Filer Manual is <https://www.sec.gov/info/edgar/edmanuals.htm>. You can obtain paper copies of the EDGAR Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

By the Commission.

Dated: March 12, 2019.

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019–06261 Filed 3–29–19; 8:45 am]

BILLING CODE P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notification of Amendment to Comparability Determination for Margin Requirements for Uncleared Swaps under the Laws of Japan.

SUMMARY: The following is an amendment (this “Amendment”) to the Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants of the Commodity Futures Trading Commission (“Commission” or “CFTC”) published on September 15, 2016 (the “Japan Determination”). This Amendment amends the Japan Determination by: Making a positive determination of comparability with respect to the scope of entities subject to margin requirements, and making a positive determination of comparability with respect to the treatment of inter-affiliate transactions. All other findings and determinations contained in the Japan Determination remain unchanged and in full force and effect.

DATES: This Amendment to the Japan Determination is effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Matthew B. Kulkin, Director, 202–418–5213, mkulkin@cftc.gov, or Frank N. Fisanich, Chief Counsel, 202–418–5949, ffisanich@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

On September 15, 2016, the Commission published the Japan Determination,¹ which provided the

¹ See Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 63376 (Sept. 15, 2016).

analysis and determination of the Commission regarding a request by the Japan Financial Services Agency (“JFSA”) that the Commission determine that laws and regulations applicable in Japan provide a sufficient basis for an affirmative finding of comparability with respect to margin requirements for uncleared swaps applicable to certain swap dealers (“SDs”) and major swap participants (“MSPs”) registered with the Commission. Although discussed in the Japan Determination, the Commission did not make a finding regarding whether the scope of entities subject to the JFSA’s margin requirements for non-cleared OTC derivatives was comparable in outcome to the scope of entities subject to the Commission’s margin requirements for uncleared swaps. As discussed below, the Commission now finds that it is. Further, the Japan Determination found the JFSA’s margin requirements for non-cleared OTC derivatives between affiliates not comparable in outcome to the Commission’s margin requirements for uncleared swaps between affiliates. As discussed below, the Commission has reconsidered this finding and now finds that such requirements are comparable in outcome to the Commission’s own.

II. Regulatory Background

Pursuant to section 4s(e) of the CEA,² the Commission is required to promulgate margin requirements for uncleared swaps applicable to each SD and MSP for which there is no U.S. Prudential Regulator (collectively, “Covered Swap Entities” or “CSEs”).³ The Commission published final margin requirements for such CSEs in January 2016 (the “CFTC Margin Rule”).⁴

Subsequently, on May 31, 2016, the Commission published in the **Federal**

Register its final rule with respect to the cross-border application of the CFTC Margin Rule (hereinafter, the “Cross-Border Margin Rule”).⁵ The Cross-Border Margin Rule sets out the circumstances under which a CSE is allowed to satisfy the requirements under the CFTC Margin Rule by complying with comparable foreign margin requirements (“substituted compliance”); offers certain CSEs a limited exclusion from the Commission’s margin requirements; and outlined a framework for assessing whether a foreign jurisdiction’s margin requirements are comparable in outcome to the CFTC Margin Rule (“comparability determinations”). The Commission stated that substituted compliance helps preserve the benefits of an integrated, global swap market by reducing the degree to which market participants will be subject to multiple sets of regulations. Further, substituted compliance builds on international efforts to develop a global margin framework.⁶

On June 17, 2016, the JFSA submitted a request that the Commission determine that laws and regulations applicable in Japan provide a sufficient basis for an affirmative finding of comparability with respect to the CFTC Margin Rule. In due course, the Commission published the Japan Determination on September 15, 2017.

III. Margin Requirements for Swaps Activities in Japan

As represented to the Commission by the JFSA, margin requirements for swap activities in Japan are governed by the Financial Instruments and Exchange Act, No. 25 of 1948 (the “Japan FIEA”), covering Financial Instrument Business

Operators (“FIBOs”) and Registered Financial Institutions (“RFIs”), which include regulated banks, cooperatives, insurance companies, pension funds, and investment funds.⁷ The Japanese Prime Minister delegated broad authority to implement these laws to the JFSA. Pursuant to this authority, the JFSA has promulgated the FIB Ordinance,⁸ Supervisory Guidelines,⁹ and Public Notifications.¹⁰ These requirements supplement the requirements of the Japan FIEA with more detailed direction with respect to margin requirements.¹¹

In Japan, the JFSA’s margin rules apply to “non-cleared OTC derivatives,” which are defined to mean:

OTC derivatives except for those cases where Financial Instruments Clearing Organizations (including an Interoperable Clearing Organization in cases where the Financial Instruments Clearing Organization conducts Interoperable Financial Instruments Obligation Assumption Business; hereinafter the same shall apply in paragraph (11), item (i)(c)1.) or a Foreign Financial Instruments Clearing Organization meets the obligation pertaining to OTC derivatives or cases designated by Commissioner of the Financial Services Agency prescribed in Article 1–18–2 of the Order for Enforcement of the [FIEA].¹²

As represented by the applicant, however, Japan has separate definitions of “OTC Derivatives” and “OTC

⁷ The Commission has provided the JFSA with opportunities to review and comment on the Commission’s description of the JFSA’s laws and regulations on which the Japan Determination and this Amendment are based. The Commission relies on the accuracy and completeness of such review and any corrections received in making its comparability determinations. A comparability determination, including any amendments made thereto, based on an inaccurate description of foreign laws and regulations may not be valid.

⁸ Cabinet Office Ordinance on Financial Instruments Business (Cabinet Office Ordinance No. 52 of August 6, 2007), including supplementary provisions (“FIB Ordinance”).

⁹ Comprehensive Guideline for Supervision of Major Banks, etc., Comprehensive Guidelines for Supervision of Regional Financial Institutions, Comprehensive Guideline for Supervision of Cooperative Financial Institutions, Comprehensive Guideline for Supervision of Financial Instruments Business Operators, etc., Comprehensive Guidelines for Supervision of Insurance Companies, and Comprehensive Guidelines for Supervision of Trust Companies, etc. (together, “Supervisory Guideline”).

¹⁰ JFSA Public Notification No.15 of March 31, 2016 (“JFSA Public Notice No. 15”); JFSA Public Notification No.16 of March 31, 2016 (“JFSA Public Notice No. 16”); and JFSA Public Notification No.17 of March 31, 2016 (“JFSA Public Notice No. 17”).

¹¹ Collectively, the Japan FIEA, FIB Ordinance, Supervisory Guideline, and JFSA Public Notifications are referred to herein as the “JFSA’s margin rules,” “JFSA’s margin regime,” “JFSA’s margin requirements” or the “laws of Japan.”

¹² See Cabinet Order No. 321 of 1965; Article 123(1)(xxi)–5 of the FIB Ordinance; and Article 2(22) of FIEA.

² 7 U.S.C. 1 *et. seq.*

³ See 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a U.S. Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable U.S. Prudential Regulator. 7 U.S.C. 6s(e)(1)(A). See also 7 U.S.C. 1a(39) (defining the term “Prudential Regulator” to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The U.S. Prudential Regulators published final margin requirements in November 2015. See Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015).

⁴ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission’s regulations. See §§ 23.150–23.159, 161. The Commission’s regulations are found in Chapter 17 of the Code of Federal Regulations, 17 CFR 1 *et. seq.*

⁵ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016). The Cross-Border Margin Rule, which became effective August 1, 2016, is codified in part 23 of the Commission’s regulations. See § 23.160.

⁶ In October 2011, the Basel Committee on Banking Supervision (“BCBS”) and the International Organization of Securities Commissions (“IOSCO”), in consultation with the Committee on Payment and Settlement Systems and the Committee on Global Financial Systems, formed a Working Group on Margining Requirements to develop international standards for margin requirements for uncleared swaps. Representatives of 26 regulatory authorities participated, including the Commission. In September 2013, the WGMR published a final report articulating eight key principles for non-cleared derivatives margin rules. These principles represent the minimum standards approved by BCBS and IOSCO and their recommendations to the regulatory authorities in member jurisdictions. See BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (updated March 2015) (“BCBS/IOSCO Framework”), available at <http://www.bis.org/bcbs/publ/d317.pdf>.

Commodity Derivatives.”¹³ Japan also has separate margin rules for OTC Commodity Derivatives that are administered by the Japan Ministry of Economy, Trade, and Industry (METI) and the Japan Ministry of Agriculture, Forestry, and Fisheries (MAFF). METI/MAFF finalized their margin requirements for non-cleared OTC Commodity Derivatives on August 1, 2016.¹⁴ While the margin rules for non-cleared OTC Derivatives and OTC Commodity Derivatives are separate, the METI/MAFF non-cleared OTC Commodity Derivative rules incorporate by reference the corresponding JFSA margin rules,¹⁵ and thus, for all purposes material to the determinations below, the METI/MAFF rules and JFSA margin rules are identical. Accordingly, for ease of reference, the discussion below refers only to the JFSA and the JFSA margin rules, but such discussion is equally applicable to METI/MAFF and the METI/MAFF non-cleared OTC Commodity Derivative margin rules. Further, CSEs may rely on the determinations set forth below regarding non-cleared OTC Derivatives subject to the JFSA margin rules equally with respect to non-cleared OTC Commodity Derivatives subject to the METI/MAFF margin rules.

IV. Amendments to the Japan Determination

A. Entities Subject to Margin Requirements

The following amends and restates the entirety of the discussion with respect to entities subject to margin requirements as it appeared in the Japan Determination.¹⁶

The scope of entities subject to the JFSA’s margin requirements and how it compares to the scope of entities subject to the CFTC Margin Rule was discussed in the Japan Determination, but the Commission made no determination of comparability or non-comparability.¹⁷ Instead, the Commission noted certain differences with respect to the scope of

application of the two regimes, noted the possibility that the CFTC Margin Rule and the JFSA’s margin rules may not apply to every uncleared swap that a CSE may enter into with a Japanese counterparty, and reminded CSEs that substituted compliance is only available to a CSE where it and its transaction are subject to both the CFTC Margin Rule and the JFSA’s margin requirements.¹⁸

Subsequent to publication of the Japan Determination, Commission staff was made aware that the lack of a comparability determination with respect to the scope of entities subject to the CFTC Margin Rule and the JFSA’s margin requirements was causing some confusion as to the scope of substituted compliance available under the Japan Determination. Specifically, the Japan Determination spoke only to the comparability of certain requirements under the Japan FIEA and the FIB Ordinance but did not determine whether margin requirements under the JFSA Supervisory Guidelines could be considered in making a substituted compliance determination with respect to Japanese entities that fall under certain thresholds. To avoid any such confusion going forward, the Commission is addressing the comparability of the scope of entities subject to the jurisdictions’ respective margin requirements, including the JFSA Supervisory Guidelines.

The CFTC Margin Rule and Cross-Border Margin Rule apply only to CSEs, *i.e.*, SDs and MSPs registered with the Commission for which there is not a U.S. Prudential Regulator. Thus, only such CSEs may rely on the determinations herein for substituted compliance, while CSEs for which there is a U.S. Prudential Regulator must look to the determinations of the U.S. Prudential Regulators. The Commission has consulted with the U.S. Prudential Regulators in making these determinations.

CSEs are not required to collect and/or post margin with every uncleared swap counterparty. The initial margin obligations of CSEs under the CFTC Margin Rule apply only to uncleared swaps with counterparties that meet the definition of “covered counterparty” in § 23.151.¹⁹ Such definition provides that a “covered counterparty” is a counterparty to a swap with a CSE that is either a financial end user²⁰ that

exceeds a certain threshold of swap activity (“material swaps exposure”)²¹ or another SD or MSP.²² On the other hand, the variation margin obligations of CSEs under the CFTC Margin Rule apply more broadly. Such obligations apply to counterparties that are SDs or MSPs and all financial end users, not just those with “material swaps exposure.”²³ Thus, importantly for comparison with the non-cleared OTC derivative margin requirements of Japan, under the CFTC Margin Rule, CSEs must exchange variation margin with any counterparty that falls within the definition of “financial end user” without regard to the size of such counterparty’s involvement in the swap market or the risk it may present to the CSE.

Pursuant to Article 29 of the Japan FIEA, any person that engages in trade activities that constitute “Financial Instruments Business”—which, among other things, includes over-the-counter transactions in derivatives (“OTC derivatives”)²⁴—must register as a FIBO. Banks that conduct specified activities in the course of trade, including OTC derivatives, must register under the FIEA as RFIs pursuant to Article 33–2 of the FIEA. Banks registered as RFIs are required to comply with relevant laws and regulations for FIBOs regarding specified activities, including transacting in OTC derivatives. Failure to comply with any relevant laws and regulations, Supervisory Guidelines, or Public Notifications would subject the applicant to potential sanctions or corrective measures.

The JFSA margin requirements generally apply to Type I FIBOs and

managers, collective investment vehicles, and insurers.

²¹ See § 23.150, which defines the initial margin threshold for financial end users as “material swaps exposure.” Material swaps exposure for a financial end user means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July and August of the previous calendar year that exceeds \$8 billion, where such amount is calculated only for business days. An entity counts the average daily aggregate notional amount of an uncleared swap, an uncleared security-based swap, a foreign exchange forward, or a foreign exchange swap between the entity and a margin affiliate only one time. For purposes of the calculation, an entity does not count a swap that is exempt pursuant to § 23.150(b) or a security-based swap that qualifies for an exemption under section 3C(g)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations or that satisfies the criteria in section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations.

²² See definition of “swap entity” in § 23.150.

²³ See § 23.153.

²⁴ See Article 2(8)(iv) of the FIEA.

¹³ Article 2, Paragraph 14 of the Commodity Derivatives Act (Act No. 239 of August 5, 1950) defines OTC commodity derivatives.

¹⁴ See Ministry of Agriculture, Forestry and Fisheries/Ministry of Economy, Trade and Industry Public Notification No. 2 of August 1, 2016; Ordinance for Enforcement of the Commodity Derivatives Act (Ordinance of the Ministry of Agriculture, Forestry and Fisheries and the Ministry of Economy, Trade and Industry No. 3 of February 22, 2005); Supplementary Provisions of Ordinance for Enforcement of the Commodity Derivatives Act No. 3 of February 22, 2005; and Basic Supervision Guidelines of Commodity Derivatives Business Operators, *etc.*

¹⁵ See *id.*

¹⁶ See Japan Determination 81 FR at 63380–81.

¹⁷ See *id.*

¹⁸ Or the METI/MAFF margin rules, as discussed above.

¹⁹ See § 23.152.

²⁰ See definition of “Financial end user” in § 23.151. In general, the definition covers entities involved in regulated financial activity, including banks, brokers, intermediaries, advisers, asset

RFIs (“JFSA Covered Entities”), and JFSA Covered Entities must comply with such requirements when transacting with each other as well as with foreign financial entities that enter into non-centrally cleared OTC derivatives “as a business” in a foreign jurisdiction where the legal validity of close-out netting is appropriately confirmed.²⁵ These entities are collectively referred to hereinafter as “JFSA Covered Counterparties.” All current CSEs established under the laws of Japan are registered in Japan as Type I FIBOs under the supervision of the JFSA, and are thus JFSA Covered Entities.

Similar to the CFTC Margin Rule’s “material swaps exposure” threshold for application of the initial margin requirements, the FIB Ordinance requires initial margin with JFSA Covered Counterparties only when both counterparties meet or exceed a certain threshold of non-cleared OTC derivatives activity (the “JFSA Initial Margin Threshold”).²⁶ But, dissimilar to the CFTC Margin Rule’s requirement that CSEs exchange variation margin with all swap entity and “financial end user” counterparties regardless of the level of activity in uncleared swaps, the JFSA margin requirements only require JFSA Covered Entities to exchange variation margin with JFSA Covered Counterparties when both counterparties exceed a minimum trading volume threshold (the “JFSA Variation Margin Threshold”).²⁷ The JFSA represents such minimum threshold is expected to exclude only those market participants that present so little risk, at an individual firm level, that the considerable costs associated with compliance are not warranted.

Finally, non-centrally cleared OTC derivatives with JFSA Covered Counterparties below the JFSA

Variation Margin Threshold and with counterparties that are not JFSA Covered Counterparties (together, “Supervised Counterparties”) are only subject to the JFSA Supervisory Guidelines, which require the establishment of an appropriate risk management system in accordance with relevant margin requirements under the JFSA FIEA, but with considerable latitude to tailor such requirements based on the risk profiles and individual circumstances of the Supervised Counterparties.²⁸

Despite the definitional differences and differences in activity thresholds with respect to the scope of application of the CFTC Margin Rule and the JFSA’s margin requirements, the Commission notes that in transactions between counterparties with the highest levels activity in uncleared swaps (and thus presumably present the most risk), both the CFTC Margin Rule and the JFSA margin requirements require both initial and variation margin. CSEs that exceed the JFSA Initial Margin Threshold transacting with JFSA Covered Counterparties that also exceed the JFSA Initial Margin Threshold would be required to collect and post initial and variation margin in amounts and with frequencies found comparable to the same requirements under the CFTC Margin Rule pursuant to the Japan Determination.²⁹ Although the “material swaps exposure” threshold under the CFTC Margin Rule (denominated in USD) is currently lower than the JFSA Initial Margin Threshold (denominated in JPY), the Commission recognizes that both are of relatively similar magnitudes and differences between the two are largely due to fluctuating JPY/USD exchange rates. Given that the initial margin thresholds serve the same purpose and are of relatively similar magnitudes, the Commission has concluded that the JFSA Initial Margin Threshold is comparable in purpose and effect to the CFTC “material swaps exposure” threshold. The Commission also notes that if a CSE/JFSA Covered Entity enters into an uncleared swap with a CSE that is a U.S. person, then it will be required to exchange variation margin and post initial margin in accordance with the CFTC Margin Rule because substituted compliance for variation margin and the collection of initial margin is not available.³⁰ This requirement significantly limits the extent to which differences between the JFSA Initial

Margin Threshold and the CFTC “material swaps exposure” threshold could negatively impact systemic risk in the United States.

With respect to uncleared swaps between CSEs and Supervised Counterparties that would be subject to the CFTC Margin Rule but not subject to the JFSA margin requirements other than the more flexible JFSA Supervisory Guidelines, the Commission recognizes that the JFSA has determined that Supervised Counterparties have so little activity in the relevant uncleared derivatives that they do not present risk that warrants the considerable costs associated with compliance to the full extent of the JFSA margin requirements.

The Commission also notes that application of the CFTC Margin Rule to these Supervised Counterparties would place CSEs otherwise eligible for substituted compliance that are seeking to transact business in Japan with Supervised Counterparties at a competitive disadvantage relative to other firms subject only to the JFSA Supervisory Guidelines.

With these factors in mind, the Commission has concluded that with respect to the margin requirements for uncleared swaps between CSEs and Supervised Counterparties, the JFSA Supervisory Guidelines are comparable in purpose and outcome to the CFTC Margin Rule.

Accordingly, the Commission finds that the scope of entities subject to non-cleared OTC derivatives margin requirements under the laws of Japan is comparable in outcome to the scope of entities subject to the CFTC Margin Rule for purposes of § 23.160. A CSE that is a JFSA Covered Entity and eligible for substituted compliance under § 23.160 may therefore classify counterparties in accordance with the margin requirements of the JFSA FIEA, FIB Ordinance, and JFSA Supervisory Guidelines with respect to determining whether initial or variation margin must be exchanged, or whether only the risk management requirements of the JFSA Supervisory Guidelines will apply. Where only the JFSA Supervisory Guidelines will apply to non-cleared OTC derivatives with a counterparty, a CSE that is a JFSA Covered Entity and eligible for substituted compliance under § 23.160 may comply with any relevant aspect of the CFTC Margin Rule by complying with the JFSA Supervisory Guidelines.

B. Treatment of Inter-Affiliate Derivative Transactions

The Japan Determination was the first comparability determination regarding uncleared swap margin requirements

²⁵ See FIB Ordinance, Article 123(10)(i)(a) and Article 123(11)(i)(a). However, foreign governments, foreign central banks, multilateral development banks, and the Bank for International Settlements are excluded. *See id.*

²⁶ See FIB Ordinance, Article 123(11)(iv). In general, the threshold for initial margin is whether the average month-end aggregate notional amount of non-cleared OTC derivatives, non-cleared OTC commodity derivatives, and physically-settled FX forwards and FX swaps of a consolidated group (excluding inter-affiliate transactions) for March, April, and May one year before the year in which calculation is required exceeds JPY 1.1 trillion. As of the date of this determination, JPY 1.1 trillion is equivalent to approximately USD 10 billion.

²⁷ In general, a JFSA Covered Entity has exceeded the JFSA Variation Margin Threshold if the average total amount of the notional principal of its OTC derivatives for a one-year period from April two years before the year in which calculation is required (or one year if calculated in December) exceeds JPY 300 billion (approximately \$2.7 billion).

²⁸ See JFSA Supervisory Guidelines at IV–2–4(4)(i).

²⁹ See Japan Determination, 81 FR at 63385–87.

³⁰ See Cross-Border Margin Rule, 81 FR at 34829.

issued by the Commission following the establishment of its substituted compliance framework in May, 2016.³¹ In the two years since issuing the Japan Determination, the Commission has issued one other determination for the European Union (“EU”),³² and is issuing a third for the requirements of the Australia Prudential Regulatory Authority concurrently with this Amendment (the “Australia Determination”). The Commission has found the margin requirements for uncleared swaps between affiliates applicable in both the EU and Australia comparable in outcome to the Commission’s requirements, despite marked differences between the approach of the Commission and the approach of those jurisdictions.³³ In addition, Commission staff is currently analyzing the comparability of the uncleared swap margin requirements of a number of additional jurisdictions. Based on our additional experience, the Commission is now weighing certain relevant factors in its determination differently than when it first made the Japan Determination, but still using an outcomes-based approach.³⁴ In the Japan Determination, the Commission concluded that the lack of a margin requirement for inter-affiliate transactions meant that the outcomes of the two jurisdictions’ rules were not comparable. In doing so, the Commission acknowledged the JFSA’s general oversight of the risk management practices of JFSA Covered Entities but did not believe that this factor was sufficient to address the differences between the two jurisdictions’ margin regimes.³⁵ The Commission has reconsidered the effect of this factor in light of a more complete understanding of the JFSA’s oversight practices, and other relevant facts and circumstances, in conducting its assessment of whether the Japanese margin regime achieves an outcome that is comparable to that of the CFTC Margin Rule.

The Commission notes that the BCBS/IOSCO Framework recognizes that the treatment of inter-affiliate derivative transactions will vary between jurisdictions. Thus, the BCBS/IOSCO Framework does not set standards with respect to the treatment of inter-affiliate

transactions. Rather, it recommends that regulators in each jurisdiction review their own legal frameworks and market conditions and put in place margin requirements applicable to inter-affiliate transactions as appropriate.³⁶ In determining comparability, considerations of comity are particularly relevant under this type of international framework.³⁷

The following amends and restates the entirety of the discussion and determination of the Commission with respect to Commission requirements for treatment of inter-affiliate transactions as it appeared in the Japan Determination.

1. Commission Requirements for Inter-Affiliate Transactions

The Commission determined through its CFTC Margin Rule to provide rules for swaps between “margin affiliates.” The definition of “margin affiliates” provides that a company is a margin affiliate of another company if: (1) Either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards; (2) both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards; or (3) for a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) would have occurred if such principles or standards had applied.³⁸

With respect to swaps between margin affiliates, the CFTC Margin Rule, with one exception explained below, provides that a CSE is not required to collect initial margin³⁹ from a margin affiliate provided that the CSE meets the following conditions: (i) The swaps are subject to a centralized risk management program that is reasonably designed to monitor and to manage the risks associated with the inter-affiliate swaps; and (ii) the CSE exchanges variation margin with the margin affiliate.⁴⁰

In an exception to the foregoing general rule, the CFTC Margin Rule does require CSEs to collect initial margin from non-U.S. affiliates that are

financial end users that are not subject to comparable initial margin collection requirements on their own outward-facing swaps with financial end users.⁴¹ This provision is an anti-evasion measure that is designed to prevent the potential use of affiliates to avoid collecting initial margin from third parties. For example, suppose an unregistered non-U.S. affiliate of a CSE enters into a swap with a financial end user and does not collect initial margin equivalent to that which would have been required if such affiliate were subject to the CFTC Margin Rule. Suppose further that the affiliate then enters into a swap with the CSE. Effectively, the risk of the swap with the third party would have been passed to the CSE without any initial margin. The rule would require this affiliate to post initial margin with the CSE. The rule would further require that the CSE collect initial margin even if the affiliate routed the trade through one or more other affiliates.⁴²

The Commission stated in the CFTC Margin Rule that its inter-affiliate initial margin requirement is consistent with its goal of harmonizing its margin rules as much as possible with the BCBS/IOSCO Framework.⁴³ Such Framework, for example, states that the exchange of initial and variation margin by affiliated parties “is not customary” and that initial margin in particular “would likely create additional liquidity demands.”⁴⁴ With an understanding that many authorities, such as those in Europe and Japan, were not expected to require initial margin for inter-affiliate swaps, the Commission recognized that requiring the posting and collection of initial margin for inter-affiliate swaps generally would be likely to put CSEs at a competitive disadvantage to firms in other jurisdictions.⁴⁵

Unlike the general rule for initial margin, however, the CFTC Margin Rule does require CSEs to exchange variation margin with margin affiliates that are SDs, MSPs, or financial end users (as is also required under the U.S. Prudential Regulators’ rules).⁴⁶ The Commission believes that marking open positions to market each day and requiring the posting or collection of variation margin reduces the risks of inter-affiliate swaps.

³¹ See Cross-Border Margin Rule.

³² See Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 82 FR 48394 (Oct. 18, 2017) (hereinafter, the “EU Determination”).

³³ See e.g., the EU Determination, 82 FR at 48399–01.

³⁴ See § 23.160(c)(3).

³⁵ See Japan Determination, 81 FR at 63382.

³⁶ See BCBS/IOSCO Framework, Element 6: Treatment of transactions with affiliates.

³⁷ As discussed above, the CFTC and the JFSA participated in the BCBS/IOSCO WGMR.

³⁸ See § 23.151.

³⁹ “Initial margin” is margin exchanged to protect against a potential future exposure and is defined in § 23.151 to mean the collateral, as calculated in accordance with § 23.154 that is collected or posted in connection with one or more uncleared swaps.

⁴⁰ See § 23.159(a).

⁴¹ See § 23.159(c).

⁴² See *id.*

⁴³ See CFTC Margin Rule, 81 FR at 674.

⁴⁴ See BCBS/IOSCO Framework, Element 6: Treatment of transactions with affiliates.

⁴⁵ See CFTC Margin Rule, 81 FR at 674.

⁴⁶ See § 23.159(b), Prudential Regulators’ Margin Rule, 80 FR at 74909.

2. Requirements for Inter-Affiliate OTC Derivatives Under the Laws of Japan

Under Article 123(10) and (11) of Japan's FIB Ordinance, the JFSA's margin requirements do not apply to OTC derivative transactions between counterparties that are "Parent Companies of the FIBOs conducting the transactions, Subsidiary Companies or Subsidiary Companies of the Parent Companies (excluding the FIBOs), or an entity equivalent to these under the laws and regulations of a foreign state." These terms are defined in the Ministry of Finance of Japan's Ordinance on Terminology, Forms, and Preparation Methods of Consolidated Financial Statements,⁴⁷ and the Commission recognizes that such are generally defined in keeping with the Commission's definition of "margin affiliate" for purposes of the CFTC Margin Rule, discussed above.

However, in mitigation of not requiring margin between Consolidated Companies, the JFSA has explained that its capital requirements for FIBOs/RFIs apply not only on a consolidated basis but also on an individual, non-consolidated basis. Thus, a CSE that is a FIBO/RFI is required to hold enough capital to cover exposures under non-cleared OTC derivatives to individual entities in the same consolidated group. This capital requirement covers uncollateralized inter-affiliate exposure. Such capital requirement can be reduced if the CSE collects initial and/or variation margin for such inter-affiliate transactions.

In addition to this, the JFSA has explained that its supervision of FIBOs/RFIs is a principles-based approach, and, in accordance with this approach, the JFSA's "Guideline for Financial Conglomerates Supervision" requires financial holding companies and parent companies to measure, monitor, and manage the risks caused by inter-affiliate transactions. Further, the JFSA's "Inspection manual for financial holding companies" requires financial holding companies to establish a robust governance framework and risk management system at a centralized group level, that would, in operation, require management of the risks caused by inter-affiliate transactions. Based on the foregoing, the JFSA has emphasized that it is not necessary for it to require the risk management procedures of FIBOs/RFIs applicable to inter-affiliate transactions to rely on margin requirements alone. Rather, taking into account capital requirements and the

JFSA's supervision and inspection programs, the JFSA represents that it ensures the safety and soundness of FIBOs/RFIs as a whole.

3. Commission Determination

Having compared the outcomes of the JFSA's margin requirements applicable to inter-affiliate non-cleared OTC derivatives to the outcomes of the Commission's corresponding margin requirements applicable to inter-affiliate uncleared swaps and reconsidered those outcomes in the broader context of the JFSA's prudential oversight of risk management and capital requirements, the Commission finds that the treatment of inter-affiliate transactions under the CFTC Margin Rule and the treatment of those transactions under the JFSA's margin requirements are comparable in outcome for purposes of § 23.160.

The CFTC Margin Rule generally excludes transactions between CSEs and their margin affiliates from its initial margin requirements⁴⁸ and subjects such inter-affiliate transactions to its variation margin requirements. The JFSA margin requirements, on the other hand, exclude inter-affiliate transactions of JFSA Covered Entities from both initial and variation margin requirements.

An uncleared swap with an affiliate presents credit risk to a CSE. The Commission has determined that this credit risk must be managed by marking open positions to market each day and requiring the posting or collection of variation margin. If the affiliate were to default, the margin provided by the affiliate would allow a CSE to continue to meet its obligations. The JFSA on the other hand has determined that this credit risk can be adequately managed by specific capital requirements and more general risk management standards that require financial holding companies and parent companies to measure, monitor, and manage the risks caused by inter-affiliate transactions to holistically ensure the safety and soundness of the consolidated companies of which JFSA Covered Entities are a part. In 2013, the Commission found the JFSA's risk management requirements for JFSA Covered Entities comparable to the Commission's risk management requirements for SDs and MSPs under subpart J of part 23 of the Commission's regulations.⁴⁹ In addition, uncollateralized credit risk from inter-

affiliate swaps would be subject to capital requirements under the Commission's proposed capital rules for CSEs.⁵⁰

The Commission notes that if a CSE/JFSA Covered Entity enters into an uncleared swap with a margin affiliate that is itself a CSE and a U.S. person, then it will be required to exchange variation margin in accordance with the CFTC Margin Rule because the U.S. CSE is required to do so and substituted compliance for the inter-affiliate variation margin requirement is not available to U.S. CSEs.⁵¹ In addition, the Commission is aware of the historic volume and aggregate size of inter-affiliate uncleared swaps of CSEs that may currently be eligible for substituted compliance pursuant to this determination. Given the inability to affirmatively transfer risk to U.S. margin affiliates that are CSEs without variation margin, the historic level of relevant inter-affiliate activity, and the capital and risk management requirements of both the JFSA and the Commission, and considerations of comity,⁵² the Commission has concluded that the requirements under the laws of Japan with respect to inter-affiliate margin for uncleared swaps are comparable to the requirements of the CFTC Margin Rule for purposes of § 23.160. The Commission intends to monitor the volume and aggregate size of inter-affiliate swaps of CSEs that may be eligible for substituted compliance pursuant to this determination and, to the extent it deems prudent, may consult with the JFSA regarding the capital and risk management treatment of the attendant risk of such swaps.

⁵⁰ See Capital Requirements for Swap Dealers and Major Swap Participants, 81 FR 91252, 91258 (Dec. 16, 2016).

⁵¹ See Cross-Border Margin Rule, 81 FR at 34829. The Commission notes that, subject to certain conditions, a CSE is generally not required to collect initial margin from a margin affiliate. See § 23.159(a)(1). However, a CSE would be required to collect initial margin from a margin affiliate that is a financial end user where the margin affiliate is located in a jurisdiction that the Commission has not found to be eligible for substituted compliance with regard to the CFTC Margin Rule, and the margin affiliate does not collect initial margin on its swaps with unaffiliated third parties for which initial margin would be required if the swap were subject to the CFTC Margin Rule. See § 23.159(c)(2)(ii). With this Amendment, the Commission has found Japan to be eligible for substituted compliance with regard to all aspects of the CFTC Margin Rule, and thus, a CSE would generally not be required to collect initial margin from a margin affiliate in Japan that is a financial end user. See § 23.159(c)(2)(iii).

⁵² It is noted that the JFSA has provided reciprocal recognition of the CFTC Margin Rule.

⁴⁸ See *infra* note 51.

⁴⁹ See Comparability Determination for Japan: Certain Entity-Level Requirements, 78 FR 78910 (Dec. 27, 2013).

⁴⁷ See Ordinance of the Ministry of Finance No. 28 of October 30, 1976.

Issued in Washington, DC on March 26, 2019, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

Today the Commission is amending its previous comparability determination for Japan with respect to margin requirements for uncleared swaps published on September 15, 2016.¹ The amendment makes a positive determination of comparability with respect to the scope of entities subject to margin requirements and the treatment of inter-affiliate transactions. All other findings and determinations contained in the original comparability determination remain unchanged and in full force and effect.

When the Commission issued its rule addressing the cross-border application of margin requirements for uncleared swaps in 2016,² I expressed my disagreement with the approach the Commission established as overly complex and unduly narrow.³ I also expressed my concern that the Commission's "element-by-element" methodology for determining when substituted compliance with a foreign regulator's margin regime would be permitted is contrary to the principles-based, holistic analysis the Commission has used in the past.

This overly complex and unduly narrow approach was reflected in the original comparability determination for Japan, which left firms subject to an impractical patchwork of U.S. and foreign regulations for cross-border transactions. I am pleased that the Commission has reconsidered its original finding and now finds that the remaining

¹ See Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 63376 (Sep. 15, 2016), available at: <https://www.govinfo.gov/content/pkg/FR-2016-09-15/pdf/2016-22045.pdf>.

² See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016), available at: <https://www.govinfo.gov/content/pkg/FR-2016-05-31/pdf/2016-12612.pdf>.

³ See Statement of Commissioner J. Christopher Giancarlo on the Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (Sep. 8, 2016), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement090816b>.

Japanese margin transaction requirements are comparable in outcome to the Commission's own requirements.

Substituted compliance helps preserve the benefits of an integrated, global swap market by reducing the degree to which market participants will be subject to multiple sets of regulations. Further, substituted compliance builds on international efforts to develop a global margin framework. Today's comparability determination is further evidence that the Commission is committed to showing deference to foreign jurisdictions that have comparable regulatory and supervisory regimes.

Appendix 3—Supporting Statement of Commissioner Brian Quintenz

I support the expansion of the Commission's 2016 Margin Comparability Determination for Japan (Determination).¹ I am pleased that the amendments to the Determination adopted by the Commission today apply an outcomes-based approach to substituted compliance and recognize the discretion of Japanese financial regulators to implement reforms consistent with the G-20 framework in a manner suited to their local markets. Moreover, the expanded Determination is appropriately deferential to our counterparts in Japan, who have already found CFTC margin regulations to be comparable to their own.

In the past, overly narrow comparability determinations have sometimes required Commission staff to provide additional no-action relief to address relatively minor differences between regimes. For example, after the 2016 Japan Determination was issued, swap dealers requested relief from the requirement to post and collect variation margin on a T+1 timeframe with certain counterparties.² Instead of the T+1 standard, these firms requested a T+3 standard, in order to accommodate the use of Japanese Government Bonds (a very common form of collateral in Japan), which settle in two or three days. The relief was needed in order to allow swap dealers to continue transacting with smaller Japanese counterparties. I am pleased that under the comprehensive Determination issued today, further no-action relief will not be necessary because the Determination appropriately accounts for swap dealers' various types of counterparties and the timing of collateral exchanges.

It is also important to note that while the Determination is deferential to the approach taken in Japan, it limits the flow of risk back to the United States. This is because under the Commission's Cross-Border Margin Rule, when a U.S. swap dealer enters into an uncleared swap with a Japanese swap dealer or end-user, it is required to collect initial

¹ Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 63376 (Sept. 15, 2016).

² CFTC Staff Letter No. 17-13, Commission Regulation 23.153: Time-Limited No-Action Position for the Timing of the Posting and Collection of Variation Margin from Certain Counterparties Operating in Japan (Feb. 23, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-13.pdf>.

margin and variation margin must be exchanged. In the case of uncleared swaps between affiliated U.S. and non-U.S. swap dealers, variation margin is always required. Moreover, the Commission will continue to work closely with the Financial Services Agency of Japan to coordinate our supervision and oversight of regulated entities that operate on a cross-border basis in both the United States and Japan.³

I would like to thank the staff of the Division of Swap Dealer and Intermediary Oversight for their hard work in issuing today's amended Determination. I would also like to compliment Chairman Giancarlo for his leadership on the cross-border regulation of the global swaps market. The Chairman has presented a vision for cross-border regulation grounded in deference and recognition that many of our global counterparts have implemented post-crisis reforms comparable to our own. I strongly support this vision and believe it is essential to maintaining a liquid, competitive global swaps market and avoiding regulatory-driven market fragmentation.

Appendix 4—Statement of Commissioner Dan M. Berkovitz

I support today's Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants ("Amended Japan Determination").

The Commission's regulations governing margin requirements for uncleared swaps ("CFTC Margin Rules") help mitigate risks posed by uncleared swaps to swap dealers, major swap participants, and the overall U.S. financial system.¹ In this regard, the CFTC Margin Rules—and other rules around the world requiring margin for uncleared swaps—are a fundamental component of the regulatory reforms adopted in the wake of the 2008 financial crisis.

In 2016, the CFTC adopted its cross-border margin rule to permit swap dealers and major swap participants located in non-U.S. jurisdictions to comply with the CFTC's Margin Rules by meeting the similar rules of their home jurisdiction *if* the Commission has deemed those rules comparable.² This framework for "substituted compliance" supports the global nature of the swaps market and conforms to the directive in the Dodd-Frank Act for the Commission to consult and coordinate with international regulators to establish consistent international standards for the regulation of swaps entities and activities.³ The

³ Memorandum of Cooperation Related to the Supervision of Cross-Border Covered Entities (March 10, 2014), <https://www.cftc.gov/idc/groups/public/%40internationalaffairs/documents/file/cftc-jfsamoc031014.pdf>.

¹ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016).

² See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

³ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376, at section 752 (2010).

substituted compliance framework helps reduce duplicative and overlapping regulatory requirements where effective comparable regulation exists, facilitates the ability of U.S. market participants to compete in foreign jurisdictions, and is consistent with the principle of international comity.

The CFTC's cross-border margin rule establishes an outcomes-based approach that considers a number of factors and does not require strict conformity with the CFTC Margin Rules. As I have said before, a comparability determination should not be based solely on the home country's written laws and regulations, but also consider the country's broader system of regulation, including oversight and enforcement. In addition, the nature of the other country's relevant markets may be taken into account. Finally, in considering these issues, the Commission should keep in mind the principle of comity: the reciprocal recognition of the legislative, executive, and judicial acts of another jurisdiction.⁴ Given all of these factors, the analysis for each determination often is unique and can change over time as circumstances change.

The Amended Japan Determination finds comparability regarding the scope of entities subject to the margin requirements and the treatment of margining for inter-affiliate transactions. The Commission's original determination for Japan's margin rules, issued on September 15, 2016, did not find comparability in these areas. Subsequently, it appeared that the absence of a finding of comparability regarding the scope of entities and inter-affiliate swaps issues was causing some confusion in applying the original determination. The CFTC staff therefore further reviewed applicable Japanese laws and regulations and engaged heavily with the Japan Financial Services Agency ("JFSA") to develop a more complete understanding of how the JFSA regulates and supervises margining for the scope of entities that enter into swaps and inter-affiliate swap transactions. The in-depth analysis outlined in today's Amended Japan Determination reflects a more holistic understanding by the Commission of the JFSA's approach to managing the risks of swap trading for the scope of relevant entities and inter-affiliate swaps. The analysis also notes the potential for risks from these swap activities returning to the United States is expected to be significantly mitigated.

For example, although the JFSA does not require variation margin for the same scope of entities covered by the CFTC Margin Rules, the JFSA indicated that the entities excluded tend to be smaller and have less regular involvement in the swap markets, thereby presenting less risk to the financial system. Furthermore, as noted in the determination, if a Japanese entity that would otherwise be subject to the CFTC Margin Rules, but for substituted compliance, enters into swaps with any U.S. entity covered by the CFTC Margin Rules, then both entities are required to exchange margin per our rules.

⁴ See Restatement (Third) of The Foreign Relations Law in the United States, section 101 (1987) (Am. Law Inst. 2019); <https://www.law.cornell.edu/wex/comity>.

This requirement limits the possibility of unmarginated risk coming to the U.S. Similarly, for inter-affiliate swap treatment, a more complete understanding of the JFSA's approach to requiring Japanese affiliates to hold more capital when margin is not exchanged with other affiliates, among other things, helps offset exposures not covered when margin is not collected.

As with other jurisdictions where the legal and regulatory structure does not mirror our own, and the substituted compliance determinations are based on the overall outcome of the regulatory system, subsequent monitoring may be appropriate to confirm that our initial understanding of the regulatory structure and the expected outcomes is accurate. Accordingly, I encourage the CFTC staff to periodically assess the implementation of this determination to confirm our expectations are accurate.

I thank the CFTC staff for their thorough work on this determination and appreciate their responsiveness to our comments and suggestions. I would also like to thank my fellow Commissioners for their collaboration in helping us reach this positive outcome.

[FR Doc. 2019-06152 Filed 3-29-19; 8:45 am]

BILLING CODE 6351-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. FDA-2017-C-1951]

Reinstatement of Color Additive Listing for Lead Acetate

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is reinstating the provision removed by our October 2018 final rule to amend the color additive regulations to no longer provide for the use of lead acetate in cosmetics intended for coloring hair on the scalp. This action does not reflect any change in our determination that new data demonstrate that there is no longer a reasonable certainty of no harm from the use of this color additive. We are reinstating this provision only because it was removed from the Code of Federal Regulations before we had the opportunity to take final action on the objections we received to the October 2018 final rule. This provision is being reinstated pending final FDA action on objections to the final rule.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT:

Molly A. Harry, Center for Food Safety and Applied Nutrition, Food and Drug

Administration, 5001 Campus Dr., College Park, MD 20740-3835, 240-402-1075.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 31, 2018 (83 FR 54665), FDA issued a final rule repealing the color additive regulation at § 73.2396 (21 Code of Federal Regulations (CFR) 73.2396) to no longer provide for the use of lead acetate in cosmetics intended for coloring hair on the scalp because new data available since lead acetate was permanently listed demonstrate that there is no longer a reasonable certainty of no harm from the use of this color additive. We gave interested persons until November 30, 2018, to file objections and requests for a hearing on the final rule. The preamble to the final rule stated the effective date of the final rule would be on December 3, 2018, except as to any provisions that may be stayed by the proper filing of objections (83 FR 54665 at 54673). We received objections and a request for a hearing on the objections from a manufacturer of hair dyes containing lead acetate. Under sections 701(e)(2) and 721(d) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 371(e)(2) and 379e(d)), the filing of the objections operates to stay the effective date of the final rule until FDA takes final action on the objections. For access to the docket to read the objections 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.

Our October 2018 final rule provided an effective date of December 3, 2018, and, on that date, § 73.2396 was removed from the CFR. However, under the FD&C Act, the filing of the objections operates to stay the effectiveness of our revocation until we take final action on the objections. To implement a stay of effectiveness as required by sections 701(e)(2) and 721(d) of the FD&C Act, we need to restore § 73.2396 to the CFR. Thus, we are issuing this final rule to reinstate § 73.2396 so that we may follow the appropriate process to address the objections that were filed. That provision will remain in place pending final FDA action on the objections to the October 2018 final rule. This action does not reflect any change in our determination that new data demonstrate that there is no longer a

reasonable certainty of no harm from the use of this color additive.

FDA finds good cause for issuing this final rule without notice and comment under the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) and FDA regulations (§ 10.40(e)(1) (21 CFR 10.40(e)(1))). Notice and comment are unnecessary because this final rule is to correct the removal of a CFR provision where FDA's October 2018 final rule removing this provision was stayed under the FD&C Act pending final FDA action on objections to that rule. Therefore, we have determined that notice and comment is unnecessary. In addition, we find good cause for this final rule to become effective on the date of publication under 5 U.S.C. 553(d)(3) and § 10.40(c)(4)(ii).

II. Analysis of Environmental Impact

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

III. Paperwork Reduction Act of 1995

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

IV. Economic Analysis of Impacts

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

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

small entities, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$154 million, using the most current (2018) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

V. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

VI. Consultation and Coordination With Indian Tribal Governments

We have analyzed this rule in accordance with the principles set forth in Executive Order 13175. We have determined that the rule does not contain policies that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the Executive Order and, consequently, a tribal summary impact statement is not required.

List of Subjects in 21 CFR Part 73

Color additives, Cosmetics, Drugs, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs, 21 CFR part 73 is amended as follows:

PART 73—LISTING OF COLOR ADDITIVES EXEMPT FROM CERTIFICATION

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e.

■ 2. Add § 73.2396 to subpart C to read as follows:

§ 73.2396 Lead acetate.

(a) *Identity.* The color additive lead acetate is the trihydrate of lead (2+) salt of acetic acid. The color additive has the chemical formula $Pb(OOCCH_3)_2 \cdot 3H_2O$.

(b) *Specifications.* Lead acetate shall conform to the following specifications and shall be free from impurities other than those named to the extent that such impurities may be avoided by good manufacturing practice:

(1) Water-insoluble matter, not more than 0.02 percent.

(2) pH (30 percent solution weight to volume at 25 °C), not less than 4.7 and not more than 5.8.

(3) Arsenic (as As), not more than 3 parts per million.

(4) Lead acetate, not less than 99 percent.

(5) Mercury (as Hg), not more than 1 part per million.

(c) *Uses and restrictions.* The color additive lead acetate may be safely used in cosmetics intended for coloring hair on the scalp only, subject to the following restrictions:

(1) The amount of the lead acetate in the cosmetic shall be such that the lead content, calculated as Pb, shall not be in excess of 0.6 percent (weight to volume).

(2) The cosmetic is not to be used for coloring mustaches, eyelashes, eyebrows, or hair on parts of the body other than the scalp.

(d) *Labeling requirements.* (1) The label of the color additive lead acetate shall conform to the requirements of § 70.25 of this chapter, and bear the following statement or equivalent:

Wash thoroughly if the product comes into contact with the skin.

(2) The label of the cosmetic containing the color additive lead acetate, in addition to other information required by the Federal Food, Drug, and Cosmetic Act, shall bear the following cautionary statement, conspicuously displayed thereon:

CAUTION: Contains lead acetate. For external use only. Keep this product out of children's reach. Do not use on cut or abraded scalp. If skin irritation develops, discontinue use. Do not use to color mustaches, eyelashes, eyebrows, or hair on parts of the body other than the scalp. Do not get in eyes. Follow instructions carefully and wash hands thoroughly after each use.

(e) *Exemption for certification.*

Certification of this color additive for the prescribed use is not necessary for the protection of the public health and therefore batches thereof are exempt from the certification requirements of section 721(c) of the Federal Food, Drug, and Cosmetic Act.

Dated: March 27, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019-06238 Filed 3-29-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 806

[Docket No. FDA-2019-N-1345]

Medical Devices; Technical Amendment

AGENCY: Food and Drug Administration; HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA or Agency) is amending the medical device reports of corrections and removals regulation to correct three inaccurate cross-references. This action is editorial in nature and is intended to improve the accuracy of the Agency's regulations.

DATES: This rule is effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT:

Madhusoodana Nambiar, Office of the Center Director, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5518, Silver Spring, MD 20993-0002, 301-796-5837.

SUPPLEMENTARY INFORMATION: FDA is amending 21 CFR 806.1 to correct three inaccurate cross-references to ensure accuracy and clarity in the Agency's medical device regulations regarding medical device reports of corrections and removals. Publication of this document constitutes final action under the Administrative Procedure Act (5 U.S.C. 553). FDA has determined that notice and public comment are unnecessary because this amendment to the regulation is nonsubstantive and

provides only technical changes to correct inaccurate cross-references.

In the **Federal Register** of September 24, 2013 (78 FR 58821), FDA added the definition of "*Human cells, tissues, or cellular or tissue-based product (HCT/P) regulated as a device*" at § 806.2(f). The addition of this definition caused the paragraphs following paragraph (f) in § 806.2 to be redesignated alphabetically. Although the definitions of the terms were correct in § 806.2, the paragraphs in § 806.1(b) cross-referenced three of the definitions (market withdrawal, routine servicing, and stock recovery) from § 806.2 based on the previous designations.

List of Subjects in 21 CFR Part 806

Imports; Medical devices; Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 806 is amended as follows:

PART 806—MEDICAL DEVICES; REPORTS OF CORRECTIONS AND REMOVALS

■ 1. The authority citation for part 806 continues to read as follows:

Authority: 21 U.S.C. 352, 360, 360i, 360j, 371, 374.

■ 2. In § 806.1, revise paragraphs (b)(2) through (4) to read as follows:

§ 806.1 Scope.

* * * * *

(b) * * *

(2) Market withdrawal as defined in § 806.2(i)

(3) Routine servicing as defined in § 806.2(l).

(4) Stock recovery as defined in § 806.2(m).

Dated: March 26, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019-06139 Filed 3-29-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA-2011-N-0103]

RIN 0910-AH98

Microbiology Devices; Classification of In Vitro Diagnostic Devices for *Bacillus* Species Detection

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is issuing a final rule to classify in vitro diagnostic devices for *Bacillus* species (spp.) detection into class II (special controls) and to continue to require a premarket notification (510(k)) to provide a reasonable assurance of safety and effectiveness of the device. FDA is also establishing special controls in a special controls guideline in addition to restricting use and distribution of the devices. An in vitro diagnostic device for *Bacillus* spp. detection is a prescription device used to detect and differentiate among *Bacillus* spp. and presumptively identify *B. anthracis* and other *Bacillus* spp. from cultured isolates or clinical specimens as an aid in the diagnosis of anthrax and other diseases caused by *Bacillus* spp.

DATES: This rule is effective May 1, 2019. See further discussion in section V "Implementation Strategy".

ADDRESSES: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and insert the docket number found in brackets in the heading of this final rule 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: Beena Puri, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4502, Silver Spring, MD 20993-0002, 301-796-6202. Beena.Puri@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

- A. Purpose of the Final Rule
- B. Summary of the Major Provisions of the Final Rule
- C. Legal Authority
- D. Costs and Benefits
- II. Background
 - A. History of This Rulemaking
 - B. Summary of Comments to the Proposed Rule
- III. Legal Authority
- IV. Comments on the Proposed Rule and FDA Response
- V. Implementation Strategy
- VI. Electronic Access
- VII. Economic Analysis of Impacts
- VIII. Analysis of Environmental Impact
- IX. Paperwork Reduction Act of 1995
- X. Consultation and Coordination With Indian Tribal Governments
- XI. References

I. Executive Summary

A. Purpose of the Final Rule

FDA is classifying in vitro diagnostic devices for *Bacillus* species (spp.) detection (product codes NVQ, NPO, NRL, NHT, and NWZ) into class II (special controls), establishing special controls in a special controls guideline entitled “Class II Special Controls Guideline: In Vitro Diagnostic Devices for *Bacillus* spp. Detection,” restricting the device to prescription use, and restricting distribution of these devices to laboratories that follow public health guidelines that address appropriate biosafety conditions, interpretation of test results, and coordination of findings with public health authorities.

This decision is based upon the recommendations from the Microbiology Devices Advisory Panel (the Panel), public comments received following the publication of the proposed rule, FDA’s experience with these devices. FDA believes that the special controls established and imposed by this final rule and special controls guideline, together with the general controls, will provide a reasonable assurance of safety and effectiveness of the device. Further, FDA believes that the restrictions on use and distribution are required for the safe and effective use of the device.

B. Summary of the Major Provisions of the Final Rule

This final rule classifies in vitro diagnostic devices for *Bacillus* spp. detection into class II (special controls), and establishes special controls in a special controls guideline entitled “Class II Special Controls Guideline: In Vitro Diagnostic Devices for *Bacillus* spp. Detection” which address: (1) Specific information relating to the devices’ intended use, components, testing procedures, specimen storage/ shipping conditions, and interpretation/

reporting; (2) detailed descriptive information regarding the studies required to demonstrate appropriate performance and control against assays that may otherwise fail to perform to acceptable standards; (3) specific labeling requirements; and (4) certain information that must be submitted for in vitro diagnostic devices for *Bacillus* spp. detection that use nucleic acid amplification.

This rule also restricts the use and distribution of these devices. Because handling the quality control organisms and those potentially present in the specimen may pose a risk to laboratory workers, FDA is finalizing a restriction on distribution of these products to laboratories that follow public health guidelines that address appropriate biosafety conditions, interpretation of test results, and coordination of findings with public health authorities. Further, FDA is restricting use of these devices to be a prescription device under the terms set forth in 21 CFR 866.3045(d).

C. Legal Authority

FDA is issuing this rule under the authority of the provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act) that apply to medical devices (21 U.S.C. 301 *et seq.*), including section 513(a) regarding device classes (21 U.S.C. 360c(a)), sections 513(b) and (c) regarding device classification panels (21 U.S.C. 360c(b) and (c)), section 513(d) regarding device classification (21 U.S.C. 360c(d)), and section 520(e) regarding restrictions on the sale, distribution, or use of a device (21 U.S.C. 360j(e)).

D. Costs and Benefits

Quantifiable benefits of this rule are annual cost savings resulting from a reduction in the time burden of inquiries manufacturers submit to FDA. The primary present value of the benefits, over a 20-year time horizon from 2018 to 2038 are estimated to be \$258,054, at a 7 percent discount rate and \$353,393, at a 3 percent discount rate. The primary estimate of the annual benefits is \$22,258 a year.

This rule has a one-time upfront cost for current manufacturers of these devices as they will need to spend time reading the rule and may need to develop new labeling. There is also an annual cost of reading the rule to firms who may submit inquiries in the future. The primary present value of the costs, over a 20-year time horizon, are estimated to be \$12,659 at a 7 percent discount rate and \$14,081 at a 3 percent discount rate. The primary annualized costs are \$1,092 at a 7 percent discount rate and \$887 at a 3 percent discount

rate. The total net benefit of the rule is estimated to be \$245,395 at a 7 percent discount rate and \$339,312 at a 3 percent discount rate. The annualized net benefits of this rule are estimated to be \$21,166 at a 7 percent discount rate and \$21,371 at a 3 percent discount rate.

II. Background

A. History of This Rulemaking

In the **Federal Register** of November 17, 2015 (80 FR 71756), FDA issued a proposed rule to classify in vitro diagnostic devices for *Bacillus* spp. detection as class II with special controls, and proposed the draft special controls guideline entitled “Class II Special Controls Guideline: In Vitro Diagnostic Devices for *Bacillus* spp. Detection; Draft Guideline for Industry and Food and Drug Administration Staff” (Ref. 1) and certain restrictions on its use and distribution. The proposed special controls and restrictions were based, in part, upon feedback received from the Panel on March 7, 2002 (Ref. 2). FDA invited interested persons to comment on the proposed regulation and the special controls guideline by February 16, 2016.

B. Summary of Comments to the Proposed Rule

FDA received one comment requesting an exclusive 510(k). This comment is outside the scope of the rule. No comments opposed the proposed classification for in vitro diagnostic devices for *Bacillus* spp. detection.

III. Legal Authority

The FD&C Act (21 U.S.C. 301 *et seq.*), as amended, established a comprehensive system for the regulation of medical devices intended for human use. The FD&C Act establishes three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness (section 513(a) of the FD&C Act). The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Class I devices are those devices for which the general controls of the FD&C Act (controls authorized by or under the general controls sections of the FD&C Act (sections 501, 502, 510, 516, 518, 519, or 520 (21 U.S.C. 351, 352, 360, 360f, 360h, 360i, or 360j)), or any combination of such sections) are sufficient to provide a reasonable assurance of the safety and effectiveness of the device; or those devices for which insufficient information exists to determine that general controls are

sufficient to provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide such assurance, but because the devices are not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and do not present a potential unreasonable risk of illness or injury, are to be regulated by general controls (section 513(a)(1)(A) of the FD&C Act). Class II devices are those devices for which general controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness, and for which there is sufficient information to establish special controls to provide such assurance, including the promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and other appropriate actions as the Agency deems necessary to provide such assurance (section 513(a)(1)(B) of the FD&C Act). Class III devices are those devices for which insufficient information exists to determine that general controls and special controls would provide a reasonable assurance of safety and effectiveness, and are purported or represented for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present a potential unreasonable risk of illness or injury (section 513(a)(1)(C) of the FD&C Act).

FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), as “preamendments devices.” Pursuant to section 513(d)(1) of the FD&C Act, FDA classifies these devices after FDA: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel’s recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device (section 513(d)(1) of the FD&C Act). FDA has classified most preamendments devices under these procedures and has followed these procedures to classify in vitro diagnostic devices for *Bacillus* spp. detection.

Section 520(e) of the FD&C Act authorizes FDA to issue regulations imposing restrictions on the sale, distribution, or use of a device, if because of its potentiality for harmful effect or its collateral measures necessary to its use, FDA determines that absent such restrictions, there

cannot be a reasonable assurance of its safety and effectiveness. Certain provisions of the FD&C Act related specifically to FDA’s authority over restricted devices. For example, section 502(q) and (r) of the FD&C Act provide that a restricted device distributed or offered for sale in any state shall be deemed to be misbranded if its advertising is false or misleading or fails to include certain information regarding the device, or it is sold, distributed, or used in violation of regulations prescribed under section 520(e) of the FD&C Act, and section 704(a) of the FD&C Act (21 U.S.C. 374(a)) authorizes FDA to inspect certain records relating to restricted devices. FDA continues to believe that the restrictions as provided in the final rule related to distribution and use are required for the safe and effective use of the device.

IV. Comments on the Proposed Rule and FDA Response

FDA received one comment on the proposed rule by the close of the comment period, requesting an exclusive 510(k). This comment is outside of the scope of the rule. No comments opposed the proposed classification for in vitro diagnostic devices for *Bacillus* spp. detection. In this final rule, FDA is adopting the classification, special controls and the restrictions on use and distribution from its proposed rule published on November 17, 2015 (80 FR 71756).

V. Implementation Strategy

This final rule will become effective 30 days after its date of publication in the **Federal Register**.

The implementation strategy is set forth below for these devices.

- Devices that have not been legally marketed prior to the date of publication of this final rule, or devices that have been legally marketed, but are required to submit a new 510(k) under 21 CFR 807.81(a)(3) because the device is about to be significantly changed or modified: Manufacturers must obtain 510(k) clearance and comply with special controls before marketing the new or changed device.

- Devices that have been legally marketed prior to the date of publication of this final rule, and devices for which 510(k) submissions have been submitted before the date of publication of this final rule: Manufacturers are not required to submit a 510(k) to demonstrate compliance with the special controls set forth in sections VI, VII, and IX of the special controls guideline. FDA had proposed that manufacturers of such devices must comply with the underlying

requirements for those special controls, as well as the labeling special controls set forth in section VIII of the special controls guideline. FDA is finalizing our classification and is clarifying that for such devices, FDA does not expect submission of documentation to FDA demonstrating compliance with the special controls set forth in sections VI, VII, and IX of the special controls guideline. Further, FDA does not intend to enforce compliance with the labeling special controls set forth in section VIII of the special controls guideline until April 1, 2020. If a manufacturer markets such a device after April 1, 2020, and that device does not comply with the labeling special controls set forth in section VIII of the special controls guideline, then FDA would consider taking action against such a manufacturer under its usual enforcement policies. FDA believes that a period of 1 year from the publication date of this final rule is appropriate for manufacturers to come into compliance with such requirements. FDA believes this approach will help ensure the efficient and effective implementation of this final rule.

VI. Electronic Access

Persons interested in obtaining a copy of the final special controls guideline may do so by using the internet. A search capability for all Center for Devices and Radiological Health guidelines and guidance documents is available at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>. The final special controls guideline is also available at <https://www.regulations.gov>. Persons unable to download an electronic copy of “Class II Special Controls Guideline: In Vitro Diagnostic Devices for *Bacillus* spp. Detection,” may send an email request to CDRH-Guidance@fda.hhs.gov to receive an electronic copy of the document. Please use the document number 1400038 to identify the special controls guideline you are requesting.

VII. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety,

and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because of the small impact expected from this rule, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to

prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$154 million, using the most current (2018) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

Quantifiable benefits of this rule are cost savings resulting from a reduction in the time burden of inquiries manufacturers submit to FDA. The cost

savings involve manufacturers, who no longer need to submit as many inquiries related to submissions for these devices, because much of the necessary information is provided by this rule and guideline, and FDA, who no longer needs to use resources to respond to these inquiries. A 20-year time horizon was chosen for this analysis because this industry has been stable and there is no reason to expect disruptions for the foreseeable future. The primary present value of the benefits, over a 20-year time horizon from 2018 to 2038 are estimated to be \$258,054, at a 7 percent discount rate and \$353,393, at a 3 percent discount rate. The primary estimate of the annual benefits, over a 20-year time horizon from 2018 to 2038, are estimated to be \$22,258 a year.

TABLE 1—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF THE FINAL RULE IN 2017 DOLLARS OVER A 20-YEAR TIME HORIZON

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered	
Benefits:							
Annualized Monetized \$/year	\$22,258	\$7,419	\$37,096	2017	7	20	
	22,258	7,419	37,096	2017	3		
Annualized Quantified					7		
					3		
Qualitative.							
Costs:							
Annualized Monetized \$/year	1,092	733	1,455	2017	7	20	
	887	595	1,183	2017	3	20	
Annualized Quantified					7		
					3		
Qualitative.							
Transfers:							
Federal Annualized Monetized \$/ year.					7		
					3		
From/To	From:			To:			
Other Annualized Monetized \$/year					7		
					3		
From/To	From:			To:			

Effects:
 State, Local or Tribal Government:
 Small Business:
 Wages:
 Growth:

This rule has a one-time upfront cost for current manufacturers of these devices as they may need to develop new labeling. There are seven total products on the market and each labeling redesign is estimated to cost \$1,096. We estimate the total labeling cost to be \$7,674. The six existing manufacturers (one firm has two products) also face a one-time upfront cost of having to read the rule and guideline which we estimate to be \$1,138 for the manufacturers. Finally, there is an annual cost of reading the rule to firms who may submit inquiries

in the future. We estimate this annual cost to be \$332. The primary present value of the costs, over a 20-year time horizon from 2018 to 2038, are estimated to be \$12,659 at a 7 percent discount rate and \$14,081 at a 3 percent discount rate. The primary annualized costs, over a 20-year time horizon from 2018 to 2038, are estimated to be \$1,092 at a 7 percent discount rate and \$887 at a 3 percent discount rate. The total net benefit of the rule is estimated to be \$245,395 at a 7 percent discount rate and \$339,312 at a 3 percent discount rate. The annualized net benefits of this

rule are estimated to be \$21,166 at a 7 percent discount rate and \$21,371 at a 3 percent discount rate.

In line with Executive Order 13771, in table 2 we estimate present and annualized values of costs and cost savings over an infinite time horizon. Based on these cost savings this final rule would be considered a deregulatory action under Executive Order 13771. Our primary estimate for the present value of the net costs is –\$319,974 (or a cost savings of \$319,974) at a 7 percent discount rate and –\$729,462 at a 3 percent discount rate in 2016 dollars.

TABLE 2—EXECUTIVE ORDER 13771 SUMMARY TABLE

[In 2016 dollars, over an infinite time horizon]

	Primary (7%)	Lower bound (7%)	Upper bound (7%)	Primary (3%)	Lower bound (3%)	Upper bound (3%)
Present Value of Costs	\$13,614	\$9,133	\$18,094	\$19,812	\$13,265	\$26,358
Present Value of Cost Savings	333,588	77,548	555,938	749,273	174,181	1,248,789
Present Value of Net Costs	(319,974)	(68,415)	(537,843)	(729,462)	(160,916)	(1,222,430)
Annualized Costs	891	597	1,184	577	386	768
Annualized Cost Savings	21,823	5,073	36,370	21,823	5,073	36,372
Annualized Net Costs	(20,933)	(4,476)	(35,186)	(21,246)	(4,687)	(35,605)

We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. The full analysis of economic impacts is available in the docket for this final rule (Ref. 3) and at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

VIII. Analysis of Environmental Impact

We have determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IX. Paperwork Reduction Act of 1995

This final rule establishes special controls and restrictions that refer to currently approved collections of information found in other 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 (the PRA) (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120 and the collections of information in 21 CFR parts 801 and 809 have been approved under OMB control number 0910–0485.

The labeling referenced in sections VI(A), VIII(A), and VIII(C) of the final special controls guideline do not constitute a “collection of information” under the PRA because the labeling is a “public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public” (5 CFR 1320.3(c)(2)).

X. Consultation and Coordination With Indian Tribal Governments

We have analyzed this rule in accordance with the principles set forth in Executive Order 13175. We have determined that the rule does not contain policies that have substantial direct effects on one or more Indian

Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the Executive Order and, consequently, a tribal summary impact statement is not required.

XI. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at <https://www.regulations.gov>. References without asterisks are not on public display at <https://www.regulations.gov> because they have a copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

- *1. Final Special Controls Guideline for Industry and Food and Drug Administration Staff, “Class II Special Controls Guideline: In Vitro Diagnostic Devices for *Bacillus* spp. Detection,” issued April 1, 2019, available at <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM470760.pdf>.
- *2. Transcript of the FDA Microbiology Devices Panel meeting, March 7, 2002 (available at <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfAdvisory/details.cfm?mtg=348>).
- *3. “Preliminary Regulatory Impact Analysis, Initial Regulatory Flexibility Analysis, and Unfunded Mandates Reform Act Analysis for Microbiology Devices; Classification of In Vitro Diagnostic Device for *Bacillus* Species Detection,” available at <https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/UCM477856.pdf>.

4. Abshire, T.G., J.E. Brown, and J.W. Ezzell, “Validation of the Use of Gamma Phage for Identifying *Bacillus anthracis*,” 102nd American Society for Microbiology Annual Meeting (poster #C122), 2001.
- *5. Abshire, T.G., et al., “Production and Validation of the Use of Gamma Phage for the Identification of *Bacillus anthracis*,” *Journal of Clinical Microbiology*, vol. 43(9), pp. 4780–8, 2005, available at <https://www.ncbi.nlm.nih.gov/pubmed/16145141>.
- *6. Brown, E.R. and W.B. Cherry, “Specific Identification of *Bacillus anthracis* by Means of a Variant Bacteriophage,” *Journal of Infectious Diseases*, vol. 96, p. 34, 1955, available at <https://jid.oxfordjournals.org/content/96/1/34.long>.
- *7. Brown, E.R. et al., “Differential Diagnosis of *Bacillus cereus*, *Bacillus anthracis*, and *Bacillus cereus* var. *mycoides*,” *Journal of Bacteriology*, vol. 75, p. 499, 1958, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC290100/pdf/jbacter00512-0024.pdf>.
- *8. Buck C.A., R.L. Anacker, F.S. Newman, et al., “Phage Isolated from Lysogenic *Bacillus anthracis*,” *Journal of Bacteriology*, vol. 85, p. 423, 1963, available at <https://jb.asm.org/content/85/6/1423.full.pdf+html?sid=c14df35d-1d7b-4cac-b55b-2097931a4623>.
9. Parry, J.M., P.C.B. Turnbull, and J.R. Gibson, “A Colour Atlas of *Bacillus* Species,” Wolfe Medical Publications Ltd., London, 1983.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

- 1. The authority citation for part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Section 866.3045 is added to subpart D to read as follows:

§ 866.3045 In vitro diagnostic device for *Bacillus* spp. detection.

(a) *Identification.* An in vitro diagnostic device for *Bacillus* species (spp.) detection is a prescription device used to detect and differentiate among *Bacillus* spp. and presumptively identify *B. anthracis* and other *Bacillus* spp. from cultured isolates or clinical specimens as an aid in the diagnosis of anthrax and other diseases caused by *Bacillus* spp. This device may consist of *Bacillus* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify bacillus-like organisms in clinical specimens; bacteriophage used for differentiating *B. anthracis* from other *Bacillus* spp. based on susceptibility to lysis by the phage; or antigens used to identify antibodies to *B. anthracis* (anti-toxin and anti-capsular) in serum. *Bacillus* infections include anthrax (cutaneous, inhalational, or gastrointestinal) caused by *B. anthracis*, and gastrointestinal disease and non-gastrointestinal infections caused by *B. cereus*.

(b) *Classification.* Class II (special controls). The special controls are set forth in FDA's special controls guideline document entitled "In Vitro Diagnostic Devices for *Bacillus* spp. Detection; Class II Special Controls Guideline for Industry and Food and Drug Administration Staff." For availability of the guideline document, see § 866.1(e).

(c) *Restriction on Distribution.* The distribution of these devices is limited to laboratories that follow public health guidelines that address appropriate biosafety conditions, interpretation of test results, and coordination of findings with public health authorities.

(d) *Restriction on Use.* The use of this device is restricted to prescription use and must comply with the following:

(1) The device must be in the possession of:

(i)(A) A person, or his agents or employees, regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale or retail distribution of such device; or

(B) A practitioner, such as a physician, licensed by law to use or order the use of such device; and

(ii) The device must be sold only to or on the prescription or other order of such practitioner for use in the course of his professional practice.

(2) The label of the device shall bear the statement "Caution: Federal law restricts this device to sale by or on the order of a _____", the blank to be filled

with the word "physician" or with the descriptive designation of any other practitioner licensed by the law of the State in which he practices to use or order the use of the device.

(3) Any labeling, as defined in section 201(m) of the Federal Food, Drug, and Cosmetic Act, whether or not it is on or within a package from which the device is to be dispensed, distributed by, or on behalf of the manufacturer, packer, or distributor of the device, that furnishes or purports to furnish information for use of the device contains adequate information for such use, including indications, effects, routes, methods, and frequency and duration of administration and any relevant hazards, contraindications, side effects, and precautions, under which practitioners licensed by law to employ the device can use the device safely and for the purposes for which it is intended, including all purposes for which it is advertised or represented. This information will not be required on so-called reminder-piece labeling which calls attention to the name of the device but does not include indications or other use information.

(4) All labeling, except labels and cartons, bearing information for use of the device also bears the date of the issuance or the date of the latest revision of such labeling.

Dated: March 22, 2019.

Scott Gottlieb,

Commissioner of Food and Drugs.

[FR Doc. 2019-06026 Filed 3-29-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 888

[Docket No. FDA-2015-N-3785]

RIN 0910-AI00

Medical Devices; Orthopedic Devices; Classification of Posterior Cervical Screw Systems

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is issuing a final rule to classify posterior cervical screw systems into class II (special controls) and to continue to require a premarket notification (510(k)) to provide a reasonable assurance of safety and effectiveness of the device. A posterior

cervical screw system is a device used to provide immobilization and stabilization in the cervical spine as an adjunct to spinal fusion surgery. The term "posterior cervical screw systems" is used to distinguish these devices from currently classified thoracolumbosacral pedicle screw systems for use in other spinal regions.

DATES: This rule is effective May 1, 2019.

ADDRESSES: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and insert the docket number found in brackets in the heading of this final rule 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: Genevieve McRae, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1457, Silver Spring, MD 20993-0002, 301-796-6423, genevieve.mcrae@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Executive Summary
 - A. Purpose of the Final Rule
 - B. Summary of the Major Provisions of the Final Rule
 - C. Legal Authority
 - D. Costs and Benefits
- II. Background
 - A. History of This Rulemaking
 - B. Summary of Comments to the Proposed Rule
- III. Legal Authority
- IV. Comments on the Proposed Rule and FDA Response
 - A. Introduction
 - B. Description of General Comments and FDA Response
 - C. Specific Comments and FDA Response
- V. Effective Date
- VI. Economic Analysis of Impacts
- VII. Analysis of Environmental Impact
- VIII. Paperwork Reduction Act of 1995
- IX. Consultation and Coordination With Indian Tribal Governments
- X. Reference

I. Executive Summary

A. Purpose of the Final Rule

Through this final rule, FDA is classifying posterior cervical screw systems (product code NKG) into class II (special controls). This decision was based upon the recommendation of the Orthopaedic and Rehabilitation Devices Panel (the Panel) and our consideration and analysis of the public comments received following the publication of the proposed rule. FDA believes that the special controls established and imposed by this final rule, together with

the general controls, will provide a reasonable assurance of safety and effectiveness of the device.

B. Summary of the Major Provisions of the Final Rule

This final rule revises the identification language for posterior cervical screw systems, classifies posterior cervical screw systems into class II (special controls), and establishes the following special controls for posterior cervical screw systems with which manufacturers must comply: (1) The design characteristics of the device ensure that the geometry and material composition are consistent with the intended use of the device; (2) nonclinical performance testing must demonstrate mechanical function and durability of the implant; (3) device components must be demonstrated to be biocompatible; (4) validation testing must demonstrate the cleanliness and sterility of, or the ability to clean and sterilize, the device components and device-specific instruments; and (5) device labeling must include a clear description of the technological features of the device, the intended use and indications for use, and certain specified device-specific warnings, precautions, and contraindications.

C. Legal Authority

FDA is issuing this rule under the authority of the provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act) that apply to medical devices (21 U.S.C. 301 *et seq.*), including section 513(a) regarding device classes (21 U.S.C. 360c(a)), section 513(b) and (c) regarding device classification panels, and section 513(d) regarding device classification.

D. Costs and Benefits

We estimate that the final rule will affect 32 manufacturers of 38 products. Manufacturers of these affected products will incur one-time costs of \$78.69 each to read and understand the rule, and will incur one-time labeling costs of \$13,189 for each product. The present value of the total costs is estimated at \$503,700. The annualized cost of this rule over 10 years is estimated to be \$62,777 at a 7 percent discount rate and \$52,853 at a 3 percent discount rate. We did not estimate quantifiable benefits of the final rule.

II. Background

A. History of This Rulemaking

In the **Federal Register** of March 10, 2016 (81 FR 12607), FDA issued a proposed rule to classify posterior cervical screw systems as class II with special controls, and proposed special

controls for these devices, and invited interested persons to comment on the proposed regulation by June 8, 2016. These recommendations were based upon feedback received from the Panel on September 21, 2012.

B. Summary of Comments to the Proposed Rule

FDA received four sets of comments on the proposed rule from trade organizations, professional societies, and an individual. The comments within the scope of FDA's proposal to classify posterior cervical screw systems into class II (special controls) were supportive and included a few suggested clarifications and/or changes to the language of the proposed rule. We considered all comments in the development of this final rule and accepted several suggested changes, as discussed in section IV below.

III. Legal Authority

The FD&C Act (21 U.S.C. 301 *et seq.*), as amended, established a comprehensive system for the regulation of medical devices intended for human use. The FD&C Act establishes three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness (section 513(a) of the FD&C Act). The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Class I devices are those devices for which the general controls of the FD&C Act (controls authorized by or under the general controls sections of the FD&C Act (sections 501, 502, 510, 516, 518, 519, or 520) (21 U.S.C. 351, 352, 360, 360f, 360h, 360i, or 360j)), or any combination of such sections) are sufficient to provide a reasonable assurance of the safety and effectiveness of the device; or those devices for which insufficient information exists to determine that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide such assurance, but because the devices are not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and do not present a potential unreasonable risk of illness or injury, are to be regulated by general controls (section 513(a)(1)(A) of the FD&C Act).

Class II devices are those devices for which general controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness, and for which there is

sufficient information to establish special controls to provide such assurance, including the promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and other appropriate actions as the Agency deems necessary to provide such assurance (section 513(a)(1)(B) of the FD&C Act).

Class III devices are those devices for which insufficient information exists to determine that general controls and special controls would provide a reasonable assurance of safety and effectiveness, and are purported or represented for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present a potential unreasonable risk of illness or injury (section 513(a)(1)(C) of the FD&C Act).

FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), as "preamendments devices." Pursuant to section 513(d)(1) of the FD&C Act, FDA classifies these devices after FDA: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device (section 513(d)(1) of the FD&C Act). FDA has classified most preamendments devices under these procedures and has followed these procedures to classify posterior cervical screw systems.

IV. Comments on the Proposed Rule and FDA Response

A. Introduction

FDA received four sets of comments on the proposed rule by the close of the comment period. One of the comments received was regarding a different device type that is not associated with posterior cervical screw systems and is thus outside the scope of the rule. We describe and respond to the applicable comments in section IV.B and C. We have grouped certain comments under the same number because the subject matter of the comments is similar; conversely, in some cases, we have separated different issues discussed in the same comment and designated them as distinct comments, with separate numbers. The number assigned to each comment or comment topic is purely for organizational purposes and does not signify the comment's value or

importance or the order in which it was received.

B. Description of General Comments and FDA Response

All comments within the scope of the rulemaking support FDA's proposed classification of posterior cervical screw systems into class II (special controls). One commenter notes that it supports the proposed classification of the device because "the use of posterior cervical screw systems has been the standard of care for surgical management of cervical spine disorders arising from tumor, trauma, degenerative [sic] disease and deformity for approximately 20 years." FDA agrees that the device type is well understood, which enables the establishment of special controls that provide a reasonable assurance of safety and effectiveness for these devices.

C. Specific Comments and FDA Response

(Comment 1) A commenter suggests removing the phrase "utilizing pedicle and lateral mass screws" when identifying and referring to posterior cervical screw systems as there are additional screw types that fall within these systems.

(Response 1) FDA agrees with this comment and has revised each relevant instance of this language within the regulation accordingly (*i.e.*, the recommended Precaution statement in § 888.3075(b)(5)(iii)(A) (21 CFR 888.3075(b)(5)(iii)(A)).

(Comment 2) A commenter recommends revising the proposed identification of "posterior cervical screw systems" to remove the specification of spinal levels for specific screw types listed in the identification and replacing it with a range of spinal levels applicable to all screw types utilized in the device.

(Response 2) FDA disagrees with the proposed edits to the identification language. Evidence in the scientific literature is not adequate to support the use of pars screws, translaminar screws, and transarticular screws outside of the specified level (C2) based upon anatomic differences between C2 and other levels. Therefore, this change is not accepted.

(Comment 3) A commenter notes that, while the preamble to the proposed rule specified that posterior cervical screw systems do not include dynamic features, the examples of dynamic features listed in the proposed identification language included "non-uniform" elements, which could be interpreted to include dual-diameter rods that may be a component of current posterior cervical screw systems. A

dual-diameter rod is a rigid rod that transitions between two different diameters along its length.

(Response 3) FDA agrees that dual-diameter rods are often part of rigid posterior cervical screw systems and that the proposed identification language should be revised to clarify that dual diameter rods or plate/rod combinations are examples of "longitudinal members," which may be included in posterior cervical screw systems. We have also revised the identification to specify that posterior cervical screw systems are rigidly fixed devices that do not contain dynamic features, including but not limited to, non-uniform longitudinal elements or features that allow more motion or flexibility compared to rigid systems.

(Comment 4) A commenter notes inconsistencies or errors in the indications for use in the proposed rule.

(Response 4) FDA agrees with this comment and has revised the indications for use within § 888.3075 to correct the noted errors. FDA has also clarified the language specifying the indications for use by replacing "degenerative disease" with "degeneration" to more appropriately reference the state to be treated and replacing "radiographic studies" with "imaging studies (radiographs, computed tomography, magnetic resonance imaging)" to account for the various imaging modalities that may be used in preoperative planning prior to implantation of a posterior cervical screw system.

(Comment 5) A commenter suggests that "wear" be removed from the list of potential means by which a device could fail.

(Response 5) FDA disagrees with this comment. Posterior cervical screw systems are comprised of multiple interconnecting components that have the potential to generate wear during spinal motion. Therefore, the definition of device failure has not been modified.

(Comment 6) A commenter recommends removing "design characteristics" as a special control because this item should be a requirement of all premarket notifications.

(Response 6) FDA disagrees with this comment. FDA considers the "design characteristics" special control necessary to help differentiate technological features for rigid posterior cervical screw systems, included within the scope of this regulation, from features considered to be dynamic.

(Comment 7) A commenter recommends revising the biocompatibility special control to be "compliance with biocompatibility

standards" rather than "[d]evice components must be demonstrated to be biocompatible" because the majority of posterior cervical screw systems are made of materials that have a long history of safe use and, as such, are compatible with standards. Testing for compliance with biocompatibility standards would be relevant only for alternative or new materials.

(Response 7) FDA disagrees with this comment. The FD&C Act and FDA's regulations allow for flexibility in the methods for addressing certain regulatory requirements. Specifically, the substantial equivalence section of the FD&C Act (section 513(i)(1)(D)) states whenever the Secretary of Health and Human Services (the Secretary) requests information to demonstrate that devices with differing technological characteristics are substantially equivalent, the Secretary shall only request information that is necessary to making substantial equivalence determinations. In making such a request, the Secretary shall consider the least burdensome means of demonstrating substantial equivalence and request information accordingly. Hence, there may be alternatives to FDA-recognized consensus standards to satisfy the special control related to the biocompatibility of devices within this device type.

(Comment 8) A commenter suggests modifying the first precaution within the labeling special control (§ 888.3075(b)(5)(iii)(a)) to include "nerve roots" as an anatomical structure to consider during preoperative planning.

(Response 8) FDA agrees with this comment. This precaution has been revised to include a reference to "neurologic structures."

(Comment 9) A commenter suggests that, within the Economic Analysis section of the proposed rule, it is unclear whether or not the required addition of precautions to the device labeling would require manufacturers to submit a new 510(k) for devices already on the market and recommends that we explicitly state that such a submission would not be required to revise the labeling for devices already on the market to add the precautions.

(Response 9) FDA disagrees with this comment. As in the proposed rule, the language in the Economic Analysis of the final rule (see Ref. 1) states, "It is not expected that manufacturers of devices already on the market would need to submit new 510(k) notifications, 510(k) amendments, or add-to-files to demonstrate conformance with the special controls," which includes the

addition of the specified precaution statement.

(Comment 10) A commenter recommends minor editorial revisions to the risks and descriptive text associated with risks as outlined in the proposed rule.

(Response 10) FDA disagrees with this comment. The recommended edits were minor and would not substantively change the meaning of the risks and associated mitigations for the device; therefore, we do not accept these suggested edits in this final rule.

V. Effective Date

This final rule will become effective 30 days after its publication in the Federal Register.

VI. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. We have identified 16 manufacturers that could be considered small entities. Two of these manufacturers each produce two devices covered by this rule. Because our final regulatory impact analysis finds that more small entities will incur relatively low costs to comply with the final rule than estimated in our preliminary regulatory impact analysis, we have decided not to certify the final rule and find that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any

rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$150 million, using the most current (2017) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

This final rule classifies posterior cervical screw systems as class II devices with special controls. Although these devices are currently unclassified, manufacturers are subject to premarket requirements similar to class II devices, with manufacturers receiving clearance to market via a 510(k) submission without a PMA requirement. We have concluded that special controls in addition to general controls are sufficient to reasonably ensure the safety and effectiveness of these devices and that these devices may be classified as class II (special controls).

Table 1 provides the Regulatory Information Service Center and Office of Information and Regulatory Affairs Combined Information System accounting information for this analysis.

TABLE 1—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF FINAL RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized Monetized \$millions/year.	.....	.....	.....	2016	7	10	
Annualized Quantified .....	.....	.....	.....	2016	3	10	
Qualitative				2016	7	10	
Qualitative				2016	3	10	
Costs:							
Annualized Monetized \$millions/year.	0.063	.....	.....	2016	7	10	
Annualized Quantified	0.053	.....	.....	2016	3	10	
Qualitative				2016	7	10	
Qualitative				2016	3	10	
Transfers:							
Federal Annualized Monetized \$millions/year.	.....	.....	.....	2016	7	10	
Federal Annualized Monetized \$millions/year.	.....	.....	.....	2016	3	10	
From:				To:			
Other Annualized Monetized \$millions/year.	.....	.....	.....	2016	7	10	
Other Annualized Monetized \$millions/year.	.....	.....	.....	2016	3	10	
From:				To:			
Effects:							
State, Local or Tribal Government:							
Small Business:							
Wages:							
Growth:							

In line with Executive Order 13771, in table 2, we estimate present and annualized values of costs and cost

savings over an infinite time horizon. Based on these costs, we consider this

final rule a regulatory action under Executive Order 13771.

TABLE 2—E.O. 13771 SUMMARY TABLE
 [In \$ millions 2016 dollars, over an infinite time horizon]

	Primary (7%)	Lower bound (7%)	Upper bound (7%)	Primary (3%)	Lower bound (3%)	Upper bound (3%)
Present Value of Costs	0.5	.....	.....	0.5	.....	.....
Present Value of Cost Savings .....	.....	.....	.....	.....	.....	.....
Present Value of Net Costs	0.5	.....	.....	0.5	.....	.....
Annualized Costs	0.033	.....	.....	0.015	.....	.....
Annualized Cost Savings .....	.....	.....	.....	.....	.....	.....
Annualized Net Costs	0.033	.....	.....	0.015	.....	.....

We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. The full analysis of economic impacts is available in the docket for this final rule (Ref. 1) and at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

VII. Analysis of Environmental Impact

We have determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Paperwork Reduction Act of 1995

This final rule establishes special controls that refer to currently approved collections of information found in other 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 (PRA) (44 U.S.C. 3501–3520). 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 801 have been approved under OMB control number 0910–0485; and the collections of information in 21 CFR part 807 have been approved under OMB control number 0910–0625. The precaution labeling provisions in § 888.3075(b)(5) are not subject to review by OMB because they do not constitute a “collection of information” under the PRA. Rather, the following labeling in § 888.3075(b)(5)(iii)(A) and (b)(5)(iii)(B) is a public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public (5 CFR 1320.3(c)(2)).

IX. Consultation and Coordination With Indian Tribal Governments

We have analyzed this rule in accordance with the principles set forth in Executive Order 13175. We have

determined that the rule does not contain policies that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the Executive Order and, consequently, a tribal summary impact statement is not required.

X. Reference

The following reference is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m. Monday through Friday; it is also available electronically at <https://www.regulations.gov>. FDA has verified the website address, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. The full analysis of economic impacts is available in Docket No. FDA–2015–N–3785 for this final rule at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

List of Subjects in 21 CFR Part 888

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 888 is amended as follows:

PART 888—ORTHOPEDIC DEVICES

■ 1. The authority citation for part 888 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 888.3075 to subpart D to read as follows:

§ 888.3075 Posterior cervical screw system.

(a) *Identification.* Posterior cervical screw systems are comprised of multiple, interconnecting components,

made from a variety of materials that allow an implant system to be built from the occiput to the upper thoracic spine to fit the patient’s anatomical and physiological requirements, as determined by preoperative cross-sectional imaging. Such a spinal assembly consists of a combination of bone anchors via screws (*i.e.*, occipital screws, cervical lateral mass screws, cervical pedicle screws, C2 pars screws, C2 translaminar screws, C2 transarticular screws), longitudinal members (*e.g.*, plates, rods, including dual diameter rods, plate/rod combinations), transverse or cross connectors, interconnection mechanisms (*e.g.*, rod-to-rod connectors, offset connectors), and closure mechanisms (*e.g.*, set screws, nuts). Posterior cervical screw systems are rigidly fixed devices that do not contain dynamic features, including but not limited to: non-uniform longitudinal elements or features that allow more motion or flexibility compared to rigid systems.

Posterior cervical screw systems are intended to provide immobilization and stabilization of spinal segments in patients as an adjunct to fusion for acute and chronic instabilities of the cervical spine and/or craniocervical junction and/or cervicothoracic junction such as: (1) Traumatic spinal fractures and/or traumatic dislocations; (2) deformities; (3) instabilities; (4) failed previous fusions (*e.g.*, pseudarthrosis); (5) tumors; (6) inflammatory disorders; (7) spinal degeneration, including neck and/or arm pain of discogenic origin as confirmed by imaging studies (radiographs, CT, MRI); (8) degeneration of the facets with instability; and (9) reconstruction following decompression to treat radiculopathy and/or myelopathy. These systems are also intended to restore the integrity of the spinal column even in the absence of fusion for a limited time period in patients with advanced stage tumors involving the cervical spine in whom life expectancy is of insufficient duration to permit achievement of fusion.

(b) *Classification.* Class II (special controls). The special controls for posterior cervical screw systems are:

(1) The design characteristics of the device, including engineering schematics, must ensure that the geometry and material composition are consistent with the intended use.

(2) Nonclinical performance testing must demonstrate the mechanical function and durability of the implant.

(3) Device components must be demonstrated to be biocompatible.

(4) Validation testing must demonstrate the cleanliness and sterility of, or the ability to clean and sterilize, the device components and device-specific instruments.

(5) Labeling must include the following:

(i) A clear description of the technological features of the device including identification of device materials and the principles of device operation;

(ii) Intended use and indications for use including levels of fixation;

(iii) Device specific warnings, precautions, and contraindications that include the following statements:

(A) "Precaution: Preoperative planning prior to implantation of posterior cervical screw systems should include review of cross-sectional imaging studies (e.g., CT and/or MRI) to evaluate the patient's cervical anatomy including the transverse foramen, neurologic structures, and the course of the vertebral arteries. If any findings would compromise the placement of these screws, other surgical methods should be considered. In addition, use of intraoperative imaging should be considered to guide and/or verify device placement, as necessary."

(B) "Precaution: Use of posterior cervical pedicle screw fixation at the C3 through C6 spinal levels requires careful consideration and planning beyond that required for lateral mass screws placed at these spinal levels, given the proximity of the vertebral arteries and neurologic structures in relation to the cervical pedicles at these levels."

(iv) Identification of magnetic resonance (MR) compatibility status;

(v) Cleaning and sterilization instructions for devices and instruments that are provided non-sterile to the end user, and;

(vi) Detailed instructions of each surgical step, including device removal.

Dated: March 22, 2019.

Scott Gottlieb,

Commissioner of Food and Drugs.

[FR Doc. 2019-06024 Filed 3-29-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 478 and 479

[Docket No. ATF 2014R-42; AG Order No. 4419-2019]

Removal of Expired Regulations Concerning Commerce in Firearms and Ammunition and Machine Guns, Destructive Devices, and Certain Other Firearms

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule makes technical amendments to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations in the Code of Federal Regulations (CFR). These technical changes are being made to remove expired, obsolete, or unnecessary regulations; correct specific headings; and to reflect changes to nomenclature resulting from the transfer of ATF to the Department of Justice pursuant to the Homeland Security Act of 2002. The changes are designed to update and provide clarity throughout these regulations.

DATES: This rule is effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Shermaine Kenner, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648-7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

ATF administers regulations published in 27 CFR part 478, concerning commerce in firearms and ammunition, and part 479, concerning machine guns, destructive devices, and certain other firearms. ATF identified several technical amendments that are needed to provide clarity and accuracy to these regulations.

The technical changes made in this rule include the removal of expired regulations and regulations that are no longer applicable; the correction of section headings for accuracy; and a change in nomenclature resulting from the transfer of ATF to the Department of Justice from the Department of the Treasury pursuant to the Homeland Security Act of 2002.

Several sections are being removed or amended because the statute that formed the basis of those regulations is no longer in effect. The Public Safety and Recreational Firearms Act (the Act), enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322, Title XI (1994), established a 10-year prohibition on the manufacture, transfer, or possession of "semiautomatic assault weapons," as defined in the Act, as well as large capacity feeding devices. The Act expired on September 13, 2004, and ATF is removing or amending the following regulatory provisions that had, in whole or in part, implemented that Act and are therefore no longer effective:

Sections 478.40, 478.40a, 478.119, 478.132, and 478.153 are being removed and reserved as they are no longer effective.

Section 478.57 is being amended to remove paragraphs (b) and (c) as they are no longer effective.

Section 478.92 is being amended to remove the section heading and replace it with a heading that does not contain "large capacity ammunition feeding devices", and to remove paragraphs (a)(3) and (c), as they are no longer effective.

Section 478.116 is being amended to remove all references to "ammunition feeding device" as those references are no longer effective.

Section 478.171 is being amended to remove the last sentence referencing exportation of semiautomatic assault weapons as it is no longer effective.

The final rule makes two additional technical changes. First, § 478.95 is being amended to reflect the correct section number as a result of the transfer of ATF to the Department of Justice from the Department of Treasury pursuant to the Homeland Security Act of 2002. Second, § 479.32 is being amended to remove paragraphs (a) and (c) referencing special occupational tax rates prior to January 1988, as the information is obsolete.

II. Statutory Orders and Executive Review

A. Executive Orders 12866, 13563, and 13771

This rule has been drafted and reviewed in accordance with Executive Orders 12866, "Regulatory Planning and Review," section 1(b), The Principles of Regulation; Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation; and Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs."

This rule makes technical corrections to eliminate outdated and incorrect terminology and improve the clarity of the regulations, and makes no substantive changes. The Department has determined that this final rule is not a “significant regulatory action” as defined in Executive Order 12866, section 3(f). Accordingly, this final rule has not been reviewed by the Office of Management and Budget.

Finally, because this rule is not a significant regulatory action, it is not subject to the requirements of Executive Order 13771. There are no costs associated with this regulation; however, it benefits the industry in that it removes outdated regulations and provides clarity for the regulated industry. Because there are no costs associated with this final rule, there are no monetized benefits. This rule is considered a deregulatory action under Executive Order 13771.

B. Executive Order 13132

This final rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, “Federalism,” the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

D. Administrative Procedure Act

Under the Administrative Procedure Act (“APA”), 5 U.S.C. 553(b)(3)(B), an agency may, for good cause, find the usual requirements of prior notice and comment are impracticable, unnecessary, or contrary to the public interest. Currently, 27 CFR parts 478 and 479 contain references to expired regulations and have obsolete, outdated, and incorrect terminology that may be confusing to the public. The rule makes technical corrections to improve the clarity and accuracy of the regulations and makes no substantive changes. For these reasons, the agency has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment is unnecessary.

Further, the APA permits an agency to make this rule effective upon the date of

publication because it is not a substantive rule. See 5 U.S.C. 553(d). Furthermore, the Department finds that there is good cause for the final rule to take effect upon publication, since the revisions made by this rule are minor, non-substantive, and technical, and there is no reason to delay these changes. *Id.*

E. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 603, 604, and 605(b), a Regulatory Flexibility Analysis is not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1535.

G. Paperwork Reduction Act of 1995

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. 3501–3521.

H. Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804.

List of Subjects

27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Customs duties and inspection, Exports, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

27 CFR Part 479

Administrative practice and procedure, Arms and munitions, Excise taxes, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Transportation.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR parts 478 and 479 are amended as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

§ 478.40 [Removed and Reserved]

■ 2. Remove and reserve § 478.40.

§ 478.40a [Removed]

■ 3. Remove § 478.40a.

§ 478.57 [Amended]

■ 4. Amend § 478.57 by removing paragraphs (b) and (c) and redesignating paragraph (a) as an undesignated paragraph.

■ 5. Amend § 478.92 by revising the section heading, removing and reserving paragraph (a)(3), and removing paragraph (c) to read as follows:

§ 478.92 Identification of firearms and armor piercing ammunition by licensed manufacturers and licensed importers.

* * * * *

§ 478.95 [Amended]

■ 6. Amend § 478.95 by removing “178.94” and adding in its place “478.94” and removing “(a)” and “(b)”.

§ 478.116 [Amended]

■ 7. Amend § 478.116 by removing “ammunition, or ammunition feeding device as defined in § 478.119(b)” and “ammunition, or ammunition feeding device” everywhere they appear and adding in their place “or ammunition”.

§ 478.119, 478.132, and 478.153 [Removed and Reserved]

■ 8. Remove and reserve §§ 478.119, 478.132, and 478.153.

§ 478.171 [Amended]

■ 9. Amend § 478.171 by removing “semiautomatic assault weapons” in the last sentence of the paragraph.

PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

■ 10. The authority citation for 27 CFR part 479 continues to read as follows:

Authority: 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

§ 479.32 [Amended]

■ 11. Amend § 479.32 by removing paragraphs (a) and (c) and redesignating paragraph (b) as an undesignated paragraph.

Dated: March 25, 2019.

William P. Barr,

Attorney General.

[FR Doc. 2019-06264 Filed 3-29-19; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 555

[Docket No. ATF 2002R-226F; AG Order No. 4418-2019]

RIN 1140-AA27

Separation Distances of Ammonium Nitrate and Blasting Agents From Explosives or Blasting Agents

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to remove the reference to an outdated guidance document in an explanatory note following the table of separation distances of ammonium nitrate and blasting agents from explosives or blasting agents. This final rule also clarifies that those separation distance requirements apply to all ammonium nitrate.

DATES: *Effective Date:* May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Denise Brown, Enforcement Programs and Services, Office of Regulatory Affairs, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648-7070.

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General has delegated to the Director of ATF responsibility for administering and enforcing title XI, Regulation of Explosives, of the Organized Crime Control Act of 1970 (OCCA), Public Law 91-452, as amended, 18 U.S.C. chapter 40. See 18 U.S.C. 847; 28 CFR 0.130. Congress has declared that the purpose of the OCCA, is to reduce the “hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials.” Public Law 91-452, title XI, sec. 1101. Regulations in 27 CFR part 555 implement title XI.

The regulations at 27 CFR 555.220 set forth a table of separation distances of

ammonium nitrate and blasting agents from explosives or blasting agents (the § 555.220 Table of Distances) followed by six explanatory notes. In this table, the term “separation distance” means the minimum distance that must be maintained between stores of certain materials, such as high explosives, and blasting agents. The third note states that the distances specified in the § 555.220 Table of Distances “apply to ammonium nitrate that passes the insensitivity test prescribed in the definition of ammonium nitrate fertilizer issued by the Fertilizer Institute” in its “Definition and Test Procedures for Ammonium Nitrate Fertilizer.”

The Fertilizer Institute (TFI) is a voluntary, non-profit trade association that currently has more than 160 members. See Membership List, The Fertilizer Institute, <http://www.tfi.org/about-tfi/members> (last visited February 13, 2019). Members include importers, wholesalers, retailers, and others involved in the fertilizer industry. *Id.*

The Agricultural Nitrogen Institute, a predecessor organization of TFI, first developed the “Definition and Test Procedures for Ammonium Nitrate Fertilizer” guidance document. See The Fertilizer Institute, Definition and Test Procedures for Ammonium Nitrate Fertilizer (Aug. 1984), available at <https://www.atf.gov/resource-center/docs/guide/definition-and-test-procedures-ammonium-nitrate-fertilizer/download> (last visited February 13, 2019). In May 1984, TFI assembled a task force of industry and government representatives who were “experts on the physical and chemical characteristics of ammonium nitrate fertilizer” to review and update the document. *Id.* at i. “Based on that review and the technical expertise and experience of the task force members, TFI published” a revised guidance document in August 1984 (the August 1984 guidance). *Id.* The August 1984 guidance defines ammonium nitrate fertilizer as “solid ammonium nitrate containing a minimum of 33.0% nitrogen, having a minimum pH of 4.0 in a 10% aqueous solution, 0.20% maximum carbon, 0.010% maximum elemental sulfur, 0.150% maximum chloride as Cl, or particulated elemental metals sufficient to release 4.60 ml, maximum, of hydrogen from 50.0 gram sample and which will pass the detonation resistance test in Section 2.0 and the burning test in Section 4.0.” *Id.* at 1.

A. The Fertilizer Institute Petition

On March 19, 2002, TFI filed a petition with ATF requesting that ATF

amend the explosives regulations at § 555.220 to remove the reference to the August 1984 guidance. TFI explained that the document is outdated because TFI last published it in 1984, will not review or update it, and cannot ensure that its procedures are still valid. TFI recognized that ATF may require an alternate method of determining the insensitivity of ammonium nitrate fertilizer and suggested that ATF reference certain Department of Transportation (DOT) regulations.

The DOT regulations include several definitions and two hazardous classifications (Class 5.1 and Class 9) for ammonium nitrate based fertilizers based, in part, on the amount of combustible material included in the fertilizer. See 49 CFR 172.101. Class 5.1 ammonium nitrate based fertilizer is defined as a uniform mixture of fertilizer with ammonium nitrate as the main ingredient within the following composition limits: (1) Not less than 90 percent ammonium nitrate with not more than 0.2 percent total combustible, organic material calculated as carbon, and with added matter, if any, that is inorganic and inert when in contact with ammonium nitrate; or (2) less than 90 percent but more than 70 percent ammonium nitrate with other inorganic materials, or more than 80 percent but less than 90 percent ammonium nitrate mixed with calcium carbonate or dolomite or mineral calcium sulphate, and not more than 0.4 percent total combustible, organic material calculated as carbon; or (3) ammonium nitrate based fertilizers containing mixtures of ammonium nitrate and ammonium sulphate with more than 45 percent but less than 70 percent ammonium nitrate, and not more than 0.4 percent total combustible, organic material calculated as carbon such that the sum of the percentage of compositions of ammonium nitrate and ammonium sulphate exceeds 70 percent. See 49 CFR 172.102(c)(1), code/special provision 150.

The 5.1 ammonium nitrate fertilizer classification can only be used for substances that are too insensitive for acceptance into Class 1 (explosive) when tested in accordance with Test Series 2 in the United Nations (UN) Manual of Tests and Criteria, Part 1. See 49 CFR 172.101, 172.102(c)(1) code/special provisions 52 and 150. To determine whether a material falls within Class 5, Division 5.1, DOT requires regulated parties to conduct tests in accordance with international standards in the UN Manual of Tests and Criteria. See 49 CFR 173.127(a).

Class 9 ammonium nitrate based fertilizer is defined as a uniform,

ammonium nitrate based fertilizer mixture containing nitrogen, phosphate, or potash with not more than 70 percent ammonium nitrate and not more than 0.4 percent total combustible, organic material calculated as carbon or with not more than 45 percent ammonium nitrate and unrestricted combustible material. See 49 CFR 172.101, 172.102(c)(1) code/special provision 132.

B. Advance Notice of Proposed Rulemaking

On September 16, 2010, based upon TFI's petition, ATF published in the **Federal Register** an advance notice of proposed rulemaking (ANPRM). 75 FR 56489. ATF requested information from explosives industry members, trade associations, consumers, and all other interested parties to determine whether a replacement reference for the August 1984 guidance is necessary, and, if so, whether there are any alternate methods available to determine the insensitivity of ammonium nitrate fertilizer. ATF solicited comments on 10 specific questions as well as any relevant information on the subject. The comment period for the ANPRM closed on December 15, 2010.

In response to the ANPRM, ATF received three comments. One commenter is the petitioner, one commenter is the Institute of Makers of Explosives (IME), an explosives trade association, and the third commenter is an associate member of the same explosives trade association. All three commenters were in support of removing the reference to the August 1984 guidance and adopting DOT regulations for classifying ammonium nitrate fertilizer in accordance with the UN Manual of Tests and Criteria.

II. Notice of Proposed Rulemaking

On May 29, 2015, ATF published a notice of proposed rulemaking (NPRM) in the **Federal Register** (80 FR 30633) that requested comments on its proposed rule to amend the regulations governing the separation distances of ammonium nitrate and blasting agents from explosives or blasting agents. ATF proposed in the NPRM to remove reference to the August 1984 guidance following the § 555.220 Table of Distances and clarify that all ammonium nitrate is subject to 27 CFR 555.206(c)(2) and the § 555.220 Table of Distances. The comment period for the NPRM closed on August 27, 2015.

The proposed rule did not include the change suggested by one of the commenters on the ANPRM, to replace the current reference to the August 1984 guidance document with a reference to

the UN Test Series 1 and 2 Gap Tests because the recommended test methods do not address all of the hazards encountered during all processes involving dangerous goods. Under common circumstances, such as during handling and storage, certain characteristics of ammonium nitrate can change and make the material more sensitive and susceptible to accidental detonation. Because these changes may occur long after the evaluation of suitability for classification under the UN testing regime occurs (following manufacture and prior to first transportation), the application of such a test, and the assignment of a UN classification for transportation may not accurately reflect the susceptibility of the material to accidental detonation throughout its lifespan. Additionally, ATF is unaware of any commercially-produced ammonium nitrate manufactured for use with, and stored in proximity of, explosives that would not fall under the § 555.220 Table of Distances, using the UN Test Series 1 and 2 Gap Tests under the commenter's suggested amendments. Thus, the Department preferred amending the third note following the § 555.220 Table of Distances to delete the reference to the August 1984 guidance and stating that all ammonium nitrate stored near high explosives and blasting agents is subject to the § 555.220 Table of Distances. These changes would be cost effective for the affected industry and maintain public safety.

III. Analysis of Comments on the NPRM and Department Response

A. Comments Received

ATF received one comment in response to the NPRM. The commenter, IME, also responded with a comment to the 2010 ANPRM. Once again, IME generally supports ATF's proposed changes with one suggested amendment. While IME appreciates ATF's efforts to "minimize costs to industry associated with regulatory compliance, and its actions to update and streamline its rules," IME suggests that by "expanding its rules to regulate 'all A[mmonium] N[itrate],' ATF's Table of Distances will continue to differ materially from its source document, the IME's American Table of Distances (ATD), and the current National Fire Protection Association publication 495, both of which reference UN test procedures for A[mmonium] N[itrate]." IME recommends that, in order to avoid any confusion that the removal of the TFI definition might engender, the word "solid" should be added to note (3) to the table in § 555.220 so it reads as

follows: (3) These distances apply to all *solid* ammonium nitrate with respect to their separation from stores of high explosives and blasting agents

B. Department Response

TFI's 1984 Definition and Test Procedures for Ammonium Nitrate Fertilizer addressed solid ammonium nitrate containing, in part, a minimum of 33 percent nitrogen that passed a detonation and burning test. Since that time, the explosives industry has developed a variety of new ammonium nitrate based products for blasting operations, and continues to develop more efficient and effective explosive products. Therefore, the Department does not believe it is in the best interests of public safety to specify that only solid ammonium nitrate should be subject to 27 CFR 555.206(c)(2) and the § 555.220 Table of Distances. Retaining flexibility to include ammonium nitrate in other forms will ensure that the public is protected from stores of all ammonium nitrate stored in proximity to high explosives and blasting agent storage. Accordingly, the Department is not adopting IME's suggestion to clarify that only solid ammonium nitrate is subject to 27 CFR 555.206(c)(2) and the § 555.220 Table of Distances.

The Department believes that this final rule will not adversely affect the explosives industry because explosives industry members storing ammonium nitrate near stores of high explosives and blasting agents do not use the outdated August 1984 guidance referenced in the existing regulations and already comply with the § 555.220 Table of Distances for all ammonium nitrate. The final rule will remove an outdated reference from the regulations and replace it with clear guidance that the Department believes will have virtually no impact on the explosives industry. All ammonium nitrate will be subject to the § 555.220 Table of Distances when stored within the sympathetic detonation distances of high explosives and blasting agents listed under the table at § 555.220. Ammonium nitrate explosive mixtures that are high explosives pursuant to § 555.202(a), or are defined as a blasting agent pursuant to § 555.11, will be subject both to the table of distances for storage of explosives materials at § 555.218 and to the § 555.220 Table of Distances. The final rule will continue to protect public safety by ensuring that all stores of ammonium nitrate, located within sympathetic detonation distances to high explosives and blasting agents, meet the minimum distances to inhabited buildings, highways, and passenger railways.

IV. Final Rule

This final rule implements, without change, the amendments to the regulations in 27 CFR 555.220 that were specified in the NPRM.

V. Statutory and Executive Order Reviews

A. Executive Orders 12866, 13563 and 13771

Executive Orders 13563, “Improving Regulation and Regulatory Review,” and 12866, “Regulatory Planning and Review,” direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” directs agencies to reduce regulation and control regulatory costs.

The Attorney General has determined that this final rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB). As this rule is not a significant regulatory action, this rule is not a regulatory action subject to the requirements of Executive Order 13771. See OMB Memorandum, “Guidance Implementing Executive Order 13771, titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

As discussed below, this rule would not have any costs to industry because this rule puts into regulation current industry practices; therefore, the explosives industry would not need to incur any hourly or capital burdens in order to comply with these changes.

Section 6 of Executive Order 13563 directs agencies to develop a plan to review existing significant rules that may be “outmoded, ineffective, insufficient, or excessively burdensome,” and to make appropriate changes where warranted. The Department selected and reviewed this rule under the criteria set forth in its Plan for Retrospective Analysis of Existing Rules, and determined that this final rule removes a reference to an outdated guidance document, clarifies the existing regulations, and continues to protect public safety.

B. Executive Order 13132

This final rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, “Federalism,” the Attorney General has determined that this final rule will not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, the Attorney General certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule updates the affected regulations by removing a reference to an outdated guidance document. The changes in this final rule are administrative and do not add any new requirements that would have any impact on the economy because the referenced test in explanatory note three was last published in 1984, is obsolete, and is not used by the explosives industry; and the explosives industry already ensures their stores of ammonium nitrate are stored in accordance with the § 555.220 Table of Distances. Accordingly, this rule does not require any business, regardless of size, to incur any additional costs.

E. Congressional Review Act

This final rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This final rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year, and it will not significantly or uniquely affect small

governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

Disclosure

Copies of the petition, this notice, and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–8740.

Drafting Information

The author of this document is Denise Brown, Enforcement Programs and Services, Office of Regulatory Affairs, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Customs duties and inspection, Explosives, Hazardous substances, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, Warehouses.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 555 is amended as follows:

PART 555—COMMERCE IN EXPLOSIVES

- 1. The authority citation for 27 CFR part 555 continues to read as follows:

Authority: 18 U.S.C. 847.

- 2. In § 555.220, revise note (3) to the table to read as follows:

§ 555.220 Table of separation distances of ammonium nitrate and blasting agents from explosives or blasting agents.

* * * * *

(3) These distances apply to all ammonium nitrate with respect to its separation from stores of high explosives and blasting agents. Ammonium nitrate explosive mixtures that are high explosives pursuant to § 555.202(a) or are defined as a blasting agent pursuant to § 555.11 are subject to the table of distances for storage of explosive materials in § 555.218 and to the table of separation distances of ammonium nitrate and blasting agents

from explosives or blasting agents in this section.

* * * * *

March 25, 2019.

William P. Barr,

Attorney General.

[FR Doc. 2019-06266 Filed 3-29-19; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 269

[Docket ID: DOD-2016-OS-0045]

RIN 0790-AK40

Civil Monetary Penalty Inflation Adjustment

AGENCY: Under Secretary of Defense (Comptroller), Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense is issuing this final rule to adjust each of its statutory civil monetary penalties (CMP) to account for inflation. 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 (the 2015 Act), requires the head of each agency to adjust for inflation its CMP levels in effect as of November 2, 2015, under a revised methodology that was effective for 2016 and for each year thereafter.

DATES: This rule is effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Brian Banal, 703-571-1652.

SUPPLEMENTARY INFORMATION:

Background Information

The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890 (28 U.S.C. 2461, note), as amended by the Debt Collection Improvement Act of 1996, Public Law 104-134, April 26, 1996, and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), Public Law 114-74, November 2, 2015, required agencies to annually adjust the level of CMPs for inflation to improve their effectiveness and maintain their deterrent effect. The 2015 Act required that not later than July 1, 2016, and not later than January 15 of every year thereafter, the head of each agency must adjust each CMP within its jurisdiction by the inflation adjustment described in the 2015 Act. The inflation

adjustment is determined by increasing the maximum CMP or the range of minimum and maximum CMPs, as applicable, for each CMP by the cost-of-living adjustment, rounded to the nearest multiple of \$1. The cost-of-living adjustment is the percentage (if any) for each CMP by which the Consumer Price Index (CPI) for the month of October preceding the date of the adjustment, exceeds the CPI for the month of October in the previous calendar year.

The initial catch up adjustments for inflation to the Department of Defense's CMPs were published as an interim final rule in the **Federal Register** on May 26, 2016 (81 FR 33389-33391) and became effective on that date. The interim final rule was published as a final rule without change on September 12, 2016 (81 FR 62629-62631), effective that date. The revised methodology for agencies for 2019 and each year thereafter provides for the improvement of the effectiveness of CMPs and to maintain their deterrent effect. The Department of Defense is adjusting the level of all civil monetary penalties under its jurisdiction by the Office of Management and Budget (OMB) directed cost-of-living adjustment multiplier for 2019 of 1.02522 prescribed in OMB Memorandum M-19-04, "Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015," dated December 14, 2018. The Department of Defense's 2019 adjustments for inflation to CMPs apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Defense after the effective date of the new CMP level.

Statement of Authority and Costs and Benefits

Pursuant to 5 U.S.C. 553(b)B, there is good cause to issue this rule without prior public notice or opportunity for public comment because it would be impracticable and unnecessary. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701(b)) requires agencies, effective 2017, to make annual adjustments for inflation to CMPs notwithstanding section 553 of title 5, United States Code. Additionally, the methodology used, effective 2017, for adjusting CMPs for inflation is established in statute, with no discretion provided to agencies regarding the substance of the adjustments for inflation to CMPs. The Department of Defense is charged only with performing ministerial

computations to determine the dollar amount of adjustments for inflation to CMPs.

Further, there are no significant costs associated with the regulatory revisions that would impose any mandates on the Department of Defense, Federal, State or local governments, or the private sector. Accordingly, prior public notice and an opportunity for public comment are not required for this rule. The benefit of this rule is the Department of Defense anticipates that civil monetary penalty collections may increase in the future due to new penalty authorities and other changes in this rule. However, it is difficult to accurately predict the extent of any increase, if any, due to a variety of factors, such as budget and staff resources, the number and quality of civil penalty referrals or leads, and the length of time needed to investigate and resolve a case.

Regulatory Procedures

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

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a "significant regulatory action," and was not reviewed by the Office of Management and Budget.

Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs"

This final rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

Unfunded Mandates Reform Act (2 U.S.C. Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule the mandates of which require spending in any year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will not mandate any requirements for State, local, or tribal

governments, nor will it affect private sector costs.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

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

The Department of Defense determined that provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. Chapter

35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

Executive Order 13132, "Federalism"

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 269

Administrative practice and procedure, Penalties.

Accordingly, 32 CFR part 269 is amended as follows.

PART 269—[AMENDED]

■ 1. The authority citation for part 269 continues to read as follows:

Authority: 28 U.S.C. 2461 note.

■ 2. In § 269.4, revise paragraph (d) to read as follows:

§ 269.4 Cost of living adjustments of civil monetary penalties.

* * * * *

(d) *Inflation adjustment.* Maximum civil monetary penalties within the jurisdiction of the Department are adjusted for inflation as follows:

United States Code	Civil monetary penalty description	Maximum penalty amount as of 01/15/18	New adjusted maximum penalty amount
National Defense Authorization Act for FY 2005, 10 U.S.C 113, note.	Unauthorized Activities Directed at or Possession of Sunken Military Craft.	\$129,211	\$132,470
10 U.S.C. 1094(c)(1)	Unlawful Provision of Health Care	11,346	11,632
10 U.S.C. 1102(k)	Wrongful Disclosure—Medical Records:		
	First Offense	6,709	6,878
	Subsequent Offense	44,726	45,854
10 U.S.C. 2674(c)(2)	Violation of the Pentagon Reservation Operation and Parking of Motor Vehicles Rules and Regulations.	1,848	1,895
31 U.S.C. 3802(a)(1)	Violation Involving False Claim	11,181	11,463
31 U.S.C. 3802(a)(2)	Violation Involving False Statement	11,181	11,463

Dated: March 26, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019-06164 Filed 3-29-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG-2018-1102]

RIN 1625-AA08

Special Local Regulation; Chesapeake Bay, Between Sandy Point and Kent Island, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations for certain navigable waters of the Chesapeake Bay. This action is necessary to provide for the safety of life on these waters located between Sandy Point, Anne Arundel County, MD, and

Kent Island, Queen Anne's County, MD, on June 1, 2019, during a paddling event. This regulation prohibits persons and vessels from being in the regulated area unless authorized by the Captain of the Port Maryland-National Capital Region or Coast Guard Patrol Commander.

DATES: This rule is effective from 7 a.m. on June 1, 2019, until 1 p.m. on June 2, 2019. This rule will be enforced from 7 a.m. until 1 p.m. on June 1, 2019, or those same hours on June 2, 2019, in case of inclement weather.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2018-1102 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald Houck, U.S. Coast Guard Sector Maryland-National Capital Region; telephone 410-576-2674, email Ronald.L.Houck@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
 COTP Captain of the Port
 DHS Department of Homeland Security
 FR Federal Register
 NPRM Notice of proposed rulemaking
 PATCOM Coast Guard Patrol Commander
 § Section
 U.S.C. United States Code

II. Background Information and Regulatory History

On December 7, 2018, ABC Events, Inc. of Arnold, MD, notified the Coast Guard through submission of a marine event application that from 8 a.m. to noon on June 1, 2019, it will be conducting the Bay Bridge Paddle in the Chesapeake Bay, under and between the north and south bridges that consist of the William P. Lane, Jr. (US-50/301) Memorial Bridges, located between Sandy Point, Anne Arundel County, MD, and Kent Island, Queen Anne's County, MD. In the case of inclement weather, the kayak and stand up paddle board racing event is scheduled from 8 a.m. to noon on June 2, 2019. In response, on February 15, 2019, the Coast Guard published a notice of proposed rulemaking (NPRM) titled

“Special Local Regulation; Chesapeake Bay, Between Sandy Point and Kent Island, MD” (84 FR 4390). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this paddle race. During the comment period that ended March 18, 2019, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041. The Captain of the Port Maryland-National Capital Region (COTP) has determined that potential hazards associated with the paddle race will be a safety concern for anyone intending to operate in or near the race area. The purpose of this rule is to protect event participants, spectators, and transiting vessels on specified waters of the Chesapeake Bay before, during, and after the scheduled event.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published February 15, 2019. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a special local regulation to be enforced from 7 a.m. to 1 p.m. on June 1, 2019, and, if necessary due to inclement weather, from 7 a.m. to 1 p.m. on June 2, 2019. The regulated area will cover all navigable waters of the Chesapeake Bay, adjacent to the shoreline at Sandy Point State Park and between and adjacent to the spans of the William P. Lane Jr. Memorial Bridges, from shoreline to shoreline, bounded to the north by a line drawn from the western shoreline at latitude 39°01'05.23" N, longitude 076°23'47.93" W; thence eastward to latitude 39°01'02.08" N, longitude 076°22'40.24" W; thence southeastward to eastern shoreline at latitude 38°59'13.70" N, longitude 076°19'58.40" W; and bounded to the south by a line drawn parallel and 500 yards south of the south bridge span that originates from the western shoreline at latitude 39°00'17.08" N, longitude 076°24'28.36" W; thence southward to latitude 38°59'38.36" N, longitude 076°23'59.67" W; thence eastward to latitude 38°59'26.93" N, longitude 076°23'25.53" W; thence eastward to the eastern shoreline at latitude 38°58'40.32" N, longitude 076°20'10.45" W, located between Sandy Point and Kent Island, MD. The duration of the special local regulations and size of the regulated area are intended to ensure the safety of life on these navigable waters before, during, and after paddle races,

scheduled from 8 a.m. until noon on June 1, 2019 (rain date of June 2, 2019). Except for participants and vessels already at berth, a vessel or person will be required to get permission from the COTP or PATCOM before entering the regulated area. Vessel operators can request permission to enter and transit through the regulated area by contacting the PATCOM on VHF-FM channel 16. Vessel traffic will be able to safely transit the regulated area once the PATCOM deems it safe to do so. A person or vessel not registered with the event sponsor as a participant or assigned as Official Patrols would be considered a spectator. Official Patrols are any vessel assigned or approved by the Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign. If permission is granted by the COTP or PATCOM, a person or vessel will be allowed to enter the regulated area or pass directly through the regulated area as instructed. Vessels will be required to operate at a safe speed that minimizes wake while within the regulated area. Official Patrol vessels will direct spectator vessels while within the regulated area. Vessels will be prohibited from loitering within the navigable channel.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, duration and location of the regulated area, which will impact a small designated area of the Chesapeake Bay for 6 hours. The Coast Guard will issue a Broadcast Notice to Mariners via VHF-FM marine

channel 16 about the status of the regulated area. Moreover, the rule will allow vessels to seek permission to enter the regulated area, and vessel traffic will be able to safely transit the regulated area once the COTP or PATCOM deems it safe to do so.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

This rule will not call for a new collection of information under the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States. The temporary regulated area will be enforced for approximately six hours during the paddle race. It is categorically excluded

from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Memorandum For Record for Categorically Excluded Actions supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.501T05–1102 to read as follows:

§ 100.501T05–1102 Special Local Regulation; Chesapeake Bay, between Sandy Point and Kent Island, MD.

(a) *Regulated area.* The following location is a regulated area: All navigable waters of the Chesapeake Bay, adjacent to the shoreline at Sandy Point State Park and between and adjacent to the spans of the William P. Lane Jr. Memorial Bridges, from shoreline to shoreline, bounded to the north by a line drawn from the western shoreline at latitude 39°01'05.23" N, longitude 076°23'47.93" W; thence eastward to latitude 39°01'02.08" N, longitude 076°22'40.24" W; thence southeastward to eastern shoreline at latitude 38°59'13.70" N, longitude 076°19'58.40" W; and bounded to the south by a line drawn parallel and 500 yards south of the south bridge span that originates from the western shoreline at latitude 39°00'17.08" N, longitude 076°24'28.36" W; thence southward to latitude 38°59'38.36" N, longitude 076°23'59.67" W; thence eastward to latitude 38°59'26.93" N, longitude 076°23'25.53" W; thence eastward to the eastern shoreline at latitude 38°58'40.32" N, longitude 076°20'10.45" W, located between Sandy Point and Kent Island,

MD. All coordinates reference North American Datum 83 (NAD 1983)

(b) *Definitions.* As used in this section:

Captain of the Port (COTP) Maryland-National Capital Region means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region or any Coast Guard commissioned, warrant or petty officer who has been authorized by the COTP to act on the COTP's behalf.

Coast Guard Patrol Commander (PATCOM) means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Maryland-National Capital Region.

Official Patrol means a vessel assigned or approved by the Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

Participant means a person or vessel registered with the event sponsor as participating in the Bay Bridge Paddle event or otherwise designated by the event sponsor as having a function tied to the event.

Spectator means a person or vessel not registered with the event sponsor as a participant or assigned as an official patrol.

(c) *Special local regulations.* (1) The COTP Maryland-National Capital Region or PATCOM may forbid and control the movement of all vessels and persons, including event participants, in the regulated area. When hailed or signaled by an official patrol, a vessel or person in the regulated area must immediately comply with the directions given by the patrol. Failure to do so may result in the Coast Guard expelling the person or vessel from the area, issuing a citation for failure to comply, or both. The COTP Maryland-National Capital Region or PATCOM may terminate the event, or a participant's operations at any time the COTP Maryland-National Capital Region or PATCOM believes it necessary to do so for the protection of life or property.

(2) Except for participants and vessels already at berth, a person or vessel within the regulated area at the start of enforcement of this section must immediately depart the regulated area.

(3) A spectator must contact the PATCOM to request permission to either enter or pass through the regulated area. The PATCOM, and official patrol vessels enforcing this regulated area, can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz) and channel 22A (157.1 MHz). If permission is granted, the

spectator may enter the regulated area or pass directly through the regulated area as instructed by PATCOM. A vessel within the regulated area must operate at a safe speed that minimizes wake. A spectator vessel must not loiter within the navigable channel while within the regulated area.

(4) A person or vessel that desires to transit, moor, or anchor within the regulated area must first obtain authorization from the COTP Maryland-National Capital Region or PATCOM. A person or vessel seeking such permission can contact the COTP Maryland-National Capital Region at telephone number 410-576-2693 or on Marine Band Radio, VHF-FM channel 16 (156.8 MHz) or the PATCOM on Marine Band Radio, VHF-FM channel 16 (156.8 MHz).

(5) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF-FM marine band radio announcing specific event date and times.

(d) *Enforcement period.* This section will be enforced from 7 a.m. to 1 p.m. on June 1, 2019, and, if necessary due to inclement weather, from 7 a.m. to 1 p.m. on June 2, 2019.

Dated: March 27, 2019.

Joseph B. Loring,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2019-06204 Filed 3-29-19; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 105

[Docket No. USCG-2013-1087]

RIN 1625-AC15

Seafarers' Access to Maritime Facilities

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing a final rule requiring each owner or operator of a maritime facility regulated by the Coast Guard to implement a system providing seafarers, pilots, and representatives of seamen's welfare and labor organizations access between vessels moored at the facility and the facility gate, in a timely manner and at no cost to the seafarer or other individuals. These access procedures must be documented in the Facility Security Plan for each facility, and

approved by the local Captain of the Port. This final rule, which implements a congressional mandate, ensures that no facility owner or operator denies or makes it impractical for seafarers or other individuals to transit through the facility.

DATES: This final rule is effective May 1, 2019.

ADDRESSES: You may view supplemental material identified by docket number USCG-2013-1087 using the Federal eRulemaking Portal at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email LCDR Myles J. Greenway, Cargo and Facilities Division (CG-FAC-2), Coast Guard; telephone 202-372-1168, email Myles.J.Greenway@uscg.mil.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

- I. Abbreviations
- II. Basis and Purpose
- III. Regulatory History
- IV. Discussion of Comments and Changes
- V. Regulatory Analyses
 - A. Regulatory Planning and Review
 - B. Small Entities
 - C. Assistance for Small Entities
 - D. Collection of Information
 - E. Federalism
 - F. Unfunded Mandates Reform Act
 - G. Taking of Private Property
 - H. Civil Justice Reform
 - I. Protection of Children
 - J. Indian Tribal Governments
 - K. Energy Effects
 - L. Technical Standards
 - M. Environment

I. Abbreviations

- ASP Alternate Security Program
- ATB Articulated tug barge
- BLS U.S. Bureau of Labor Statistics
- CBP U.S. Customs and Border Protection
- CFR Code of Federal Regulations
- CGAA Coast Guard Authorization Act of 2010
- COTP Captain of the Port
- DHS Department of Homeland Security
- DoS Declaration of Security
- FR Federal Register
- FRFA Final Regulatory Flexibility Analysis
- FSO Facility security officer
- FSP Facility security plan
- ISPS Code International Ship and Port Facility Security Code
- ITB Integrated tug barge
- MISLE Marine Information for Safety and Law Enforcement
- MTSA Maritime Transportation Security Act of 2002
- NAICS North American Industry Classification System
- NPRM Notice of proposed rulemaking
- OMB Office of Management and Budget
- RA Regulatory analysis
- § Section symbol
- SBA Small Business Administration
- SCI Seamen's Church Institute
- SME Subject matter expert

TWIC Transportation Worker Identification Credential
U.S.C. United States Code

II. Basis and Purpose

Throughout the maritime sector, vessels arrive at facilities regulated by the Maritime Transportation Security Act of 2002 (MTSA) (Pub. L. 107-295, codified at 46 U.S.C. 70101 *et seq.*) for any number of commercial and other purposes. These vessels are operated by seafarers,¹ who are individuals assigned to work on a vessel and who may be at sea for days, weeks, or months as part of their employment on that vessel. Generally, transiting through a MTSA-regulated facility is the only way for seafarers to access the shore, and the services, businesses, family members, and friends, among other things, beyond the vessel and the facility. Additionally, individuals providing services for seafarers, or having another legitimate purpose for accessing the vessel, can generally access a vessel moored at an MTSA-regulated facility only by transiting through the facility.

Section 811 of the Coast Guard Authorization Act of 2010 (CGAA) (Pub. L. 111-281, codified at 46 U.S.C. 70103 note) requires facility owners and operators to ensure shore access for seafarers and other individuals. Specifically, section 811 requires each MTSA-regulated facility to "provide a system for seamen assigned to a vessel at that facility, pilots, and representatives of seamen's welfare and labor organizations to board and depart the vessel through the facility in a timely manner at no cost to the individual."

In addition, MTSA-regulated facilities must implement national maritime security initiatives, including the provision of security measures for access control. Coast Guard access-control regulations in title 33 of the Code of Federal Regulations (CFR), § 105.255, require MTSA-regulated facilities to control an individual's access to the facility and designate secure areas within the facility, unless the individual is either authorized to access that area or is escorted by someone who is authorized to access that area. Accordingly, facility owners and operators must consider the security implications of permitting seafarers and other individuals to transit through their facilities. Coast Guard regulations at 33 CFR 105.200(b)(9) require MTSA-regulated facilities to ensure coordination of shore leave for

¹ The terms "seafarer" and "seaman" are synonymous (as are their plural forms, "seafarers" and "seamen"), and are used interchangeably in this final rule.

these persons. Finally, the Coast Guard administers facility security plans under the authority of 46 U.S.C. 70103(c), which is delegated to the Coast Guard by DHS delegation number 0170.1 (II)(97)(b).

This regulatory action is necessary to help ensure that owners and operators of MTSA-regulated facilities provide seafarers and other covered individuals with the ability to transit through the facility in a timely manner, at no cost to the individuals. In addition, this regulatory action is necessary to help ensure that facility owners and operators provide the same no-cost access between a vessel and facility gate to covered individuals with a legitimate purpose for accessing the vessel. By statute, these individuals include representatives of seafarers' welfare and labor organizations, and pilots. Access by these statutorily authorized persons will be in accordance with the Facility Security Plan (FSP).

III. Regulatory History

On December 29, 2014, the Coast Guard published a notice of proposed rulemaking (NPRM) to solicit comments on Seafarers' Access to Maritime Facilities (79 FR 77981). We proposed requiring each owner or operator of a MTSA-regulated facility to implement a system allowing seafarers and other individuals to have access between vessels moored at the facility and the facility gate. Under the proposal, access should be in a timely manner and at no cost to the seafarer or other individual.

In that NPRM, we also published a notice of public meeting to solicit additional public comments. The Coast Guard held this public meeting in Washington, DC, on January 23, 2015.

The initial comment period on the NPRM closed on February 27, 2015. On May 27, 2015, we reopened the public comment period for an additional 60 days (80 FR 30189), based on comments requesting an extension of the comment period and also to specifically seek input on our estimate of a 10.3-percent noncompliance rate for facilities with respect to providing seafarers' access. We stated that we would consider all public comments on the NPRM received during the reopened comment period.

The second comment period closed on July 27, 2015 (80 FR 32512). In total, the Coast Guard received comments from 163 commenters. The commenters represented private individuals, port authorities, pilots' associations, industry groups, professional mariner associations, seafarers' unions, seafarers' churches and centers, other mariner non-governmental organizations, the

World Shipping Council, and the Company of Master Mariners of Canada.

As a result of the public comments received on the NPRM, we made two changes to this final rule. First, we changed the types of individuals to which the rule applies, to mirror section 811 of the CGAA (Pub. L. 111–281, codified at 46 U.S.C. 70103 note), by deleting the proposed category of “other authorized individuals”. Second, we changed the regulations to address concerns raised by commenters about the need to modify their facility security plans (FSPs) to accommodate the no-cost mandate of the rule.

Additionally, we proposed to add § 101.112 on federalism, but a rule published in 2016 put identical language in place, so we have removed that amendatory instruction (see 81 FR 57652, 57708, effective date August 23, 2018).

IV. Discussion of Comments and Changes

In this section, we organize the public comments we received into 18 categories. In each category, we feature a brief description of the comments and our responses to those comments.

(1) Transportation Worker Identification Credential Issues

This section discusses comments received on possible interaction between Transportation Worker Identification Credential (TWIC) requirements and the access requirements established by this final rule. As we explain in our responses that follow, this rule does not change existing TWIC requirements, and whether escorts are or are not required under TWIC rules does not affect the obligation to provide no-cost access to the seafarer. The facility has flexibility to decide how to comply with its TWIC requirements and the no-cost access requirements of this rule.

Several commenters noted that a TWIC should be sufficient identification for a mariner to have unescorted access to a facility.

While it may be possible on some facilities to design a system for unescorted access, the concern for secure areas of the facility remains paramount. To be granted unescorted access to the secure areas of a facility, the facility security regulations in 33 CFR 105.255 require a person to have a TWIC and to be authorized to access to the secure areas of a facility. A TWIC, by itself, does not satisfy the regulatory requirement and some facilities may opt for escorts to protect the secure areas of the facility. Other facilities may develop a system that does not require escorts.

Based upon the variety of scenarios under which a facility has the flexibility to decide how to comply with the TWIC and the no cost requirements of this rule, a facility has the option to use equipment and implement procedures that would allow unescorted access.

Congress requires MTSA-regulated facilities to grant access through the facility to seafarers at no cost to the seafarer. This rule does not change the requirement to escort or otherwise monitor the access of a person who is not authorized to have unescorted access to the facility.

A few commenters stated that seafarers may be precluded from taking taxis from the vessel to the facility gate because taxi drivers do not hold TWICs.

We recognize that the method of transfer between a vessel in port and the port facility gate may preclude certain options, such as taxis. It is also possible that taxi drivers could obtain TWICs and the Coast Guard is aware of several taxi companies that have drivers who have already obtained a TWIC. We are providing facility owners with the flexibility to implement a system to provide access that is tailored to each facility.

Other commenters expressed concern that the requirements for the seafarers' access program will duplicate existing TWIC escort requirements. They urged the Department of Homeland Security (DHS) to allow individual facilities under the Alternative Security Program (ASP) to add a seafarers' access system as an annex to their current FSP and to submit the annex to the Captain of the Port (COTP) for review and approval.

We concur with the comment. In lieu of amending the ASP and submitting the entire plan to the COTP for approval, the owner or operator of a facility covered under an ASP may submit an annex for each facility that explains how the facility will comply with the requirements of this final rule.

One commenter noted that the port of Port Everglades, Florida, is a restricted area inside a restricted area, and should not be accessed by any individual who does not possess a TWIC without a proper escort.

This final rule provides no-cost access for seafarers and other covered individuals to a port facility gate. Security of the facility or who has access to it should already be addressed by the FSP that was approved by the COTP for each port. Each port facility should ensure that its FSP is updated and approved to reflect the mandates of the law to provide no-cost access for seafarers and other covered individuals.

One commenter stated that “other authorized individuals” are generally

eligible to receive TWICs, but that this is not the case for non-U.S. seafarers. These seafarers should not be penalized for their inability to obtain TWICs, and, according to the commenter, they are treated as criminals because of their lack of visas. Fair treatment of non-U.S. mariners who are allowed access would help to ensure fair treatment of U.S. mariners abroad.

This comment is beyond the scope of this rulemaking, as this final rule concerns no-cost access through facilities, not unescorted access or the inability to obtain a TWIC. This rule does not change the requirement to escort or otherwise monitor the access of a person who is not authorized to have unescorted access to the facility.

(2) Seafarer Safety Concerning Access to Port Facility Gates

Many commenters noted that they have experienced unsafe conditions while attempting to gain facility access, and believe that safe transportation and pedestrian walkways must be mandated. Many commenters also complained that the current methods of allowing seafarers access are burdensome, expensive, or unsafe. Another commenter noted that they saw no reason to make special accommodations for seafarers if facility operators feel that safety and security is reduced if such seafarers are allowed on the facility.

Several commenters stated that this rule jeopardizes the ability of private port facilities to deny access to the docks out of safety concerns to mariners, and also noted the possibility that the free movement of mariners about the docks could impose an undue burden on dock operators and create an unsafe situation for mariners.

One commenter fully endorsed safe transit for mariners to and from the facility gate, and believed that such safe passage must be mandated.

The purpose of this final rule is to implement the Congressional requirement of no-cost access for seafarers and certain support organizations through MTSA-regulated facilities. The Coast Guard considered mandating specific infrastructure, such as pedestrian walkways, but determined that this could be unnecessary and costly in many facilities. Moreover, the no-cost access required by section 811 of the CGAA and this rulemaking does not diminish the requirement for facilities to comply with other laws and regulations, such as Occupational Safety and Health Administration (OSHA) requirements under 29 CFR. This final rule provides facility owners and operators with flexibility to ensure the safe passage of seafarers to and from the

facilities' gates through a variety of methods. It remains the responsibility of the facility owner or operator to ensure safety in accordance with the approved FSP on file. If conditions are unsafe or overly burdensome at certain facilities, mariners are encouraged to contact the local COTP to report such unsafe or overly burdensome conditions.

(3) Cost Concerns Associated With the Requirement for "No Cost" Access to Port Facility Gates

Many commenters were concerned with the cost of providing seafarers with no-cost access to facility gates. Some commenters said that the vessel owner or operator should bear the financial cost of providing access to facilities, while others said that the facility should bear the cost, and one commenter said the cost should not be borne by only one stakeholder. Several commenters proposed regulatory text placing the financial burden on one party or the other. Two commenters said the rule should be amended to clearly state that costs for providing access to facilities can be charged back to the vessel owner, because relieving vessel owners or operators from the financial burden of no-cost access goes beyond the intent of the CGAA.

The CGAA does not specify who should pay for no-cost access for seafarers. Ultimately, the Coast Guard determined that it is the facility's responsibility to provide the no cost service, as Coast Guard regulations already require each facility to have an approved FSP, which must now include a system for providing no-cost access to the facility for certain individuals. However, the Coast Guard declined to specifically prohibit charges to the vessel, and let parties decide the allocation of costs between facility and vessel. This rule provides flexibility to facilities on how to comply with the mandate and how to provide no-cost access for seafarers, as long as its solution does not result in a cost to seafarers.

Some commenters suggested that the rule should allow "reasonable fees" that can be passed on to the vessel owner to pay for seafarers' access. Many commenters noted that if facility owners are allowed to charge the vessel for seafarer access, the vessel owner will charge the mariner for access, and the intent of the law will be frustrated.

We are advising COTPs, through formal and informal communications with field units, to be on the lookout for this problem. Facilities that violate any provision of this rule are subject to enforcement by the COTP. Under 46 U.S.C. 70119 and 33 CFR 101.415(b),

any person who does not comply with the applicable requirements, including 33 CFR part 105, is liable to the U.S. for a civil penalty of not more than \$25,000 for each violation.²

Pursuant to the International Convention for Safety of Life at Sea (SOLAS) Chapter XI-2, the International Ship and Port Facility (ISPS) Code, the International Maritime Organization's "Reminder in Connection with Shore Leave and Access to Ships" MSC/1/Circ.1342, and the 2016 Amendments to the Convention on the Facilitation of International Maritime Traffic (FAL) Annex 1, there is an internationally recognized obligation to protect the interest of seafarer's shore leave, including shoreside access. As stated in Annex 1 of the FAL, "Crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for public health, public safety or public order. Shore leave shall be allowed in a manner which excludes discrimination such as on the grounds of nationality, race, colour, sex, religion, political opinion, or social origin and irrespective of the flag State of the ship on which they employed, engaged or work." If private actors thwart or hinder the ability of the United States to fulfill its international obligations, such as by imposing fees on crewmembers as a condition to shoreside access in the United States, any and all legal and diplomatic responses, to include notification to the vessel's flag-state, may be taken by the U.S. Government. Should the practice of the vessel owner charging the seamen for access prove to be an on-going issue for seamen, we will consider the possibility of amending the regulations, or even seeking new statutory authority, to deal with the matter.

(4) The Proposed Rule Underestimated the Cost of Compliance for Facilities

Several commenters stated that the Coast Guard's regulatory analysis underestimated the cost of compliance for facilities. One commenter stated that annual facility costs amount to \$75,000 annually and others stated the \$1,121 they reference in their comments is an underestimation and the actual costs will likely be higher than the costs we estimated in the proposed rule. One commenter also stated "the expansion of covered individuals will likely

²The statutory penalty amount is adjusted annually to keep pace with inflation: The current amount of this penalty is located in 33 CFR 27.3.

exceed \$1,121 per year”. Another commenter stated the annual expense could be \$50,000 as a result of the proposed rule. Another commenter presented a third-party cost estimate of \$185,000 for intra-terminal seafarer shuttle services for two of five facilities. Included in some comments is a reference to family members and who would bear the cost.

Based on these comments and information provided in these comments, we revised our regulatory analysis for the final rule by increasing the number of trips that a security guard may make. As a result, the costs for facilities that choose method 1 increased from about \$64,000 initially in the proposed rule, to about \$99,000 in this final rule. For facilities that choose method 2, costs increased from our estimate in the proposed rule of about \$52,000 initially to about \$77,000 initially in the final rule. Additionally, estimated annual recurring costs for method 1 increased from about \$36,000 in the proposed rule to about \$67,583 for the final rule. Annual recurring costs for method 2 increased from about \$24,000 in the proposed rule to about

\$45,000 in the final rule. Please see the supporting regulatory analysis for more detailed cost estimates.

Concerning the \$1,121 cost referenced by several commenters, apparently, commenters divided the estimated annualized cost of about \$2.8 million (with annual costs discounted over a 10-year period at a 7 percent discount rate) by the total number of MTSA-regulated facilities of 2,469. However, in the NPRM, we estimated the majority, 90% of the facilities, were already compliant and would not incur any additional costs as a result of this rule. By dividing the annualized cost by the total population of MTSA-regulated facilities the commenter has incorrectly estimated a lower cost per facility than the NPRM actually reported. The regulatory analysis only estimated the costs that noncompliant MTSA-regulated facilities would incur.

Additionally using the average cost per facility does not take into account the different methods with which a facility can choose to comply with this rule. The five different methods of compliance estimated in the regulatory analysis vary significantly in cost.

For example, in the NPRM, we estimated that 10 percent or 42 out of 420 facilities will choose method 1, which we estimate will cost a facility on average about \$99,143 in the initial year. However, for method 5 the NPRM estimated the initial year costs to be \$180. Therefore, it is more appropriate to evaluate the estimated costs for facilities based on the method chosen by a given facility.

Regarding the cost of “individuals covered” and the potential for security-related problems these individuals may pose. In response to public comments, the Coast Guard removed the terms “other authorized personnel” and “other authorized individuals” from paragraph (b) of § 105.237 (see section 4 below). We expect the removal of these terms in the final rule will reduce the number of authorized individuals who would have access to MTSA regulated facilities and would potentially result in lower costs to the facilities depending on which method of compliance the facility chooses.

Table 1 below provides the final rule’s estimated costs by method.

TABLE 1—AVERAGE ANNUAL COST PER METHOD OVER A 10-YEAR PERIOD OF ANALYSIS

Compliance method	Method 1	Method 2	Method 3	Method 4	Method 5
Weighted Average Annual Cost per Method	\$70,795	\$48,267	\$3,153	\$1,576	\$191

Regarding the cost for allowing family members, we have removed “family members” from paragraph (b) of § 105.237 of this rule and the supporting regulatory analysis does not include costs for these individuals.

(5) The Proposed Rule Underestimated the Noncompliance Rate

One commenter noted that the percentage of seafarers denied access to facilities is actually much higher than the 10 percent noted in the proposed rule (79 FR 77981). Several commenters also stated that we underestimated the number of seafarers calling on MTSA-regulated facilities in the proposed rule and the number of seafarers who would benefit from the proposed rule estimate is much higher.

We conducted an initial regulatory flexibility analysis and a regulatory impact analysis for this rule and offered these analyses for public comment. After receiving comments regarding the 10.3-percent noncompliance rate of facilities, and the costs associated with implementing the rule, we reopened the comment period, specifically asking for input on these figures. We received no further comments on these matters. In

2016, the Seamen’s Church Institute (SCI) released its annual survey and based on this survey, discussions with SCI, public comments, and facility population information, we calculated a new non-compliance rate of 17 percent (35 known noncompliant MSTA-regulated facilities in the 2016 SCI survey identified by the Coast Guard, out of 203 surveyed by SCI in its 2016 survey).

SCI in its 2015 report compiled data about shore access at facilities actually visited by port chaplains stating, “The data does not reflect the number of seafarers who were detained on ships in the terminals where chaplains and seafarers were denied access through the terminals. This report is based on restrictions actually observed by chaplains in their ship visits; accordingly, the number of seafarers being denied shore leave by terminal restrictions is probably under-reported.” The Coast Guard concedes that there is an underrepresentation of data based on chaplain access to facilities in the 2015 report; however, SCI made this statement in its 2015 report only and not in its subsequent 2016, 2017, and 2018 annual reports. Most ports visited

by chaplains in SCI’s 2016, 2017 and 2018 surveys allow unrestricted access to chaplains as stated in the reports. Moreover, their public comment indicates the noncompliance rate could be higher than the rate we extrapolated from their surveys in the NPRM.

Based on their comment we reached out to SCI and were able to specifically identify the noncompliant MTSA-regulated facilities in the 2016 SCI survey. This allowed us to narrow the scope of the analysis to only those facilities that would be affected by this rule and provided us with the best estimate of noncompliant MTSA-regulated facilities available. We were unable to separate out the MTSA-regulated facilities in SCI’s 2017 & 2018 report which is why we did not use the more recent surveys.

We acknowledge that the noncompliance rate could be different than our estimated 17 percent noncompliance rate used in this final rule, which we based on SCI’s 2016 survey. However, this is the best data we were able to obtain. Although several commenters provided information on specific ports, we were not able to estimate an overall

compliance rate based on the data they provided.

By using a 17 percent noncompliance rate from known non-compliant facilities only and applying it to the total number of estimated MTSA-regulated facilities of 2,469, we obtained the number of about 420 facilities (2,469 facilities \times 0.17) that will be modifying operations, in addition to documenting the changes in their FSPs.

Regarding the number of seafarers who would benefit from the proposed rule. In the supporting regulatory analysis for the proposed rule, we stated that on average from 2006 to 2014, 907 seafarers were denied access due to terminal restrictions and that the proposed rule would ensure access to these seafarers. We obtained this figure using SCI's reports that they published in these years. In the supporting regulatory analysis for the final rule, we removed this number and present a noncompliance rate, which we apply to facilities and not to a quantified number of seafarers calling on MTSA-regulated facilities or the actual number of seafarers who would benefit from the proposed rule. In addition, we did not rely on another report, which references several databases, mentioned by one commenter because we could not use the data in the report to determine the number of seafarers being denied access at MTSA-regulated facilities.

One commenter said that if only 10 percent of facilities are not providing these services, the Coast Guard should focus solely on those facilities instead of changing the entire system. In addition, other commenters complained that this rule places too high a burden on facilities. For example, one commenter stated that the rule would result in extreme changes to its FSP.

The statute directs that "each" FSP "shall provide a system" for no-cost access to the facility. The Coast Guard does not have discretion to waive this requirement, or to apply it only to certain facilities. We expect all MTSA-regulated facilities to provide a system for no-cost access to the facility and update their FSPs to document their system of access. As a result, these facilities will incur operational costs and costs to modify their FSPs.

(6) The Rule Should Explicitly Define the Individuals Who Are Allowed No-Cost Access for Seafarers to Port Facility Gates

Several commenters discussed the question of who should be allowed no-cost access, as 33 CFR 105.237(b) proposed access for (1) the seafarers assigned to a vessel moored at the facility; (2) the pilots and other

authorized personnel performing work for a vessel moored at the facility; (3) representatives of seafarers' welfare and labor organizations; and (4) other authorized individuals in accordance with the DoS or other arrangement between the vessel and facility. One commenter believed that proposed § 105.237(b)(2) went beyond the intent of the CGAA by expanding the list to "other authorized personnel."

Several commenters asked the Coast Guard to define "other authorized individuals" in § 105.237(b)(4), saying that this catch-all category (1) was too broad in scope, (2) could jeopardize the safety and security of the facility, and (3) could become very costly for facilities to provide no-cost access to such a wide array of people. On the other hand, some commenters encouraged the Coast Guard to extend no-cost access to the maximum number of individuals, including those individuals not already enumerated in the proposed rule. For example, one commenter stated that the proposed "other authorized individuals" category should include ship service providers. Another commenter stated that pilots should be their own category of individuals covered by the seafarer's access requirements of this rule.

After consideration of the public comments, we agree that the rule should explicitly enumerate which persons or groups are provided no-cost access, and that the list proposed in the NPRM was more extensive than the requirements in Section 811 of the CGAA. As such, we are limiting the no-cost access requirement to the people and groups specifically required by the Act. We removed proposed paragraph (b)(4), the "other authorized individuals" category from the list of individuals in § 105.237(b), for whom no-cost access will be provided. We also removed the category of "other authorized personnel" in paragraph (b)(2), following pilots. In striking these additional categories of personnel, we are not prohibiting these individuals from accessing a facility or a vessel. That decision is based on the individual facility's FSP, which is approved by the COTP. Rather, by deleting these categories of personnel from the no-cost list, we are removing those types of personnel from the list of individuals for whom the facility must provide no-cost access. Finally, as previously stated, we also revised § 105.237(b)(2) of this final rule to solely reference pilots as an enumerated group to be provided no-cost access.

(7) Foreign Ports Manage Seafarers' Access Better Than U.S. Ports

Several commenters noted that many foreign ports have systems in place to enable seafarer access to shore resources. One commenter noted that the rule should ensure fair treatment of U.S. vessels and non-U.S. vessels, and it should ensure that all U.S. ports treat all vessels fairly and do not place restrictions on certain vessels.

We encourage facility owners and COTPs to consider successful access systems already in use—including those in foreign ports—when designing their own systems for seafarer access.

(8) The Coast Guard Should Extend the Comment Period

A few commenters asked that we extend the comment period or hold one or more public meetings for this rulemaking. One commenter noted that comments were not being posted in a timely manner, and one commenter believes that the comment period should be extended for 60 days to allow facilities to realistically study how they will be impacted.

The NPRM was published in the **Federal Register** on December 29, 2014, with a 60-day public comment. The Coast Guard held a public meeting on January 23, 2015. After requests for more time were received, we extended the comment period for an additional 60 days (by a document published in the **Federal Register** on May 27, 2015). We believe providing 4 months of public comment and holding a public meeting allowed ample opportunity for members of the public and industry to read the NPRM and reply with any comments.

During both public comment periods and the public meeting, we received 163 comments. These commenters included private individuals, port authorities, pilots associations, industry groups, professional mariner associations, seafarers' unions, seafarers' churches and centers, other mariner non-governmental organizations, the World Shipping Council, and the Company of Master Mariners of Canada. We did not exclude any comment that was submitted to the docket.

(9) The Rule Further Restricts Seafarers Who Are Already Restricted by Existing Regulations That Do Not Help the Maritime Industry

Two commenters noted that mariners deal with burdensome security requirements already, and the Coast Guard should not further restrict mariners with additional regulations and "red tape." One commenter argued that the burdensome security

requirements drive people away from the maritime industry.

The purpose of this rule is to enable seafarers to obtain no-cost access to port facilities. This rule imposes no increase in the regulatory burden on the seafarer.

(10) The Proposed Rule Is Burdensome and Lacks Consistency or Enforcement

Some commenters remarked that the proposed rule has burdensome procedures. Other commenters noted that the proposed rule has no means of consistency or enforcement, and that the Coast Guard has failed to enforce provisions set forth by the COTP.

We disagree. The rule provides facilities with a great deal of flexibility in complying with the statutory mandate to provide no-cost access for seafarers to the facilities' gates. This flexibility is manifested in both the method that a facility may employ to provide no-cost access and in the manner in which a facility can determine whether the no-cost access is timely. Facilities that violate any provision of this rule are subject to enforcement by the COTP. Under 46 U.S.C. 70119 and 33 CFR 101.415(b), any person who does not comply with the applicable requirements, including 33 CFR part 105, is liable to the U.S. for a civil penalty of not more than \$25,000 for each violation.

(11) The Proposed Rule Is Unconstitutional

One commenter said that the proposed rule is unconstitutional and directly conflicts with MTSA.

We disagree. While the commenter did not specifically cite the Takings Clause, the Coast Guard has interpreted the comment to invoke this provision of the Constitution (U.S. Constitution, Amendment V). Section 811 of the CGAA and proposed 33 CFR 105.237 require facilities to provide access that enables individuals to transit to and from a vessel moored at the facility and the facility gate, in a timely manner and at no cost to the seafarer. Through this rulemaking, the Coast Guard does not mandate the facility take any particular action that would permanently disrupt the operations at the facility or deny the facility owner all economic benefit of the property. Rather, individual facilities would have flexibility to implement these requirements in the manner best suited for the individual facility when a vessel is moored at the facility. Notwithstanding the flexibility provided by the proposed rule for facilities to tailor shore access requirements to the design and needs of the facility, the commenter did not present the Coast Guard with any data

or other information to support their claim that the proposed rule would constitute a taking (or regulatory taking) of the facility's property. In addition, the commenter did not provide data or other information to support their statement that the proposed rule directly conflicts with MTSA. As the Coast Guard stated in the NPRM preamble (79 FR 77981, 77983) and reiterates in this final rule, the Coast Guard is authorized to issue regulations governing access requirements to MTSA-regulated facilities.

(12) The Proposed Rule Will Have a Positive Economic Impact on Communities

One commenter predicted that this rule will have a positive economic impact on communities where secure maritime facilities are located.

Whether that is true or not, Congress has directed the Coast Guard to require the FSP to provide a system for seafarers to transit through the facility in a timely manner, at no cost to the individuals, and we have done that in this final rule.

(13) The Proposed Rule Should Use the Same Language as the International Ship and Port Facility Security Code

Several commenters requested that the rule use the same language as the International Ship and Port Facility Security Code (ISPS) Code. Specifically, the commenter recommended that we utilize language from the ISPS Code in the FSP to "facilitate" access to and from a vessel.

We believe that the final rule conforms to international conventions, specifically the ISPS Code. We have chosen to use the words "implementation of a system" in § 105.237 as that is a stronger imperative than "facilitate" and requires positive action on the part of the facility to devise and put in place a system in accordance with the mandate of Section 811 of the CGAA.

(14) The Coast Guard Should Consider the Impact of the Proposed Rule on Existing ASPs and FSPs

One commenter noted that they use the Coast Guard-approved ASP, "Industry Standard for Passenger Vessels and Small Passenger Vessels and their Facilities," and requested that the proposed rule be amended so that there will be no need to amend their ASP to conform to the seafarer access rule until the regularly-scheduled renewal period occurs.

Another commenter believed that developing a new access system would be time-consuming and impossible to complete by the deadline. This

commenter suggested that a 10-month submission window for an amended FSP would be reasonable, but that the implementation deadline should be extended to possibly a year after receipt of the updated plan's approval. Two other commenters also said the implementation date should be extended. In contrast, another commenter stated that the compliance deadline should be moved forward to 6 months (instead of 1 year) because people should already be complying.

Each facility operating under a Coast Guard-approved ASP must include seafarer access as directed by the ASP itself. This may be in the form of an annex or appendix explaining how the facility will comply with this rule. This document must be submitted to and approved by the cognizant COTP in the location of the facility submitting the annex.

The Coast Guard believes there are various means by which a facility may accomplish this mandate depending on the facility design, equipment, procedures and location. The Coast Guard has worked with the Seamen's Church and with individual facilities to discuss many options for complying with this Congressional mandate and has provided flexibility within this rule for facility owners and operators to comply with its TWIC requirements and the no-cost access requirements of this rule.

However, in light of the comments on timing we have extended the date that each facility owner or operator must implement a system to 14 months after publication of this final rule. This additional time allows more time for the COTP to work with each facility in the event of deficiencies in the plan.

(15) Coordination Between Seamen's Missions and the Coast Guard

One commenter questioned whether a partnership between the Coast Guard and seamen's missions is possible for port control.

We agree that coordination is possible, and currently exists at several facilities. Information from seamen's missions facilitates port control. Since the rule enhances the well-being of seafarers by providing no-cost access from the vessel moored at the facility to the facility's gate, we are hopeful that the rule will further our relationship with seamen's missions.

(16) The Coast Guard Should Publish Guidance That Includes Explanatory Language Found in the Preamble of the Proposed Rule

One commenter was concerned that the explanatory language in the NPRM

will be absent from the actual CFR, perhaps leaving an undesirable opening in interpretation of the rule. The commenter stated that explicit language is desirable and necessary in implementing the rule. Several commenters recommended that the Coast Guard publish a Navigation and Vessel Inspection Circular to accompany the final rule to reflect the basic explanatory language as written in the preamble to the proposed rule.

While we have not included all the explanatory text from the preamble in the regulatory text itself, we rely on the broader explanation in the preamble to provide the support and basis for the regulatory text. The Coast Guard does not believe a NVIC is necessary at this time.

(17) The Coast Guard Should Not Invalidate Shore Passes After 29 Days

One commenter took issue with a regulation that invalidates shore passes after 29 days. The commenter stated that this regulation makes it difficult for crewmembers who have been at sea for long periods to gain access to shore, even if they possess approved U.S. visas. The commenter said that crewmembers were recently detained on board a vessel for 2 months; they held valid U.S. visas but expired shore passes, and U.S. Customs and Border Protection (CBP) in both New Orleans and Galveston would not help them gain shore access or return them to their home countries.

The commenter was in favor of the proposed rule in that it will assist seafarers transiting between vessels and the terminal gates. The comment about the invalidation of shore passes after 29 days, however, does not pertain to a Coast Guard regulation, but to a statutory requirement imposed by section 252 of the Immigration and Nationality Act (8 U.S.C. 1282), which is administered by CBP. The Coast Guard's regulation is concerned with providing no-cost access to facility gates for seafarers. Customs clearance is beyond the scope of this regulation and a change to the validity period of shore passes is beyond our legal authority. Therefore, no changes were made to the final rule in response to this comment.

(18) Implementing the Rule With Regard to the Use of Taxi Companies, Hybrid Access Methods, Brown Water Vessels, Tug and Tows, and Integrated Tug Barge (ITB) and Articulated Tug Barge (ATB) Crews

One commenter who favored the proposed rule had questions regarding facility baseline performance evaluations: How will facilities be rated

on use of taxi companies that meet facility requirements? Will "hybrid" methods of access be acceptable to COTPs? What is the status of brown water vessels, tugs and tows, and ITB and ATB crews? The commenter was also concerned with taxi company availability, the availability of reasonably priced alternatives to taxis, and the location near commercial infrastructure and shopping centers.

This rule requires the COTP to approve the method of seafarer access that a facility intends to provide. As such, the COTP will examine the methods of access proposed by a facility in light of that facility's FSP to determine if they meet the requirements of both this rule and the FSP.

We are unclear as to what the commenter means by "hybrid" methods of access. If the commenter is referring to the rule's allowance for a facility to choose between different methods of seafarer access, all such methods will be reviewed by the COTP for approval. We are also unclear as to what the commenter means by the "status of brown water vessels, tugs and tows, and ITB and ATB crews." If the commenter is referring to whether or not such vessels, tugs and tows, and ITB and ATB crews are subject to the requirements of this rule, the rule applies to covered facilities that may be used by such vessels and crew. In short, the rule ensures that facilities do not charge seafarers for access to their gates, irrespective of the type of vessel and crew docked there.

Regarding the commenter's concern about taxi availability, reasonably priced alternatives to taxis, and the location near commercial infrastructure and shopping centers, these are conditions that each facility will need to evaluate to determine which modes of access make financial sense for that facility while meeting the statutory mandate. The rule provides the flexibility to allow facility owners and operators to design a system of access that makes sense to them. Incorporation of the system of access in the approved FSP allows for the necessary oversight by the local COTP.

(19) Timeliness of Seafarer Access to Port Facility Gates

Many commenters noted that a seafarer's definition of "timely access" may vary from a facility's definition of "timely access."

We believe that the issue of "timely access" is best managed by the COTP. Because of the many different types of facilities and FSPs, the local COTP is in the best position to evaluate concerns

and address complaints of facilities providing untimely access.

One commenter stated that "timely access" should be agreed on by both the facility operator and the COTP.

This rule states that facility owners and operators are responsible for implementing a system that provides access for seafarers between vessels moored at the facility and the facility gate, in a timely manner and at no-cost to the seafarer. Every facility is different, which makes "timely access" impossible to prescribe. Ultimately, the COTP will decide whether the proposed timely access is adequate.

One commenter expressed concern with seafarers having timely access to port facility gates, especially for seafarers who are in port for short periods of time.

We agree. This is an important component in ensuring that port facilities comply with the mandates of this rule. In § 105.237(c), we include factors that a facility, subject to review by the COTP, must consider in allowing seafarers no-cost access to the facility's gate, in a timely fashion.

One commenter stated that the length of stay for a vessel is irrelevant in determining whether or not a seafarer's access to the facility gate is timely.

We disagree. While facilities have great flexibility under this rule in providing timely access between the vessel and the facility gate, some parameters are necessary to meet the requirements of Section 811 of the CGAA. We use length of time in port as a metric for the COTP to determine whether or not a wait time to and from the facility gate is reasonable.

One commenter stated that the Coast Guard needs to define "reasonable time" in the regulatory text more specifically. The commenter asks if the Government will take into consideration the size of the group when it comes to "reasonable time."

A second commenter understands that it is impossible to develop a one-size-fits-all definition of "timely access," and that it is impractical for facilities to provide for every potential combination of factors in their security plans. This commenter requested that the Coast Guard clarify how the COTP will determine "timely access" on a case-by-case basis.

Another commenter stated that a modest 10-minute delay waiting for transportation during half their visits equals more than 3,443 hours of lost time. Additionally, the commenter noted that waiting on transportation potentially makes a service provider's day dangerously long, putting them and others at risk. The commenter offered

the following additional factors that a facility must consider when establishing timely access without unreasonable delay: (1) The expected number of ship service personnel who will be visiting a ship; (2) the costs of transportation relative to delay time costs incurred by ship service providers; and (3) the costs of transportation relative to safety impacts to service providers.

One commenter noted that the proposed rule appropriately explains factors to consider and to document in FSPs to provide timely access without reasonable delay.

We appreciate the additional factors supplied by commenters, and believe that § 105.237(c) already covers most, if not all, of these factors. We provide the COTP with the authority to review these points to ensure that the facility is providing timely access to seafarers. These factors in § 105.237(c) provide a framework for the COTP to decide, on a case-by-case basis, whether or not the facility is complying with the mandates of this regulation. Covered individuals may contact the local COTP or representatives of seafarers' welfare and labor organizations with any facility access concerns.

(20) The Coast Guard Should Reconsider Where It Intends To Place the Seafarers' No-Cost Access Requirements in the CFR

One commenter asked why the new section in 33 CFR part 105 is placed between §§ 105.235 and 105.240. This commenter suggested that the new section be placed in § 105.257, entitled "Security Measures for Newly Hired Employees," as § 105.257 does not merit its own standalone section and has caused confusion among facilities.

While we appreciate this commenter's suggestions, we are implementing section 811 of the CGAA, and changes to 33 CFR 105.257 are outside the scope of this rule. We will consider whether a future rulemaking should update, change, or improve regulations at 33 CFR 105.257.

(21) The Proposed Rule Should Clarify "Shore Leave" and "Access" To Reduce the Risk of Seafarers' Noncompliance With CBP or Union Rules

One commenter supporting the rule stated that "shore leave" and "access" should be clarified to reduce the risk of noncompliance with CBP or union rules.

We believe these terms do not need defining in this rulemaking, as the rule specifically defines the kinds of access that is required. In addition, this rule is concerned with providing no-cost shore access for certain individuals and does not concern shore leave or other terms that may raise customs and immigration issues. Irrespective of this rule's mandates and requirements, seafarers are still required to comply with all CBP rules when arriving in and departing from the United States.

V. Regulatory Analyses

We developed this final rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on these statutes or Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 ("Regulatory Planning and Review") and 13563 ("Improving Regulation and Regulatory Review") direct agencies to assess the costs and benefits of available regulatory

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

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. Because this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See OMB's Memorandum titled "Guidance Implementing Executive Order 13771, titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5, 2017).

Table 2 shows the impacts of the final rule by category. A final Regulatory Assessment is available in the docket, and a summary follows.

We estimate the total cost to industry and the Government to be about \$53.9 million over a 10-year period of analysis using a 7 percent discount rate. We estimate the annualized cost to be about \$7.7 million using a 7 percent discount rate. See Table 2.

TABLE 2—SUMMARY OF THE IMPACTS OF THE FINAL RULE

Category	Summary
Applicability	Owners or operators of MTSA facilities regulated by the Coast Guard are required to implement a system that provides seafarers with access between the shore and vessels moored at the facility.
Affected population	2,469 MTSA-regulated facilities will update FSPs, an additional 420 MTSA-regulated facilities will update FSPs and facility operations.
Total costs to industry and Government (7% discount rate).	10-Year: \$53.9 million. Annualized: \$7.7 million.
Unquantified benefits	Provides seafarers and covered individuals timely access between a vessel and a MTSA-regulated-facility gate. Enhances the safety, health, and welfare of seafarers, and the overall quality of life by allowing seafarers access to fundamental human services. Conforms to the intent of the ISPS Code and IMO's FAL Convention. Reduces regulatory uncertainty by harmonizing the Coast Guard's regulations with Sec. 811 of Public Law 111-281.

Affected Population

The Marine Information for Safety and Law Enforcement (MISLE) system is the Coast Guard's internal database that

contains MTSA-regulated facility population data. According to MISLE information reviewed in January 2017, there were 2,469 MTSA-regulated

facilities in 2016. This number is consistent with facility population data for the previous 5 years as well; the population number remains around

2,500 +/- 40 facilities. We anticipate that all 2,469 facilities will update their FSPs with the system of seafarer access description within 10 months of publication of the final rule. The total implementation time is 14 months, with Coast Guard COTPs having 4 months to approve the plans for implementation. Any changes in the following years of analysis will be accomplished under existing updates to FSPs; therefore, we account for no marginal change in opportunity cost beyond the first year of analysis.

Additionally, some facilities will need to modify existing operations to implement a system of seafarer access. In this analysis, we refer to this group of facilities as the noncompliant facilities. In the NPRM, we estimated the rate of noncompliant facilities at 10.3 percent (of the 2,469 total facilities). We estimated this rate using the SCI's Center for Seafarer's Rights annual survey from the year 2011. We received five individual public comments out of 163 commenters who suggested the non-compliance rate was higher than 10.3 percent; however, an alternative compliance rate was not supplied in any of the public comments. We used facility information mentioned in public comments, specifically SCI's 2016 report, to calculate the new non-compliance rate of 17 percent (please see the Coast Guard's explanation of the use of this rate in the comment response section of this preamble), which we based on known noncompliant MTSA-regulated facilities divided by the number of MTSA facilities surveyed by SCI (35/203). Also, SCI's surveys are more comprehensive than any data on seafarer access the Coast Guard can obtain. As noted in the Regulatory History section of this preamble, we reopened the public comment period for an additional 60 days (80 FR 30189), specifically seeking input on our estimate of a 10.3 percent noncompliance rate for facilities with respect to providing seafarers' access.

We received no new information as a result of the reopened comment period. For the final rule's regulatory impact analysis, we strictly used data from SCI's 2016 survey. With this survey and through discussion with the SCI, we calculated a noncompliance rate of 17 percent for the final rule. At this rate, 420 (0.17 x 2,469, rounded) out of the total 2,469 facilities affected by this rule will need to develop and implement a system of seafarer access in addition to updating the FSP. We also calculated operational costs for these 420 facilities.

Costs

There are two cost components in this final rule—administrative and operational. Prior to the publication of this rule, all MTSA-regulated facilities described a system of access in the FSP. These descriptions, however, may not contain all the necessary details required by this final rule. Therefore, we calculated these administrative costs for the entire affected population. The total cost of this provision includes 6 hours of labor at the executive wage rate, 10 minutes of labor at the administrative assistant wage rate, plus 10 cents for stationery:

2,469 population x [(6 hours³ x \$67.59 wage rate⁴) + (0.17 hours x \$40.09 wage rate) + \$0.10 stationery] = \$1,018,352. The 420 facilities implementing new seafarer access operations will choose from the six compliance options provided in section 105.237(d), as listed below:

- (1) Method 1—Regularly scheduled shuttle service;
- (2) Method 2—On-call shuttle service;
- (3) Method 3—Taxi service;
- (4) Method 4—Arrangements with the seafarers' welfare organizations;
- (5) Method 5—Monitoring of pedestrian routes; or
- (6) Method 6—Any other system approved by the COTP.

Any facility implementing a third-party operated system of access, such as Method 4, will need to designate a

supplemental method of access in case the third-party organization is unavailable or fails to provide access to seafarers at any time. For the purposes of this analysis, we assume such facilities will partner with taxi services to provide this supplemental access. We do not include supplemental methods of access costs for facilities complying with Method 3, which will also provide access via a third party (taxi drivers), because we assume (and calculate costs for) a sufficient number of taxis. We also do not calculate costs for any facilities complying with this rule through Method 6. We assume facilities would choose the sixth option only if that option had a lower cost than the first five options.

Based on information provided by Coast Guard subject matter experts (SMEs) in the Office of Port and Facility Compliance and on information from Coast Guard inspectors nationwide, we expect that a small percentage of facilities are sufficiently large or dangerous enough to warrant the purchase of a passenger van used solely to provide a regularly scheduled or on-call gate access service to seafarers.⁵ A taxi service, alternatively, provides a flexible and relatively cheap alternative. Some facilities would choose to partner with a seafarers' welfare organization to provide transit, a presumably cost-free option, where available, coupled with a taxi service. Based on discussions with several SMEs with knowledge of port and facility access, most facilities would choose pedestrian monitoring. Due to current MTSA regulations most facilities are already equipped with security guards and monitoring. If facilities choose this method we anticipate an additional 1 hour of training annually to review security protocol in the event that a seafarer leaves the designated passageway.

Table 3 provides the number of affected facilities and the per-facility costs based on chosen requirement.

TABLE 3—ADMINISTRATIVE AND OPERATIONAL COSTS PER FACILITY
[By method]

	Population	Initial cost	Annual recurring cost, years 2–5, 7–10	Annual recurring cost, year 6	Total 10-year undiscounted
Cost Per Facility (FSP Documentation)	2,469	\$412	\$0	\$0	\$412

³ In the collection of information (OMB control number 1625–0077), we estimate that it takes 100 hours to create a new FSP made up of 18 sections. We estimate that it would take 6 hours (100 hours

+ 18 sections = 5.55 hours) to create a new section in the FSP.

⁴ See Chapter 3.1 of the standalone RA for information regarding wages.

⁵ Our MISLE database does not capture the physical size of MTSA-regulated facilities.

TABLE 3—ADMINISTRATIVE AND OPERATIONAL COSTS PER FACILITY—Continued
[By method]

	Population	Initial cost	Annual recurring cost, years 2–5, 7–10	Annual recurring cost, year 6	Total 10-year undiscounted
Cost Per Facility Operations					
Method 1: 24-hour Shuttle Service	42	99,143	67,583	68,138	707,945
Method 2: On-call Shuttle Service	84	76,615	45,055	45,611	482,666
Method 3: Taxi	84	5,897	2,848	2,848	31,529
Method 4: Seafarers' Welfare Organization	42	2,948	1,424	1,424	15,764
Method 5: Monitoring of Pedestrian Routes	168	191	191	191	1,910

Table 4 provides the key costs for the methods and an explanation of changes from the NPRM to the final rule.

TABLE 4—KEY COST INPUTS⁶

Input	Final rule	NPRM	Reason for change	Source
MTSA facility noncompliance rate.	17%	10.3%	Updated with information from 2016 SCI report.	http://seamenschurch.org/sites/default/files/sci-shore-leave-survey-2016.pdf .
Security guard wage	\$20.58	\$19.41	Updated to 2016 wage rates	http://www.bls.gov/oes/2016/may/oes339032.htm .
Cargo and freight agents wage	\$30.63	\$30.81	Updated to 2016 wage rates	http://www.bls.gov/oes/2016/may/oes435011.htm .
Managers	\$67.59	\$63.35	Updated to 2016 wage rates	http://www.bls.gov/oes/2016/may/oes113071.htm .
Administrative assistants	\$40.09	\$35.81	Updated to 2016 wage rates	http://www.bls.gov/oes/2016/may/oes436011.htm .
Passenger van	\$28,995 to \$33,800.	\$28,995 to \$33,800.	Updated with current information.	http://www.chevrolet.com/express/passenger-van . https://www.ford.com/trucks/transit-passenger-van-wagon/ . https://www.gmfleet.com/chevrolet/express-passenger-van.html . https://www.chrysler.com/pacifica.html#app-compare . http://www.nissancommercialvehicles.com/nv-passenger?dcp=psn.58700002307877422&gclid=CPm5ttfug9QCFYFJgQodlkoMmA&gclid=ds&dclid=CPOS89fug9QCFcplkwQodGnoAJw .
Cost of gas	\$2.25	\$4.04	Updated with current information.	https://www.eia.gov/dnav/pet/PET_PRI_GND_DCUS_NUS_A.htm .
Average miles per gallon, passenger van.	13.4	13	Updated with current information.	http://www.fueleconomy.gov/feg/byclass/Vans_Passenger_Type2016.shtml .
Driving speed	10 mph to 30 mph	15 mph to 30 mph	Updated with current information.	http://www.panynj.gov/port/pdf/highway-speed-limits-2008.pdf . http://www.fmtcargo.com/terminal_guides/fmt_guide_burns_harbor.pdf . http://www.fmtcargo.com/terminal_guides/fmt_guide_cleveland.pdf . http://www.fmtcargo.com/terminal_guides/fmt_guide_port_mantee.pdf . http://www.fmtcargo.com/terminal_guides/fmt_guide_lake_charles.pdf . http://www.fmtcargo.com/terminal_guides/fmt_guide_milwaukee.pdf .
Driving time, 1 lap	0.33 hours	0.33 hours	No change	

TABLE 4—KEY COST INPUTS⁶—Continued

Input	Final rule	NPRM	Reason for change	Source
TWIC	\$277.82 or \$268.04.	\$401.00	Updated with current information; created two TWIC costs: one for security guards and one for taxi drivers, respectively.	https://www.tsa.gov/for-industry/twic .
Taxi driver Wage	\$18.55	\$17.92	Updated to 2016 wage rates	http://www.bls.gov/oes/2016/may/oes533041.htm .
Miles to enrollment center	100 miles	100 miles	No change	
Average commute speed, mph	28.87	28.87	No change	

Table 5 presents the total discounted costs of the final rule to industry over a 10-year period of analysis.

TABLE 5—SUMMARY OF COSTS TO INDUSTRY 10-YEAR, 7- AND 3-PERCENT DISCOUNT RATES

Year	Undiscounted costs	Discounted costs	
		7%	3%
1	\$12,269,354	\$11,466,686	\$11,911,994
2	6,954,316	6,074,169	6,555,110
3	6,954,316	5,676,793	6,364,184
4	6,954,316	5,305,414	6,178,820
5	6,954,316	4,958,331	5,998,854
6	7,024,326	4,680,605	5,882,762
7	6,954,316	4,330,798	5,654,495
8	6,954,316	4,047,475	5,489,801
9	6,954,316	3,782,687	5,329,904
10	6,954,316	3,535,222	5,174,664
Total	74,928,208	53,858,180	64,540,588
Annualized		7,668,193	7,566,126

Note: Totals may not sum due to independent rounding.

The Government will incur costs as a result of modifications made to FSPs by MTSA-regulated facilities personnel in Years 1 and 2 because the Coast Guard must review and approve the modifications to the FSPs. As a result, MTSA-regulated facilities with FSPs will have 10 months to submit their plans to the respective Coast Guard sectors for review and the sectors will have 4 months to approve the plans for implementation. We then divide the

one-time government cost between Years 1 and 2 equally. Based on information from Coast Guard SMEs, we estimated 30 minutes for an E-4, E-5, or E-6 to review the modified FSP. Using the average hourly wage rate of the three ranks, we calculate the one-time cost to review all FSPs as follows:

$$2,469 \text{ FSPs} \times \$51.33 \text{ wage rate/hour}^7 \times 0.5 \text{ hours} = \$63,367$$

As explained above, we divided the estimated government cost of \$63,367

equally between Years 1 and 2, or \$31,683.50 in each year (Table 6 below takes into account rounding). Table 6 presents the total discounted costs to Government and industry over a 10-year period of analysis. We estimate an annualized cost of the final rule to industry and government to be about \$7.7 million using a 7 percent discount rate. See table 6.

TABLE 6—SUMMARY OF COSTS OF THE FINAL RULE TO GOVERNMENT AND INDUSTRY [7 and 3 percent discount rates]

Year	Undiscounted costs	Discounted costs	
		7%	3%
1	\$12,301,038	\$11,496,297	\$11,942,755
2	6,986,000	6,101,843	6,584,975
3	6,954,316	5,676,793	6,364,184
4	6,954,316	5,305,414	6,178,820
5	6,954,316	4,958,331	5,998,854
6	7,024,326	4,680,605	5,882,762

⁶ We present the mean hourly wage rates as loaded wage rates in 2016 dollars using 2016 BLS Benefits multiplier: <http://www.bls.gov/ncs/lect/sp/ececcrtn.pdf>. For more information on wages, see

Chapter 3 of the supporting regulatory analysis in the docket.

⁷ From the Commandant Instruction 7310.1Q (https://www.uscg.mil/directives/ci/7000-7999/CI_7310_1Q.pdf) for reimbursable rates, the hourly rates for E-4s, E-5s, and E-6s are \$44, \$52, and \$58, respectively. These rates result in an average \$51.33 per hour for reviewing the FSPs.

TABLE 6—SUMMARY OF COSTS OF THE FINAL RULE TO GOVERNMENT AND INDUSTRY—Continued
[7 and 3 percent discount rates]

Year	Undiscounted costs	Discounted costs	
		7%	3%
7	6,954,316	4,330,798	5,654,495
8	6,954,316	4,047,475	5,489,801
9	6,954,316	3,782,687	5,329,904
10	6,954,316	3,535,222	5,174,664
Total	74,991,575	53,915,465	64,601,214
Annualized		7,676,349	7,573,233

Note: Totals may not sum due to independent rounding.

Benefits

The primary benefit of this final rule is to provide seafarers and covered individuals timely access between a

vessel and a MTSA-regulated facility gate. Other benefits of this final rule include enhancing the safety, health, and welfare of seafarers, which in turn improves the overall quality of life for

a seafarer. Lastly, the provisions of this rule align with international conventions and will reduce regulatory uncertainty. Table 7 presents a summary of the benefits of this final rule.

TABLE 7—SUMMARY OF BENEFITS OF THE FINAL RULE

Implications	Description of benefits
Seafarers' Access	Provides seafarers and covered individuals timely access between a vessel and a MTSA-regulated-facility gate. Enhances the safety, health, and welfare of seafarers, and the overall quality of life by allowing seafarers access to fundamental human services.
International Conventions	Conforms to the intent of the ISPS Code and IMO's FAL Convention.
Regulatory Uncertainty	Reduces regulatory uncertainty by harmonizing the Coast Guard's regulations with Sec. 811 of Public Law 111–281.

The primary benefit of this final rule is to provide seafarers and covered individuals with access between the vessel and the facility gate, thereby enhancing their quality of life. Although the Coast Guard does not collect data on the number of seafarers denied access to MTSA-regulated facilities, the SCI's Center for Seafarers' Rights issued a report in 2016 and found through a survey that 29 U.S. ports denied access through a terminal to about 18.4 percent of seafarers or about 200 (SCI mentioned about 81.6 percent did not have valid visas) seafarers who possibly had valid visas (as we explain in the supporting regulatory analysis, SCI presents in its report shore leave for mariners without valid visas and other reasons are given in its survey for the denial of shore leave; nevertheless, it is reasonable to assume that the remaining percentage of denials in the report contains some number of mariners with valid visas who were denied shore leave).

SCI recently issued reports in 2017 and 2018; the information in these reports is similar with the 2016 report with 22 and 23 ports surveyed, respectively. However, these reports, as with the 2015 and 2016 reports, did not specify which facilities were MTSA-regulated or not, so we assumed the

reports included facilities other than the MTSA-regulated facilities to which the final rule applies (the difference is, with the 2016 report, we were able to identify, at the time of this writing, which facilities were MTSA-regulated through correspondence with SCI in 2016).

As stated above, the 2016 report cites other reasons for access denial, such as CBP restrictions and vessel operations, which account for about 4 percent of denials; again, this also includes facilities that are not MTSA-regulated. This is important because access denials to seafarers without valid visas would not be counted as part of the noncompliance rate and are not part of the affected population. Only mariners with valid visas who were denied port access to MTSA-regulated facilities are the affected population of this final rule. Non MTSA-regulated facilities who denied port access to seafarers are not part of the applicable population of this final rule. Table ES–4 of the Final Regulatory Analysis and for this final rule lists the website where a copy of the 2016 SCI report may be viewed. Combined in one document, the Final Regulatory Analysis and the Final Regulatory Flexibility Analysis are available in the docket for review.

Generally, transiting through a MTSA-regulated facility is the only way for seafarers to access shore side businesses and amenities, and to engage in activities such as doctor visits (which includes obtaining prescriptions for medications), business visits, and family member and friend visits, among other things such as enjoying basic leisure time, that go beyond the confines of a vessel. This, in turn, will enhance seafarers' overall quality of life by allowing access to fundamental human services instead of being bound to a vessel while moored at a MTSA-regulated facility. This final rule provides seafarers and covered individuals access through MTSA-regulated facilities, and enhances the safety, health, and welfare of seafarers. This final rule also mandates that the system of access provide access for representatives of seafarers' welfare and labor organizations. Individuals and organizations, who generally can only access vessels moored at a MTSA-regulated facilities by transiting through the facility, will be able to provide services for seafarers on board a vessel. For example, this includes labor organizations, port workers organizations, and port engineers or superintendents. This also will enhance

the welfare and overall quality of life for a seafarer, who otherwise would not have access to shore side facilities while a vessel is moored at an MTSA-regulated facility.

Another benefit of this final rule is that it will conform to international conventions, which in turn benefits seafarers. The provisions of this final rule will align with the intent of the International Ship and Port Facility Security Code (ISPS), an amendment to the International Convention on the Safety of Life at Sea (SOLAS) (1974, 1988), Chapter XI-2 (Special Measures to Enhance Maritime Security), as entered into force under that chapter. An IMO resolution adopted the ISPS Code in December 2002 and another resolution included amendments to Chapter XI of SOLAS and added a new chapter, which is Chapter XI-2. IMO added amendments in 2016, which became effective January 1, 2018, to the Convention on Facilitation of International Maritime Traffic, 1965 as amended (FAL), which added a new provision to strengthen shore leave for seafarers, in Section 3 of the Annex, part G.

We believe this is a benefit to seafarers because if the U.S. does not adhere to these international conventions and denies shore leave to these individuals, other countries may engage in an act of reciprocity and deny shore leave to U.S. seafarers abroad. The preamble to ISPS (paragraph 11), ratified in December 2002, states: "Recognizing that the Convention on the Facilitation of Maritime Traffic, 1965, as amended, provides that foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order, Contracting Governments when approving ship and port FSPs should pay due cognizance to the fact that ship's personnel live and work on the vessel and need shore leave and access to shore based seafarer welfare facilities, including medical care."

This rule will also reduce regulatory uncertainty by harmonizing regulations with Sec. 811 of Public Law 111-281. The benefit to seafarers is that they will be knowledgeable of the regulations as they relate to international conventions thereby reducing confusion and uncertainty among the population.

Alternatives

Below, we summarize our chosen compliance option and four discussed

alternatives. Refer to Chapter 5 of the standalone RA, available in the docket where indicated under the **ADDRESSES** portion of this preamble, for more cost and descriptive information on the alternatives analyzed.

- *Preferred Alternative*

The preferred alternative is to amend Coast Guard regulations to require that MTSA-regulated facilities implement a system of seafarers' access and amend their FSPs to document this system. This alternative was chosen for this final rule because it provides regulatory flexibility and the least costly options that would comply with the intent of the statute.

- *Other Alternatives Considered*

Alternative 1—No change to regulations. Instead of amending the current regulations, COTPs would deny approval of FSPs that do not adequately address shore leave procedures. While this approach may address some deficiencies at some facilities, we reject this alternative because it would not provide clear and consistent regulatory standards for facilities to implement and COTPs to enforce. Additionally, the current regulation in 33 CFR 105.200(b)(9) does not explicitly require facility owners and operators to provide free and timely access to seafarers. Alternative 1 does not meet the mandate set in the CGAA, nor would it address the existing access issues. The benefit of Alternative 1 is that there would be zero incremental cost.

Alternative 2—Require a section of the DoS between the facility and the vessel to include the facility's seafarers' access procedures. We reject this alternative due to the heavy burden it would place on industry. We do not support this alternative because it would not specifically target noncompliant facilities, but, instead, would require many facilities and vessels that would not need a DoS to have one, increasing the collection of information burden. The benefits of this alternative are the same as the preferred alternative—the facility would be required to work out a free and timely access plan with each arriving vessel and include this plan in the vessel's DoS.

Alternative 3—Require facilities to implement specific and prescriptive procedures for seafarers' access and to include these procedures in their FSPs. This alternative would require facilities to implement a prescribed space, infrastructure, or other specific resource as a system of seafarers' access. We reject this alternative because it would impose a stricter than necessary operational change on many facilities. For example, this alternative could

mandate that all facilities provide 24-hour shuttle service to seafarers. This would increase the total cost burden to industry, and many facilities do not require shuttle service for timely gate access. The benefits of this alternative are the same as the preferred alternative.

Alternative 4—Publish guidance to industry clarifying that 33 CFR 105.200(b)(9) affirmatively requires facility owners/operators to provide shore leave and visitor access. We do not support this approach. Current regulations in 33 CFR 105.200(b)(9) do not require facility owners and operators to provide free and timely access to seafarers. Some facilities deny seafarers access altogether or make shore access impractical based on misinterpretations of our existing regulations (*i.e.*, they contend that, since 33 CFR 105.200(b)(9) only requires coordination of shore leave if there is actual shore leave to coordinate, if access to shore is denied altogether, there is no shore leave to coordinate). Further, public comments indicate that, while some facilities grant seafarers access to and from vessels, they make it impractical by placing extreme limitations on escort availability or charging exorbitant fees. Section 811 of the CGAA makes access mandatory, necessitating an update to our regulations to avoid regulatory uncertainty.

B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601-612, we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Based on our analysis, we have no information or evidence to determine, which, or how many MTSA-regulated facilities will need to implement a system of access. Our estimated costs to small entities vary greatly depending upon whether a facility will only need to modify its FSP or whether it will have to modify its operations. We detail this analysis below:

A Final Regulatory Flexibility Analysis (FRFA) discussing the impact of this final rule on small entities is available in the docket where indicated under the **ADDRESSES** portion of the preamble. A summary of the FRFA follows.

(1) *A statement of the need for, and objectives of, the rule:*

Agencies take regulatory action to correct for market failure. This final rule will ensure that MTSA-regulated facilities do not deny access or make it impractical for seafarers to obtain shore access. The rationale given by some facilities for denying such access is based on a misinterpretation of existing Coast Guard regulations; namely, that 33 CFR 105.200(b)(9) only requires coordination of shore leave if there is actual shore leave to coordinate, and, if access to shore is denied altogether, there is no shore leave to coordinate. Some facilities provide shore access, but make it impractical for seafarers and other individuals by placing extreme limitations on escort availability or charging exorbitant fees. Furthermore, possible costs to implement a system of access should not be borne by those who need access, thereby providing a disincentive for the facilities to provide such access.

(2) A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the final rule as a result of such comments:

We received five public comments regarding the estimated per-company cost of implementing this rule. The commenters argued that the \$1,121 cost was too low. The Coast Guard addressed this comment in Part IV of this preamble.

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments:

The Coast Guard did not receive any comments from the SBA Office of Advocacy regarding the impact that this rule would have on small entities.

(4) A description and estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available:

This rule would affect primarily MTSA-regulated facilities, which would need to provide seafarers' access if they do not currently provide this service to seafarers. Based on MISLE data, we estimate that there are 1,347 owners or operators of 2,469 facilities. Of these 1,347 entities, we estimate that 69 percent of them are small businesses, as determined by the size standards (or threshold) of the SBA.⁸ We determined this percentage by researching and compiling the employee size and revenue data for a random sample of 300 entities, of which 145 (included in this number are 8 governmental jurisdictions that we found to be small based on the RFA's definition) were found to be below the threshold for small entities, and 63 were assumed to be below the threshold due to lack of available information. In total, there are 208 (145 + 63) small entities for the purposes of this analysis.⁹ To estimate the sizes of these entities, we used the

revenue or employee size of these entities from *referenceusagov.com* and *www.Manta.com* for businesses and the most current population information from the U.S. Census Bureau's website for government jurisdictions. Based on the information from this analysis, we found that—

- There are an estimated 1,347 entities that would be affected by the final rule;
- The sample size consists of 300 entities;
- There were 10 government entities above the threshold for being small, and 8 below the threshold, we found revenue information on all 8 governmental jurisdictions by reviewing their respective annual reports online and U.S. Census Bureau data for one of them;
- There were no nonprofit entities found in the data;
- There were 92 businesses considered above the threshold for being small, and 145 below the threshold; and
- Size information was not found for the remaining 63 entities, so they were considered small.

The SBA provides business size standards for all sectors, defined as the North American Industry Classification System (NAICS). We use these codes to assess the effect that this final rule will have on these sectors. Table 8 provides a list of the most prevalent NAICS codes and their description and size standards.

TABLE 8—BREAKDOWN OF INDUSTRIES BY NAICS CODES

NAICS	Industry	SBA size threshold	SBA size standard type
324110	Petroleum Refineries	1,500	Employees.
488320	Marine Cargo Handling	\$38.5	Revenue in millions.
221122	Electric Power Distribution	1,000	Employees.
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals).	200	Employees.
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing	500	Employees.
483212	Inland Water Passenger Transportation	500	Employees.
336611	Ship Building and Repairing	1,250	Employees.
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	100	Employees.
424690	Other Chemical and Allied Products Merchant Wholesalers	150	Employees.
561510	Travel Agencies	\$20.5	Revenue in millions.
713930	Marinas	\$7.5	Revenue in millions.

Revenue Impact on Entities

To estimate how this final rule would affect entities that fall under the SBA and U.S. Census Bureau for small entities, we calculated the per-facility cost based on each method of access.

Facilities that only need to modify their FSP would only be affected by the one-time FSP cost. Those that need to modify operations would be affected by the FSP cost and the weighted average

of the transportation costs. Table 9 provides the range in per-facility costs.

⁸ As indicated by either their revenue or personnel data for businesses.

⁹ The sample size of 300 entities provides a confidence level at 95 percent and a confidence interval of 5.

TABLE 9—PER FACILITY COST BY MODE OF TRANSPORTATION

Cost description	Initial cost	Annual recurring cost, years 2–5, 7–10	Annual recurring cost, year 6 ¹⁰
Cost Per Facility (FSP Documentation)	\$412	\$0	\$0
Cost Per Facility, Operations			
Method 1: Regularly scheduled escort	99,143	67,583	68,138
Method 2: On-call escort	76,615	45,055	45,611
Method 3: Taxi	5,897	2,848	2,848
Method 4: Seafarers' welfare organizations with supplemental taxis	2,948	1,424	1,424
Method 5: Visual/equipment monitoring	191	191	191

For facilities that will only need to document a system of access in the FSP, we estimate that this final rule will not have a significant impact on a substantial number of small entities; *i.e.*, the cost to modify the FSP, \$412, is less than 1 percent of annual revenue for all sampled small entities that were reviewed. For facilities that have to modify operations and document the new system of access in their FSPs, this final rule may have a significant impact on a substantial number of small entities. Because we have no way to determine which facilities (and, therefore, which entities) will need to implement a system of access, we performed two analyses.

We have revenue information for 145 of the estimated 208 small entities including 8 small governmental jurisdictions (these revenue data include taxes and other revenues as reported in the jurisdictions' annual reports, which is publicly available information, in addition to data from the U.S. Census Bureau for one of them).

Three NAICS codes represent these 8 governmental jurisdictions with two governmental jurisdictions having a NAICS code of 921110 (Executive Offices), three of them having a NAICS code of 921120 (Legislative Bodies), and the remaining three having a NAICS code of 926120 (Regulation and Administration of Transportation Programs).

Using this revenue information, we determined that the cost of both modifying operations and documenting the new system of access in the FSP is: (1) Less than 1 percent of annual revenue for 66 percent of affected facilities; (2) between 1 and 3 percent of annual revenue for 14 percent of facilities; (3) between 3 and 5 percent of annual revenue for 5 percent of facilities; and (4) greater than 5 percent of annual revenue for 15 percent of facilities. Seven of the 8 governmental jurisdictions fell into the less than 1 percent impact category and the eighth jurisdiction fell into the greater than 5 percent impact category. Table 10 displays this data, as well as the impacts of annual recurring costs.

TABLE 10—ESTIMATED REVENUE IMPACT OF THE FINAL RULE, WEIGHTED AVERAGE COST

Revenue impact	Initial implementation cost	Annual recurring costs, years 2–5, 7–10	Annual recurring costs, year 6
FSP Only Cost			
Cost to Modify FSP	\$412	\$0	\$0
0% < Impact <= 1%	100%	.....	.....
FSP Plus Access Implementation			
Per facility cost (weighted average)	\$27,200	\$16,558	\$16,724
0% < Impact <= 1%	66%	73%	73
1% < Impact <= 3%	14%	11%	11
3% < Impact <= 5%	5%	6%	6
5% < Impact <= 10%	10%	7%	7
Above 10%	5%	3%	3

Additionally, we calculated the estimated revenue impacts of this final rule based on the average annual cost per compliance method over the 10-year period of analysis. Table 11 displays the results of this analysis. The average annual costs of Methods 3, 4, and 5 are

less than 1 percent of annual revenue for 100 percent of the identified small businesses. Method 1 has the highest average annual cost per facility. This cost is less than 1 percent of annual revenue for about 50 percent of the identified small entities, and above 10

percent of annual revenue for 18 percent of the identified small entities.

¹⁰ Year 6 has a slightly higher average cost because those complying with Method 1 and

Method 2 will need to renew TWIC cards for security guards.

TABLE 11—ESTIMATED REVENUE IMPACT OF FINAL RULE, AVERAGE ANNUAL COST PER METHOD

Compliance method	Method 1	Method 2	Method 3	Method 4	Method 5
Weighted Average Annual Cost	\$70,795	\$48,267	\$3,153	\$1,576	\$191
Cost Per Facility, Operations					
0% < Impact <= 1%	50%	54%	100%	100%	100%
1% < Impact <= 3%	19%	17%	0%	0%	0
3% < Impact <= 5%	9%	6%	0%	0%	0
5% < Impact <= 10%	5%	7%	0%	0%	0
Above 10%	18%	13%	0%	0%	0

(5) A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record:

This final rule adds information to an existing collection of information. We anticipate that all MTSA-regulated facilities will need to add additional security information to their FSPs, for a total cost of \$412 per facility. These FSPs will be updated by the Facility Security Officer (FSO). The FSO will need to know the security protocol regarding each facility and describe the information required in this rule in order to comply with the recordkeeping requirement of this rule. We anticipate that this recordkeeping requirement will not have a significant impact on any small entities, i.e., the \$412 recordkeeping cost is less than 1 percent of revenue for all sampled small entities.

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected:

We considered other alternatives in this final rule. Those alternatives include no regulatory changes, requiring changes to the DoS rather than to the FSP, and outlining more prescriptive measures. We rejected each alternative, because making no regulatory changes would not fulfill our mandate, changing the DoS would not specifically target noncompliant facilities, and making more prescriptive measures would not provide as much regulatory flexibility.

In addition, public comments suggested that requiring escorting for a

list of individuals would pose security problems and become too costly to implement. This rule narrows the list of acceptable individuals to seafarers, pilots, and welfare organizations, reducing the scope of individuals who will be allowed to be escorted through the facility to those people and groups specifically required by the Act.

The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we offer to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

This rule calls for a collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), “collection of information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions,

searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection. Under the provisions of this final rule, the affected facilities and vessels are required to update their FSPs to include provisions for seafarers’ access. This requirement would amend an existing collection of information by increasing the number of instances requiring information to be collected under OMB control number 1625–0077.

Title: Security Plans for Ports, Vessels, Facilities, and Outer Continental Shelf Facilities and other Security-Related Requirements.

OMB Control Number: 1625–0077.

Summary of the Collection of Information: This final rule modifies an existing collection of information for facility owners and operators of MTSA-regulated facilities. MTSA-regulated facilities are required to include a description of a system for seafarer access in their FSPs. This rule requires a one-time change in previously approved OMB Collection 1625–0077.

Final Use of Information: The Coast Guard will use this information to determine whether a facility is providing adequate seafarer access and complying with the provisions of the final rule.

Description of the Respondents: The respondents are owners of MTSA-regulated facilities regulated by the Coast Guard under 33 CFR chapter I, subchapter H.

Number of Respondents: We estimate that 2,469 MTSA-regulated facilities with FSPs will be required to modify their existing FSP.

Frequency of Response: There will be a one-time response for all 2,469 respondents. The FSP would need to be updated within 10 months of the publication of the final rule.

Burden of Response: The burden resulting from this final rule is 6 hours per respondent in the initial year.

Estimate of Total Annual Burden: The estimated implementation period burden for facilities is 6 hours per FSP amendment. Since there are 2,469 MTSA facilities that are required to

modify their existing FSP, with the inclusion of administrative time of about 420 hours, the total burden is 15,234 hours [(2,469 facilities × 6 hours) + (2,469 facilities × 0.17 administrative hours)]. The current burden listed in this collection of information is 1,108,043. The new burden, as a result of this final rulemaking, is 1,123,277 (1,108,043 + 15,234).

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this final rule to OMB for its review of the collection of information. You are not required to respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, we will publish a notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the final collection.

E. Federalism

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

This rule would update existing regulations in 33 CFR part 105 by requiring each owner or operator of a facility regulated by the Coast Guard to implement a system that provides seafarers and other covered individuals with access through the facility at no cost to the seafarer. Additionally, this rule requires facilities to amend facility security plans in order to ensure compliance.

It is well-settled that States may not regulate in categories reserved for regulation by the Coast Guard. (See the decision of the Supreme Court in the consolidated cases of *United States v. Locke* and *Intertanko v. Locke*, 529 U.S. 89, 120 S.Ct. 1135 (2000)). The Coast Guard believes the federalism principles articulated in *Locke* apply to the regulations promulgated under the authority of the Maritime Transportation Security Act. States and local governments are foreclosed from regulating within the fields covered by regulations found in 33 CFR parts 101, 103, 104, and 106. However, with regard to regulations found in 33 CFR part 105,

State maritime facility regulations are not preempted so long as these State laws or regulations are more stringent than what is required by 33 CFR part 105 and no actual conflict or frustration of an overriding need for national uniformity exists. Therefore, the rule is consistent with the principles of federalism and preemption requirements in Executive Order 13132.

F. Unfunded Mandates Reform Act

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

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights").

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 ("Civil Justice Reform"), to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045 ("Protection of Children from Environmental Health Risks and Safety Risks"). This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this rule under Executive Order 13211 ("Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use"). We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A final Record of Environmental Consideration (REC) supporting this determination is available in the docket where indicated in the **ADDRESSES** section of this preamble. This final rule involves providing access for seafarers to maritime facilities. Therefore, this rule is categorically excluded under paragraph L54 and paragraph L56 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. Paragraph L54 pertains to regulations which are editorial or procedural. Paragraph L56 pertains to regulations concerning the training, qualifying, licensing, and disciplining of maritime personnel.

List of Subjects in 33 CFR Part 105

Maritime security, Reporting and recordkeeping requirements, Security measures.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 105 as follows:

33 CFR—Navigation and Navigable Waters

PART 105—MARITIME SECURITY: FACILITIES

■ 1. The authority citation for part 105 is revised to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. 70103; 50 U.S.C. 191; Sec. 811, Pub. L. 111–281, 124 Stat. 2905; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department of Homeland Security Delegation No. 0170.1.

§ 105.200 [Amended]

■ 2. Amend § 105.200 as follows:

■ a. In paragraph (b)(1), remove the words “security organizational structure” and add in their place the words “organizational structure of the security personnel” and remove the words “within that structure”;

■ b. In paragraph (b)(4), remove the text “an FSP” and add in its place the text “a Facility Security Plan (FSP)”;

■ c. In paragraph (b)(6) introductory text, remove the acronym “TWIC” and add in its place the words “Transportation Worker Identification Credential (TWIC)”;

■ d. In paragraph (b)(6)(i), after the words “FSP are permitted to” add the words “serve as an”;

■ e. In paragraph (b)(6)(ii), remove the word “should” and add in its place the words “in the event that”;

■ f. In paragraph (b)(6)(iii), remove the word “what”, and add in its place the word “which” and after the words “are secure areas and” add the words “which are”;

■ g. In paragraph (b)(9), remove the text “coordination of” and add in its place the text “implementation of a system, in accordance with § 105.237, coordinating” and remove the text “(including representatives of seafarers’ welfare and labor organizations)” and add in its place the text “, as described in § 105.237(b)(3)”;

■ h. In paragraph (b)(14), remove the text “TSA” and add in its place the text “Transportation Security Administration (TSA)”.

■ 3. Add § 105.237 to read as follows:

§ 105.237 System for seafarers’ access.

(a) *Access required.* Each facility owner or operator must implement a system by June 1, 2020 for providing access through the facility that enables individuals to transit to and from a vessel moored at the facility and the facility gate in accordance with the requirements in this section. The system must provide timely access as described in paragraph (c) of this section and incorporate the access methods

described in paragraph (d) of this section at no cost to the individuals covered. The system must comply with the Transportation Worker Identification Credential (TWIC) provisions in this part.

(b) *Individuals covered.* The individuals to whom the facility owner or operator must provide the access described in this section include—

(1) Seafarers assigned to a vessel at that facility;

(2) Pilots; and

(3) Representatives of seafarers’ welfare and labor organizations.

(c) *Timely access.* The facility owner or operator must provide the access described in this section without unreasonable delay, subject to review by the Captain of the Port (COTP). The facility owner or operator must consider the following when establishing timely access without unreasonable delay:

(1) Length of time the vessel is in port.

(2) Distance of egress/ingress between the vessel and facility gate.

(3) The vessel watch schedules.

(4) The facility’s safety and security procedures as required by law.

(5) Any other factors specific to the vessel or facility that could affect access to and from the vessel.

(d) *Access methods.* The facility owner or operator must ensure that the access described in this section is provided through one or more of the following methods:

(1) Regularly scheduled escort between the vessel and the facility gate that conforms to the vessel’s watch schedule as agreed upon between the vessel and facility.

(2) An on-call escort between the vessel and the facility gate.

(3) Arrangements with taxi services or other transportation services, ensuring that any costs for providing the access described in this section, above the service’s standard fees charged to any customer, are not charged to the individual to whom such access is provided. If a facility provides arrangements with taxi services or other transportation services as the only method for providing the access described in this section, the facility is responsible to pay any fees for transit within the facility.

(4) Arrangements with seafarers’ welfare organizations to facilitate the access described in this section.

(5) Monitored pedestrian access routes between the vessel and facility gate.

(6) A method, other than those in paragraphs (d)(1) through (5) of this section, approved by the COTP.

(7) If an access method relies on a third party, a back-up access method that will be used if the third party is unable to or does not provide the required access in any instance. An owner or operator must ensure that the access required in paragraph (a) of this section is actually provided in all instances.

(e) *No cost to individuals.* The facility owner or operator must provide the access described in this section at no cost to the individual to whom such access is provided.

(f) *Described in the Facility Security Plan (FSP).* On or before February 3, 2020, the facility owner or operator must document the facility’s system for providing the access described in this section in the approved FSP in accordance with § 105.410 or § 105.415. The description of the facility’s system must include—

(1) Location of transit area(s) used for providing the access described in this section;

(2) Duties and number of facility personnel assigned to each duty associated with providing the access described in this section;

(3) Methods of escorting and/or monitoring individuals transiting through the facility;

(4) Agreements or arrangements between the facility and private parties, nonprofit organizations, or other parties, to facilitate the access described in this section; and

(5) Maximum length of time an individual would wait for the access described in this section, based on the provided access method(s).

■ 4. Amend § 105.405 as follows:

■ a. In paragraph (a)(18), remove the text “part 105; and,” and add in its place “this part;”;

■ b. In paragraph (a)(21), remove the period at the end of the paragraph and add in its place “; and”; and

■ c. Add paragraph (a)(22).

The addition reads as follows:

§ 105.405 Format and content of the Facility Security Plan (FSP).

(a) * * *

(22) System for seafarers’ access.

* * * * *

Dated: March 27, 2019.

Jennifer F. Williams,

Captain, U. S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2019–06272 Filed 3–29–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 165**

[Docket Number USCG–2019–0202]

RIN 1625–AA00

Safety Zone; Missouri River, Miles 226–360, Glasgow, MO to Kansas City, MO

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Missouri River from mile marker (MM) 226 to MM 360 between Glasgow, MO and Kansas City, MO. This action is necessary to provide for the safety of persons, vessels, and the marine environment on these navigable waters as a result of increasing flood conditions on the river that is threatening to overtop levees. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative.

DATES: This rule is effective without actual notice from April 1, 2019 until April 30, 2019, or until cancelled by the Captain of the Port Sector Upper Mississippi River, whichever occurs first. For the purposes of enforcement, actual notice will be provided from 8:30 a.m. on March 26, 2019 until April 1, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2019–0202 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Christian Barger, Sector Upper Mississippi River Waterways Management Division, U.S. Coast Guard; telephone 314–269–2560, email Christian.J.Barger@uscg.mil.

SUPPLEMENTARY INFORMATION:**I. Table of Abbreviations**

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

USACE United States Army Corps of Engineers
 U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. It is impracticable because we must establish this safety zone immediately and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay the establishment of the safety zone and compromise public safety.

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

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The COTP has determined that potential hazards associated with flood waters threaten to overtop levees along the river. The United States Army Corps of Engineers (USACE) Kansas City District has expressed concern that vessel traffic in the affected area could cause damage to the levees resulting in overtopping or failure. This rule is necessary to ensure the safety of persons, vessels, and the marine environment on these navigable waters due to the flood impacts to USACE levees.

IV. Discussion of the Rule

On March 25, 2019, the USACE Kansas City District contacted the Coast Guard to report an increase in flood waters approaching the tops of levees along the Missouri River between Mile Marker (MM) 226 and MM 360 and requested a river closure to ensure the safety of persons, vessels, and the marine environment that would result if

floodwaters overtop the levees. This rule establishes a temporary safety zone from March 26, 2019 until April 30, 2019, until cancelled by the Captain of the Port Sector Upper Mississippi River (COTP), whichever occurs first. The safety zone will cover all navigable waters of the Missouri River from MM 226 to MM 360, unless reduced in scope by the COTP as flood conditions warrant.

No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River. To seek permission to enter, contact the COTP or a designated representative via VHF–FM channel 16, or through USCG Sector Upper Mississippi River at 314–269–2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative. The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in size of the safety zone as flood conditions improve, through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the emergency nature of the

action and after consultation with representatives of the shipping industries that use this reach of river indicate that the many shipping companies have already made arrangements to avoid this area. Moreover, the Coast Guard will issue a BNM via VHF-FM marine channel 16 about the zone, and the rule allows vessels to seek permission to enter the zone on a case-by-case basis.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

This rule will not call for a new collection of information under the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary safety zone prohibiting entry on a ninety mile stretch of the Missouri River that is experiencing significant flooding that is impacting levees. It is categorically excluded from further review under paragraph L60(d) of

Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination will be made available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034; 46 U.S.C. 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0202 to read as follows:

§ 165.T08–0202 Safety Zone; Missouri River, Miles 226–360, Glasgow, MO to Kansas City, MO.

(a) *Location.* The following area is a safety zone: all navigable waters of the Missouri River from mile marker (MM) 226 to MM 360. This section will be enforced on all navigable waters of the Missouri River from MM 226 to MM 360, unless reduced in scope by the Captain of the Port Sector Upper Mississippi River (COTP) as flood conditions warrant.

(b) *Effective period.* This rule is effective without actual notice from April 1, 2019 until April 30, 2019, or until cancelled by the COTP, whichever occurs first. For the purposes of enforcement, actual notice will be provided from 8:30 a.m. on March 26, 2019 until April 1, 2019.

(c) *Regulations.* (1) In accordance with the general safety zone regulations in § 165.23, entry of persons or vessels into this safety zone described in paragraph (a) of this section is prohibited unless authorized by the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S.

Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River.

(2) To seek permission to enter, contact the COTP or a designated representative via VHF-FM channel 16, or through USCG Sector Upper Mississippi River at 314-269-2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in size of the safety zone as flood conditions improve, through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

Dated: March 26, 2019.

S.A. Stoermer,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2019-06093 Filed 3-29-19; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900-AQ27

Release of Information From Department of Veterans Affairs' Records

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs' (VA) regulations governing the submission and processing of requests for information under the Freedom of Information Act (FOIA) and the Privacy Act to reorganize, streamline, and clarify existing regulations.

DATES: This rule is effective May 1, 2019.

FOR FURTHER INFORMATION CONTACT:

Catherine Nachmann, Attorney, Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-7742 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On April 5, 2018, VA published a proposed rule in the **Federal Register** [83 FR 14613]. We proposed to amend VA's regulations pertaining to release of information under 5 U.S.C. 552 and implementation

of the FOIA, codified at 38 CFR 1.550 through 1.562. We proposed to update VA's FOIA regulations to implement amendments in the FOIA Improvement Act of 2016, Public Law 114-185, and those governing release of information from claimant records protected under the Privacy Act of 1974, namely 38 CFR 1.577 (c) and (e) and 1.580. In addition to complying with statutory changes, we proposed to amend the regulations to clarify sections as needed and streamline VA processes regarding release of information, thus making it easier for the requester to follow the agency's procedures.

We received comments from four commenters that both supported the proposed rule and recommended modifications of the proposed rule; one comment was received in duplicate. To clarify, we received total of four comment submissions from four separate commenters. We address each of the recommendations below as we sequentially discuss the relevant provisions.

The first commenter suggested that VA add the definition of FOIA public liaison to the "definitions" section, based on the liaison's increased role in the FOIA process. The commenter suggested that VA use the following definition: "FOIA public liaison means a supervisory agency FOIA official who assists in the resolution of any disputes between the requester and the agency." We agree that adding the definition of FOIA public liaison in the definitions section will assist requesters in identifying individuals potentially involved in the FOIA process; accordingly, we accept this suggestion and will add "FOIA public liaison" to § 1.551. We note that the proposed rule included reference to FOIA public liaison in § 1.556 and § 1.557; in addition, current § 1.551 references the availability of FOIA public liaisons to assist in resolution of disputes between the agency and the requester. Incorporating the definition, therefore, merely elaborates upon the term as presented in VA's FOIA regulations. Accordingly, the addition of this definition is within the scope of the FOIA regulations and is a logical outgrowth of the proposed rule.

The commenter also advised that VA's definition of "request" may be confusing because it provides that the term request includes "any action emanating from the initial demand for records, including an appeal related to the initial demand." We agree that use of the term "appeal" within the definition of "request" may be confusing; accordingly, we revised the definition in § 1.551. The revision of the

definition is a clarification of the current definition and is not a significant alteration of the proposed rule.

The second commenter expressed dissatisfaction with the current VA FOIA web page and suggested that VA engage in usability testing and other means of testing user experience. We note in response that VA Office of Privacy and Identity Protection is revising the VA FOIA web page and in doing so, will address the concerns expressed by the commenter. Regarding usability testing, VA will test the FOIA site to ensure that it is working properly, although VA does not have a specific program to regularly test the site. In the event an issue is identified when VA tests the site, however, the issue will be addressed and resolved. The commenter also suggested that we write the regulations in plain language; we agree and endeavor to write in plain language to the extent possible.

The third commenter objected to the absence of changes to § 1.553; the commenter argued that VA should revise the section in its entirety. The commenter stated that proactive disclosures are not discretionary disclosures because they are triggered by statute, and supplied sample language as provided in the DOJ OIP FOIA regulation template. We note that these comments are beyond the scope of the proposed rule; as a matter of courtesy, we stress nonetheless that current § 1.553 specifically addresses the disclosure of records required by the FOIA. The section then separately addresses disclosure of records at VA discretion. Accordingly, we believe that § 1.553 is in keeping with the letter and spirit of the FOIA and requires no revision.

The third commenter also observed that proposed § 1.554(d) and the sections following it do not comply with the Department of Justice (DOJ) Office of Information Policy (OIP) template regarding requirements for making a request. The commenter also pointed out that § 1.554 does not contain language offering the services of a FOIA Public Liaison. In response to the allegation here and throughout this commenter's submission pertaining to VA's adherence to the OIP regulation template, VA responds that, as noted on the DOJ website, the OIP regulation template provides guidelines and sample language for agencies as they address the key elements of each section. The template does not require agencies to use the identical format or language in drafting its own agency regulations. Currently, we are revising VA's FOIA regulations to make them

consistent with the FOIA Improvement Act of 2016; simultaneously, we are revising some provisions based on our experience in implementing the existing regulations. While we appreciate the usefulness of the template in certain circumstances, we conclude that our proposed rule represents a revision of and improvement to the current regulations consistent with current law and policy and that revising to mimic the template verbatim is not necessary.

As to the commenter's statement that VA does not include language in § 1.554 regarding the services of a FOIA Public Liaison, we point out that the availability of FOIA Public Liaisons is described in § 1.552; further, requesters are advised of the availability of FOIA Public Liaisons in their initial agency determinations pursuant to §§ 1.554 (d) and (e). VA also intends to make information regarding FOIA Public Liaisons available on its FOIA home page and in internal agency guidance as necessary. Overall, we are satisfied that the notification of the availability of FOIA Public Liaisons as contained in the current regulation is consistent with the FOIA.

The third commenter further suggested that the requester's right to request records in a particular form or format should be included § 1.554 rather than § 1.557 ("Responses to requests"), based on the location of the information in the OIP template. First, we note that the comment is beyond the scope of the proposed rule. In addition, we refer to our response above regarding the requirement to follow the OIP template verbatim. Lastly, as a matter of courtesy, we note in response that as currently written, VA FOIA regulations address the issue of the form or format of responsive records in a manner that sufficiently advises the requester of his or her right to receive records in a specific format. Accordingly, we decline to revise the regulation based on this comment.

In addition, this commenter noted that § 1.554 does not contain a paragraph dedicated to "customer service," to include notifying requesters of the availability of FOIA Public Liaisons. In response, we refer first to our discussion above regarding FOIA Public Liaisons. As to customer service generally, we conclude that VA regulations provide sufficient customer service in various forms; the regulations, for example, provide guidance regarding how and where to send a FOIA request, information that the request must contain, and information pertaining to the FOIA process. The regulations also describe the FOIA Officers' duties, including an obligation to communicate

with the FOIA requester. In view of the totality of VA's FOIA regulations, we believe that no additional revisions are necessary in this regard.

The first commenter suggested that VA include in § 1.554(c) a description of the distinction between requests under the FOIA and those under the Privacy Act, as follows: "The Freedom of Information Act applies to the third-party requests for documents concerning the general activities of the Government and of VA in particular. When a U.S. citizen or an individual lawfully admitted for permanent residence requests access to his or her own records, it is considered a Privacy Act request. Such records are maintained by VA under the individual's name or personal identifier. Although requests are considered either FOIA requests or Privacy Act requests, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access while safeguarding an individual's personal privacy." We agree that including such a distinction in VA FOIA regulations is useful, but we believe that it is more appropriately placed at the beginning of VA FOIA regulations. Accordingly, we added the language in § 1.550 (b).

The first commenter also noted that the language of proposed § 1.556 (c)(1), *i.e.*, "Where an extension of more than 10 business days is needed . . ." does not comply with the FOIA, as the FOIA does not permit an extension beyond 30 business days simply by notifying the requester and giving him or her the opportunity to modify the request. The commenter offered the following language in its place: "Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request."

The language used by VA in the current regulation was not intended to imply that an extension beyond 30 days was consistent with the FOIA. Given that the proposed language could be read that way, however, we agree with the commenter's suggested revision and we revised the section consistent with the language provided. We believe the revised language merely clarifies the intended meaning of the section and is not a significant change to the proposed rule.

Further, the first commenter suggested that under § 1.556 (c)(iii), it was unclear whether the term "components" referred to VA components. The commenter suggested that we insert "VA" prior to

"components" in order to clarify. We agree with the comment and inserted "VA" for clarification. The revision represents a clarification only and is not a significant change to the proposed rule.

The third commenter suggested that VA add the following language in § 1.557(a) after providing that the FOIA Officer will advise the requester of the receipt of the FOIA request and a FOIA request number: ". . . if it will take longer than 10 working days to process. Agencies must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests. . . ." VA agrees that providing information to the FOIA requester is useful in the FOIA request process; VA regulation § 1.557(a) provides that the VA FOIA Officer will advise the requester of the receipt of the request and will provide the requester with the assigned FOIA request number to allow the requester to track the request. We believe that as it stands, § 1.557(a) complies with both the letter and the spirit of the FOIA and provides adequate information to the requester. Accordingly, we do not believe that additional modification to the language is necessary.

In addition, the third commenter suggested that VA remove of § 1.557(b) based on its non-compliance with the FOIA improvement Act of 2016. We find this comment to be outside the scope of the proposed rule. In response nevertheless, we conclude that § 1.557(b) is consistent with both the letter and the spirit of the FOIA and that no deletion is required. The commenter otherwise objects generally to § 1.557's lack of conformance to the OIP template for agency FOIA regulations and suggests that parts of the section be moved elsewhere. In this regard, we refer to our response above regarding OIP regulation template guidance.

The first commenter suggested that VA add language in subsection 1.557(d), "grants of requests in full," regarding appeal rights and information about OGIS. Upon review, we agree that including the additional information is useful. Accordingly, we added appeal and mediation rights to subsection 1.557(d). This revision is an extension or outgrowth in this regard, and does not represent a substantial alteration of the proposed rule.

The first commenter also noted that in section 1.557 (e)(5), the word "public" is missing from the phrase "FOIA Public Liaison." VA corrected this oversight. The revision is not a significant change to the proposed rule.

The third commenter suggested that the term “business information” as used in § 1.551 should be replaced with “confidential commercial information” because the latter term “supplanted” the term “business information” in 2003. In response, we point out that when VA revised its regulations in 2011, we purposefully replaced the term “confidential commercial information” with “business information.” We concluded at that time that the change used plain language and permitted individuals to get a clear idea at the outset whether their request would involve such information. We still believe that the use of “business information” more effectively allows individuals to find relevant provisions in VA’s regulations. Accordingly, we believe that revising the term to “confidential commercial information” in this section is not necessary.

The third commenter also stated that the VA is not compliant with FOIA Improvement Act of 2016 in § 1.559 unless it includes language in the appeals section that refers to the availability of dispute resolution services with OGIS. In addition, the first commenter noted that written appeal notices should also notify the requester of dispute resolution services offered by OGIS; the commenter suggested adding the following language to section (e), Responses to appeals: “Dispute resolution is a voluntary process. If an agency agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.”

In response, we point out that VA appeal letters contain language notifying the requester of the option to pursue dispute resolution services with OGIS, although the regulations do not contain specific direction to do so. We believe that inclusion of the language in final agency decisions satisfies the requirements under the FOIA and that more specific direction as to the requester’s option regarding dispute resolution services is more appropriate for inclusion in a policy document.

The third commenter stated that VA’s section regarding FOIA fees, § 1.561, should begin by acknowledging that VA fee regulations must comply with OMB Fee Guidelines. In response, we note that VA’s FOIA fee section addresses the requirements imposed by FOIA and OMB fee guidelines. We believe specific reference to the OMB fee guidelines at the outset of the regulation is superfluous; accordingly, we decline the commenter’s suggestion in this regard.

The first commenter suggested that VA add the definition of “fee waiver” to

the “definitions” provided in § 1.561; the commenter noted that even experienced requesters can be confused between requester category and fee waiver. We agree that addition of the definition is beneficial and revised the “definitions” section to include “fee waiver.” The revision is a natural outgrowth of the proposed rule in that it simply enlarges information already provided in the proposed rule.

Further, the first commenter noted that § 1.561(f) consists of a table summarizing FOIA requester fee categories, and that the table lists five categories. The commenter further noted that the corresponding § 1.561(c)(2)–(4), identifying fee requester categories, consists of four categories. The commenter suggested that we combine the entries in the chart for Educational Institution and Non-Commercial Scientific Institution to create consistency between the section and the table. We agree with this suggestion and believe that the revision will resolve any confusion that the current structure could cause. Accordingly, we revised § 1.561(f) to combine the categories in the table, per the suggestion. We note that the revision is not significant in that Educational Institution and Non-Commercial Scientific Institution are in the same fee category. The revision is a logical outgrowth and not a significant revision of the proposed rule.

Lastly, with regard to § 1.561(n), the first commenter noted that the FOIA does not require that requesters seeking a fee waiver or reduction respond to the agency with additional information within 10 days or their fee waiver or reduction request will be closed. The commenter observed that other agencies that have a similar regulation allow 30 days and recommended that VA do the same.

Upon consideration of this comment, VA notes that section (n)(1) relates to fee waiver or reduction requests. The section provides that the requester must provide adequate justification for the waiver or reduction. The additional 10 business days that the FOIA Officer may afford the requester under this section is based on the FOIA Officer’s exercise of his or her discretion upon consideration of the information provided in support of the fee waiver request. Given that the requester is responsible for submitting justification at the outset, we believe that in those instances where additional information is needed, an additional 10 business days is sufficient. Accordingly, we decline to revise the regulation based on this comment.

Finally, the third commenter noted that § 1.580(c) fails to cite statutory authority for the change articulated in

the proposed rule and questions why VA is “. . . allowed to NOT respond to Privacy Act requests for access . . . and then amend errors that are causing bad decisions affecting Veterans—and not call it an OGC appealable denial of access?”

In response, we first point out that the authority cited in the current regulation, 38 U.S.C. 501, supports VA’s revision. Section 501 provides that the Secretary has the authority to prescribe rules and regulations that are necessary or appropriate to carry out the laws administered by VA. In addition, the regulation does not “allow VA to NOT respond . . .” Rather, the regulation clarifies that § 1.580 applies to a written denial of a request rather than the absence of a denial. The requester has the right to appeal a written denial of access to OGC.

The fourth and final commenter suggested that VA add language to § 1.577 that is similar to the language of § 1.554(d)(3), providing that if the requester does not reasonably describe the records being sought, VA will provide the requester the opportunity to modify the request to meet the elements required for a perfected request.

We accept the commenter’s suggestion and added language similar to that in § 1.577 with regard to requests under the Privacy Act.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule concerns the procedures for requesting information from VA and the payment of certain fees for processing such requests. The fees prescribed by this final rule will generally comprise only an insignificant portion of a small entity’s expenditures. Therefore, this final rule is exempt, pursuant to 5 U.S.C. 605(b), from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review, defines “significant regulatory action” to mean any regulatory action that is likely to result in a rule that may: “(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined that the action is not a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>,

usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s website at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 through FYTD. 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 year. This final rule would have no such effect on state, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There is no Catalog of Federal Domestic Assistance number for the program affected by this final rule.

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, and Wages.

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 March 14, 2019, for publication.

Dated: March 26, 2019

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, VA amends 38 CFR part 1 as follows:

PART 1—GENERAL PROVISIONS

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

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

- 2. In § 1.519, revise paragraph (c) to read as follows.

§ 1.519 Lists of names and addresses.

* * * * *

(c) The Associate Deputy Assistant Secretary for Information Resources Management is authorized to release lists of names and addresses to organizations which have applied for such lists in accordance with paragraph (a) of this section, if he or she finds that the purpose for which the organization desires the names and addresses is directly connected with conduct of programs and the utilization of benefits under title 38 U.S.C. Lists of names and addresses authorized to be released pursuant to this paragraph shall not duplicate lists released to other elements, segments, or chapters of the same organization.

* * * * *

- 3. In § 1.550, revise paragraph (b) to read as follows:

§ 1.550 Purpose.

* * * * *

(b) Requests for records about an individual, protected under the Privacy Act, 5 U.S.C. 552a, including one’s own records and records that pertain to an individual and that may be sensitive, will be processed under the FOIA and the Privacy Act. The FOIA applies to third-party requests for documents concerning the general activities of the Government and of VA in particular. When a U.S. citizen or an individual lawfully admitted for permanent residence requests access to his or her own records, it is considered a Privacy Act request. Such records are maintained by VA under the individual’s name or personal identifier. Although requests are considered either FOIA requests or Privacy Act requests, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access while safeguarding an individual’s personal privacy. In addition to the following FOIA regulations, see 1.575 through 1.584 for regulations applicable of Privacy Act records.

* * * * *

- 4. In § 1.551, add in alphabetical order a definition for “FOIA public liaison” and revise the definition of “request” to read as follows:

§ 1.551 Definitions.

* * * * *

FOIA Public Liaison means a supervisory agency FOIA official who assists in the resolution of any disputes between the requester and the agency.

* * * * *

Request means a written demand for records under the FOIA as described § 1.554(a). The term request includes any action emanating from the initial demand for records, including any subsequent action related to the request.

* * * * *

- 5. In § 1.552, revise paragraph (a) to read as follows:

§ 1.552 General provisions.

(a) *Additional information.* Information regarding VA’s FOIA and Privacy Act process generally, including how to file FOIA requests, and information made available by VA under the FOIA, is available at the following internet address: <http://www.oprm.va.gov/foia/>.

* * * * *

- 6. In § 1.554, revise paragraphs (a) through (c), (d)(2) and (4), and (e) to read as follows:

§ 1.554 Requirements for making requests.

(a) *Requests by letter and facsimile (fax).* The FOIA request must be in writing and may be by letter or fax. To assist in processing, the request letter, envelope, or fax cover sheet of any FOIA request should be marked "Freedom of Information Act Request." Information helpful for filing a request, such as a list of VA FOIA contacts, VA's FOIA Reference Guide, and the text of the FOIA, are available on VA's FOIA homepage on the internet. See § 1.552(a) for the pertinent internet address. VA has a decentralized FOIA system, meaning that each VA component, *i.e.*, administrations and staff offices, the Veterans Health Administration (VHA) medical centers, Veterans Benefits Administration (VBA) regional offices, or offices located within the VA Central Office in Washington, DC (*e.g.*, the Office of the Secretary), maintain their own FOIA processes and respond to FOIA requests directly. Accordingly, requesters must write directly to the FOIA Officer for the VA component that maintains the records. If requesting records from a particular medical facility, regional office, or Central Office component, the request should be sent to the FOIA Office at the address listed for that component. A legible return address must be included with the FOIA request; the requester may wish to include other contact information as well, such as a telephone number and email address. If the requester is not sure where to send the request, he or she should seek assistance from the FOIA Contact for the office believed to manage the programs whose records are being requested or, if these efforts fail, he or she should send the request to the Director, FOIA Service (005R1C), 810 Vermont Avenue NW, Washington, DC 20420, who will refer it for action to the FOIA contact at the appropriate component.

(b) *Requests by email.* VA accepts email FOIA requests. To assure prompt processing, email FOIA requests must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA requests. An email FOIA request that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA request. Mailbox addresses designated to receive email FOIA requests are available on VA's FOIA homepage. See § 1.552(a) for the pertinent internet address.

(c) *The content of a request.* Whether submitting the request by letter, fax, or email, the following applies: If the requester is seeking records about himself or herself or to which a

confidentiality statute applies (38 U.S.C. 5701, *e.g.*), the requester must comply with the verification of identity requirements set forth in § 1.577 of this part, which applies to requests for records maintained under the Privacy Act. If the requester is seeking records not covered by the Privacy Act, but which the requester believes may pertain to him or her, the requester may obtain greater access to the records by complying with the verification of identity requirements set forth in § 1.577 of this part, by providing the image of the requester's signature (such as an attachment that shows the requester's handwritten signature), or by submitting a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. The suggested language for a statement under 28 U.S.C. 1746 is included on VA's FOIA homepage; see § 1.552(a) for the pertinent internet address. If the requester is seeking records pertaining to another individual under the FOIA, whether by letter, fax, or email, the requester may obtain greater access to the records if he or she provides satisfactory authorization to act on behalf of the record subject to receive the records or by submitting proof that the record subject is deceased (*e.g.*, a copy of a death certificate or an obituary). Each component has discretion to require that a requester supply additional information to verify that a record subject has consented to disclosure.

(d) * * *
(2) Requests for voluminous amounts of records may be placed in a complex track of a multitrack processing system pursuant to § 1.556(b); such requests also may meet the criteria for "unusual circumstances," which are processed in accordance with § 1.556(c) and may require more than 20 business days to process despite the agency's exercise of due diligence.

* * * * *
(4) The time limit for VA to process the FOIA request will not start until the FOIA Officer determines that the requester has reasonably described the records sought in the FOIA request. If the FOIA Officer seeks additional clarification regarding the request and does not receive the requester's written response within 30 calendar days of the date of its communication with the requester, he or she will conclude that the requester is no longer interested in pursuing the request and will close VA's files on the request.

(e) *Agreement to pay fees.* The time limit for processing a FOIA request will be tolled while any fee issue is

unresolved. Depending on the circumstances, the FOIA Officer will notify the requester of the following: That the FOIA Officer anticipates that the fees for processing the request will exceed the amount that the requester has stated a willingness to pay or will amount to more than \$25.00 or the amount set by Office of Management and Budget fee guidelines, whichever is higher; whether the FOIA Officer is requiring the requester to agree in writing to pay the estimated fee; or whether advance payment of the fee is required prior to processing the request (*i.e.*, if the estimated fee amount exceeds \$250 or the requester previously has failed to pay a FOIA fee in a timely manner). If the FOIA Officer does not receive the requester's written response to the notice regarding any of these items within 10 business days of the date of the FOIA Officer's written communication with the requester, the FOIA Officer will close the request. If requesting a fee waiver under § 1.561, the requester nonetheless may state his or her willingness to pay a fee up to an identified amount in the event that the fee waiver is denied; this will allow the component to process the FOIA request while considering the fee waiver request. If the requester pays a fee in advance, and VA later determines that the requester overpaid or is entitled to a full or partial fee waiver, a refund will be made. (For more information on the collection of fees under the FOIA, see § 1.561.)

* * * * *
■ 7. In § 1.556, revise paragraphs (c)(1) and (d)(3) to read as follows:

§ 1.556 Timing of responses to requests.

* * * * *

(c) * * *
(1) FOIA Officers may encounter "unusual circumstances," where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the 20-business day time limit for 10 more business days and notify the requester in writing of the unusual circumstances and the date by which it expects to complete processing of the request. Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request; notice of the availability of the VA FOIA Public Liaison, and the right to seek dispute resolution services from the Office of Government Information Services.

Unusual circumstances consist of the following:

(i) The need to search for and collect the requested records from field facilities or components other than the office processing the request;

(ii) The need to search for, collect and examine a voluminous amount of separate and distinct records that are the subject of a single request; or

(iii) The need for consultation with another agency or among two or more VA components or another agency having a substantial interest in the subject matter of a request.

* * * * *

(d) * * *

(3) Within 10 calendar days of its receipt of a request for expedited processing, the FOIA Officer shall determine whether to grant the request and will provide the requester written notice of the decision. If the FOIA Officer grants a request for expedited processing, the FOIA Officer shall give the request priority and process it as soon as practicable. If the FOIA Officer denies the request for expedited processing, the requester may appeal the denial, which appeal shall be addressed expeditiously.

■ 8. In § 1.557:

■ a. Revise paragraphs (a) and (c);

■ b. Redesignate paragraph (d) as paragraph (e);

■ c. Add new paragraph (d); and

■ d. Revise newly redesignated paragraph (e).

The revisions and addition read as follows:

§ 1.557 Responses to requests.

(a) *Acknowledgement of requests.*

When a request for records is received by a component designated to receive requests, the component's FOIA Officer will assign a FOIA request number; the FOIA Officer will send the requester written acknowledgement of receipt of the request and will advise the requester of the assigned FOIA request number and how the requester may obtain the status of his or her request.

* * * * *

(c) *Time limits for processing requests.*

A component must advise the requester within 20 business days from the date of VA's receipt of the request whether the request is granted in its entirety, granted in part, or denied in its entirety and provide the reasons therefor. If the request must be referred to another component, the response time will begin on the date that the request was received by the appropriate component, but in any event not later than 10 business days after the referring office receives the FOIA request; the

referring component has an affirmative duty to refer the FOIA request within 10 business days.

(d) *Grants of requests in full.* When a component makes a determination to grant a request in full, it shall notify the requester in writing. The component also shall inform the requester of any fees charged under § 1.561. The component also must inform the requester of his or her right to appeal and to seek mediation or the assistance of the appropriate VA FOIA Public Liaison and provide the contact information for the Liaison.

(e) *Adverse determinations of requests.* When a component makes an adverse determination denying the request in any respect, the component FOIA Officer shall promptly notify the requester of the adverse determination in writing. Adverse determinations include decisions that a requested record is exempt from release in whole or in part, does not exist or cannot be located, is not readily reproducible in the form or format sought by the requester, or is not a record subject to the FOIA; adverse determinations also include denials regarding requests for expedited processing and requests involving fees, such as requests for fee waivers. The adverse determination notice must be signed by the component head or the component's FOIA Officer, and shall include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied by the FOIA Officer in denying the request;

(3) The amount of information withheld in number of pages or other reasonable form of estimation; an estimate is not necessary if the volume is indicated on redacted pages disclosed in part or if providing an estimate would harm an interest provided by an applicable exemption;

(4) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal under § 1.559 of this part; and

(5) Notice that the requester may seek assistance or dispute resolution services from the VA FOIA Public Liaison or dispute resolution services from the Office of Government Information Services.

■ 9. In § 1.558, revise paragraphs (c)(3) and (e) to read as follows:

§ 1.558 Business information.

* * * * *

(c) * * *

(3) Whenever the FOIA Officer notifies the submitter of VA's intent to

disclose over the submitter's objections, the FOIA Officer will also notify the requester by separate correspondence.

* * * * *

(e) *Consideration of objection(s) and notice of intent to disclose.* The FOIA Officer will consider all pertinent factors, including but not limited to, the submitter's timely objection(s) to disclosure and the specific grounds provided by the submitter for non-disclosure in deciding whether to disclose business information. Information provided by the submitter after the specified time limit and after the component has made its disclosure decision generally will not be considered. In addition to meeting the requirements of § 1.557, when a FOIA Officer decides to disclose business information over the objection of a submitter, the FOIA Officer will provide the submitter with written notice, which includes:

(1) A statement of the reason(s) why each of the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date of not less than 10 days from the date of the notice (to allow the submitter time to take necessary legal action).

* * * * *

■ 10. In § 1.559, revise paragraphs (b) through (d) to read as follows:

§ 1.559 Appeals

* * * * *

(b) *How to file and address a written appeal.* The requester may appeal an adverse determination denying the request, in any respect, except for those concerning Office of Inspector General records, to the VA Office of the General Counsel (024), 810 Vermont Avenue NW, Washington, DC 20420. Any appeals concerning Office of Inspector General records must be sent to the VA Office of Inspector General, Office of Counselor (50), 810 Vermont Avenue NW, Washington, DC 20420. The FOIA appeal must be in writing and may be by letter or facsimile (fax); whichever method is used, the appeal must comply with all requirements of this paragraph and paragraph (d). Information regarding where to fax the FOIA appeal is available on VA's FOIA homepage on the internet. See § 1.552(a) of this part for the pertinent internet address.

(c) *How to file an email appeal.* VA accepts email appeals; the appeal must comply with all requirements of this paragraph and paragraph (d) of this section. In order to assure initial processing of an appeal filed by email, the email must be sent to one of the

official VA FOIA mailboxes established for the purpose of receiving FOIA appeals; an email FOIA appeal that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA appeal. Mailbox addresses designated to receive email FOIA appeals are available on VA's FOIA homepage. See § 1.552(a) of this part for the pertinent internet address.

(d) *Time limits and content of appeal.* The appeal to the VA OGC (024) or VA Office of Inspector General (50) must be received or postmarked no later than 90 calendar days after the date of the adverse determination and must contain the following: A legible return address; clear identification of the determination being appealed, including any assigned request number (if no request number was assigned, other information must be provided such as the name of the FOIA officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal); and identification of the part of the determination that is being appealed (if appealing only a portion of the determination). If the appeal involves records about the requester himself or herself or records to which a confidentiality statute applies, the requester must comply with the verification of identity requirements set forth in § 1.577 of this part, which applies to requests for records maintained under the Privacy Act. If the appeal involves records not covered by the Privacy Act, but which the requester believes may pertain to him or her, the requester may obtain greater access to the records by complying with the verification of identity requirements set forth in § 1.577 of this part, providing the image of the requester's signature (such as an attachment that shows the requester's handwritten signature), or submitting a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. The suggested language for a statement under 28 U.S.C. 1746 is included on VA's FOIA homepage. See § 1.552(a) of this part for the pertinent internet address. If the appeal involves records pertaining to another individual (i.e., the requester is not the record subject), the requester may obtain greater access to the records if he or she provides satisfactory authorization to act on behalf of the record subject to receive the records or by submitting proof that the record subject is deceased (e.g., a copy of a death certificate or an obituary). Each component has discretion to require that a requester

supply additional information to verify that a record subject has consented to disclosure. Appeals should be marked "Freedom of Information Act Appeal." The requester may include other information as well, such as a telephone number and email address and a copy of the initial agency determination. An appeal is not perfected until VA either receives the required information identified above or the appeal is otherwise easily and sufficiently defined. The designated official within the Office of the General Counsel (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all appeals pertaining to Office of Inspector General records. A determination by the Office of General Counsel, or designated official within the Office of Inspector General, will be the final VA action.

* * * * *

- 11. Amend § 1.561 by:
- a. Revising paragraphs (a) and (b)(3);
- b. Adding paragraph (b)(1);
- c. Revising paragraphs (d)(2) and (e);
- d. Revising paragraphs (f), (g) introductory text, and (g)(1);
- e. Removing and reserving paragraph (g)(2), and
- f. Revising paragraphs (h), (i), (l)(3) and (5), and (n)(1).

The revisions and additions read as follows:

§ 1.561 Fees.

(a) *General.* VA will charge for processing requests under the FOIA, as amended, and in accordance with this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States. Payment by credit card also may be acceptable; the requester should contact the FOIA Officer for instructions on credit card payments. Note that fees associated with requests from VA beneficiaries, applicants for VA benefits, or other individuals, for records retrievable by their names or individual identifiers processed under 38 U.S.C. 5701 (records associated with claims for benefits) and 5 U.S.C. 552a (the Privacy Act), will be assessed fees in accordance with the applicable regulatory fee provisions relating to VA benefits and VA Privacy Act records.

(b) * * *

(3) *Direct costs* mean expenses that VA incurs in responding to a FOIA request; direct costs include searching for and duplicating (and in the case of commercial use requesters, reviewing) records to respond to a FOIA request,

the hourly wage of the employee performing the work plus 16 percent of the hourly wage, and the cost of operating duplication machinery. Direct costs do not include overhead expenses, such as the costs of space or heating and lighting of the facility where the records are kept.

* * * * *

(10) *Fee waiver* means waiving or reducing processing fees if a requester can demonstrate that certain statutory standards are satisfied, including that the information is in the public interest and is not requested for commercial interest.

* * * * *

(d) * * *

(2) *Duplication.* When the agency provides duplicated records in response to a request, no more than one copy will be provided.

* * * * *

(e) *Limitations on charging fees.* (1) When VA determines that a requester is an educational institution, a non-commercial scientific institution, or a representative of the news media, VA will not charge search fees.

(2) VA charges fees in quarter hour increments; no search or review fee will be charged for a quarter hour period unless more than half of that period is required for search or review.

(3) VA may provide free copies of records or free services in response to an official request from another government agency or a congressional office and when a component head or designee determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

(4)(i) If VA fails to comply with the time limit to respond to a request, it may not charge search fees, or, in cases of requests from requesters described in paragraph (e)(1) of this section, may not charge duplication fees, except as described in paragraph (e)(4)(ii) through (iv) of this section.

(ii) If VA has determined that unusual circumstances as defined by the FOIA apply and has provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If VA has determined that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request, VA may charge search fees, or in the case of requesters described in paragraph (e)(1) of this section, may charge duplication fees, if the following steps are taken: VA must provide timely written notice of unusual circumstances

to the requester in accordance with the FOIA and must discuss with the requester via written mail, email or telephone (and later confirmed in writing) (or have made not less than three good-faith attempts to do so) how the requester could effectively limit the

scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the component may charge all applicable fees incurred in the processing of the request. (iv) if a court has determined that exceptional circumstances exist, as

defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order. (f) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
(1) Commercial Use	Yes	Yes	Yes.
(2) Educational Institution and Non-Commercial Scientific Institution.	No	No	Yes (100 pages or 1 disc free).
(3) News Media	No	No	Yes (100 pages or 1 disc free).
(4) All other	Yes (2 hours free)	No	Yes (100 pages or 1 disc free).

(g) *Fee schedule.* If it is determined that a fee will be charged for processing the FOIA request, VA will charge the direct cost to the agency and in

accordance with the requester's fee category (see § 1.561(c)); to the extent possible, direct costs are itemized in paragraph 1 of this section. Duplication

fees also are applicable to records provided in response to requests made under the Privacy Act (see § 1.577(e),(f)). (1) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8½" x 11"; 8½" x 14") paper records or records on electronic media.	Paper records: \$0.15 per page. Electronic media: \$3.00 per each compact disc (CD) or digital versatile disc (DVD). Direct cost to VA.
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings).	
(iii) Record search by manual (non-automated) methods	Hourly wage of the employee(s), plus 16 percent.
(iv) Record search using automated methods, such as by computer	Direct cost to VA.
(v) Record review (for Commercial Use Requesters only)	Hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the Federal Government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

Note to paragraph (g)(1): VA will charge fees consistent with the salary scale published by the Office of Personnel Management (OPM).

* * * * *

(h) *Notification of fee estimate or other fee issues.* (1) VA will not charge the requester if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or estimated amount of fees and ask the requester to provide written assurance of the payment of all fees or fees up to a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. When the requester does not provide sufficient information upon which VA can identify a fee category (see paragraphs (c)(1) through (c)(4) of this section), or

a clarification is otherwise required regarding a fee, the FOIA Officer may notify the requester and seek clarification; the notification to the requester will state that if a written response is not received within 10 days, the request will be closed. The timeline for responding to the request will be tolled and no further work will be done on the request until the fee issue has been resolved.

(i) *Charges for other services.* Apart from the other provisions of this section, VA will charge the requester the direct costs of providing any special handling or services requested, such as certifying that records are true copies or sending them by other than ordinary mail. The FOIA Officer may choose to provide such a service as a matter of administrative discretion.

* * * * *

(1) * * *

(3) Where the requester previously has failed to pay a properly charged FOIA fee to VA within 30 days of the date of billing, a FOIA Officer may

require the requester to pay the full amount due, plus any applicable interest as specified in this section, and to make an advance payment of the full amount of any anticipated fee, before the FOIA Officer begins to process a new request or continues to process a pending request from that requester.

* * * * *

(5) In cases in which a FOIA Officer requires advance payment or payment is due under this section, the time for responding to the request will be tolled and further work will not be done on the request until the required payment is received.

* * * * *

(n) * * *

(1) *Waiving or reducing fees.* Fees for processing the request may be waived if the requester meets the criteria listed in this section. The requester must submit adequate justification for a fee waiver; without adequate justification, the request will be denied. The FOIA Officer may, at his or her discretion, communicate with the requester to seek

additional information, if necessary, regarding the fee waiver request. If the additional information is not received from the requester within 10 days of the FOIA Officer's communication with the requester, VA will assume that the requester does not wish to pursue the fee waiver request and the fee waiver request will be closed. If the request for waiver or reduction is denied or closed, the underlying FOIA request will continue to be processed in accordance with the applicable provisions of this Part. Requests for fee waivers are decided on a case-by-case basis; receipt of a fee waiver in the past does not establish entitlement to a fee waiver each time a request is submitted.

* * * * *

■ 12. In § 1.577, revise paragraphs (c) and (e) to read as follows:

§ 1.577 Access to Records.

* * * * *

(c) The VA component or staff office having jurisdiction over the records subject to the Privacy Act request will establish appropriate disclosure procedures, including notifying the individual who filed the Privacy Act request of the time, place, and conditions under which the VA will comply with the request, in accordance with applicable laws and regulations. Access requests for Privacy Act records or information must be sent to the staff office that maintains the records; the individual seeking access may consult the system of record notice (https://www.oprm.va.gov/privacy/systems_of_records.aspx) in order to identify the office to which the request should be sent. Each component has discretion to

require that a requester supply additional information to verify his or her identity. If the Privacy Officer determines that the request does not reasonably describe the records being sought, the Privacy Officer will advise the requester how the request is insufficient; the Privacy Officer will provide an opportunity to discuss the request by documented telephonic communication or written correspondence in order to modify it to clearly identify the records being sought.

* * * * *

(e) Fees to be charged, if any, to any individual for making copies of his or her record shall not include the cost of and search for and review of the record. Fees under \$25.00 shall be waived. Fees to be charged are as follows:

Activity	Fees
(1) Duplication of documents by any type of reproduction process to produce plain one-sided paper copies of a standard size (8½" x 11"; 8½" x 14"; 11" x 14").	\$0.15 per page after first 100 one-sided pages or electronic equivalent.
(2) Duplication of non-paper records, such as microforms, audiovisual materials (motion pictures, slides, laser optical disks, video tapes, audio tapes, etc.), computer tapes and disks, diskettes for personal computers, and any other automated media output.	Direct cost to the Agency as defined in § 1.561(b)(3) of this part to the extent that it pertains to the cost of duplication.
(3) Duplication of document by any type of reproduction process not covered by paragraphs (e)(1) or (2) of this section to produce a copy in a form reasonably usable by the requester.	Direct cost to the Agency as defined in § 1.561(b)(3) of this part to the extent that it pertains to the cost of duplication.

■ 13. Revise § 1.580 to read as follows:

§ 1.580 Administrative review.

(a) Upon consideration and denial of a request under § 1.577 or § 1.579 of this part, the responsible VA official or designated employee will inform the requester *in writing* of the denial. The adverse determination notice must be signed by the component head or the component's Privacy Officer, and shall include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial and the policy upon which the denial is based; and

(3) Notice that the requester may appeal the adverse determination under paragraph (b) of this section to the Office of General Counsel (providing the address as follows: Office of General Counsel (024), 810 Vermont Avenue NW, Washington, DC 20420), and instructions on what information is required for an appeal, which includes why the individual disagrees with the initial denial with specific attention to one or more of the four standards (*e.g.*, accuracy, relevance, timeliness, and completeness), and a copy of the denial letter and any supporting

documentation that demonstrates why the individual believes the information does not meet these requirements.

(b) The final agency decision in appeals of adverse determinations described in paragraph (a) of this section will be made by the designated official within the Office of General Counsel (024).

(c) A written denial must have occurred to appeal to OGC. The absence of a response to an access or amendment request filed with a VA component is *not* a denial. If an individual has not received a response to a request for access to or amendment of records, the individual must pursue the request with the Privacy Officer of the administration office (*e.g.*, the VHA, VBA, or National Cemetery Administration Privacy Officer) or staff office (*e.g.*, the Office of Information Technology or Office of Inspector General Privacy Staff Officer) that has custody over the records.

[FR Doc. 2019-06101 Filed 3-29-19; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 447

[CMS-2345-F2 and 2345-IFC2]

RIN 0938-AT09

Medicaid Program; Covered Outpatient Drug; Line Extension Definition; and Change to the Rebate Calculation for Line Extension Drugs

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

ACTION: Final rule and interim final rule with comment period.

SUMMARY: This interim final rule with comment period revises the regulatory text to accurately reflect the applicable statutory language describing the rebate calculation for line extension drugs, which was revised by the Bipartisan Budget Act (BBA) of 2018. In addition, we also are issuing a final rule which responds to comments on the definition and identification of line extension drugs for which we requested additional comments in the Covered Outpatient Drugs final rule with comment period

published in the February 1, 2016 **Federal Register**.

DATES: *Effective date:* April 1, 2019.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on May 31, 2019.

ADDRESSES: In commenting, please refer to file code CMS-2345-IFC2 when commenting on issues in the interim final rule with comment period. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of three ways (please choose only one of the ways listed):

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

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2345-IFC2, P.O. Box 8016, Baltimore, MD 21244-8016.

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

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2345-IFC2, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Ruth Blatt, (410) 786-1767, for issues related to the definition and identification of line extension drugs, and the rebate calculation for line extension drugs. Wendy Tuttle, (410) 786-8690, for all other inquiries.

SUPPLEMENTARY INFORMATION:

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

Provisions open for comment: We will consider comments that are submitted as indicated above in the **DATES** and

ADDRESSES sections on the rebate calculation for line extension drugs discussed in the IFC.

I. Background

A. Introduction

The Covered Outpatient Drugs final rule with comment period (COD final rule) was published in the February 1, 2016 **Federal Register** (81 FR 5170) and became effective on April 1, 2016. The COD final rule implemented provisions of section 1927 of the Social Security Act (the Act) that were added by the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act) pertaining to Medicaid reimbursement for covered outpatient drugs (CODs). It also revised other requirements related to CODs, including key aspects of Medicaid coverage and payment and the Medicaid Drug Rebate (MDR) program under section 1927 of the Act. Additionally, the COD final rule did not finalize a regulatory definition of "line extension" but requested additional public comments on the definition and identification of line extension drugs.

B. Requesting Comments on Definition and Identification of Line Extension Drugs

We stated in the preamble to the COD final rule that we received numerous comments regarding our proposed definition of line extension drug. The comments addressed reasons why certain parameters should not be included in the definition of a line extension drug. For example, comments addressed why new combinations, new indications, and new ester, new salt or other noncovalent derivatives should not be included in the definition of a line extension. Other comments included concerns that our definition was too broad and not supported by legislative history and suggested alternative definitions of line extension drugs.

We stated that while we appreciated the comments that were provided, we had decided not to finalize the proposed regulatory definition of line extension drug at § 447.502. Instead, we requested additional public comments on the definition and identification of line extension drugs (81 FR 5197). The comment period for this additional request for public comments closed on April 1, 2016.

The Comprehensive Addiction and Recovery Act of 2016 (CARA) (Pub. L. 114-198, enacted on July 22, 2016) amended the last sentence of section

1927(c)(2)(C) of the Act. That statutory provision now reads, in this subparagraph, the term "line extension" means, with respect to a drug, a new formulation of the drug, such as an extended release formulation, but does not include an abuse-deterrent formulation of the drug (as determined by the Secretary), regardless of whether such abuse-deterrent formulation is an extended release formulation. The amendment applies to drugs that are paid for by a state in calendar quarters beginning on or after the July 22, 2016, the date of enactment of CARA, which would be, October 1, 2016, the beginning of fourth quarter 2016. In short, CARA exempts certain abuse-deterrent formulations (ADFs) from the definition of line extension for purposes of the MDR program.

We issued Manufacturer Release No. 102 on November 17, 2016 to provide guidance on CARA. In that Manufacturer Release we described how we intend to verify if a drug is an ADF, and thus, should be excluded from the definition of line extension for purposes of the MDR program. This Manufacturer Release states that we intend to use information provided on the Drug Details page for the drug on Drugs@FDA: FDA Approved Drug Products to perform this verification process for the MDR program. For further details, please see the release which is available at <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Prescription-Drugs/Downloads/Rx-Releases/MFR-Releases/mfr-rel-102.pdf>. Please note that FDA has subsequently updated the way in which it lists drug information on Drugs@FDA. The "Drug Details" section is no longer included but details about the drug are available based on the application number, including whether FDA has determined whether the drug has abuse-deterrent properties.

C. Statutory Change to the Rebate Calculation for Line Extension Drugs

Section 53104 of the BBA of 2018 (Pub. L. 115-123, enacted on February 9, 2018) amends section 1927 of the Act by providing a technical correction to the alternative rebate formula for line extension drugs that was established under the Affordable Care Act. Specifically, it amends section 1927(c)(2)(C) of the Act such that the rebate for a line extension drug is the greater of either (a) the standard rebate (calculated as a base rebate amount plus an additional inflation-based rebate), or (b) the base rebate amount increased by the alternative formula contained in section 1927(c)(2)(C)(i) through (c)(2)(C)(iii) of the Act. This amendment

applies to rebate periods beginning on or after October 1, 2018. We issued Manufacturer Release No. 109 and State Release No. 186 on August 9, 2018 to provide guidance to manufacturers and states on the statutory amendments to the alternative rebate formula for line extension drugs. For further details, please see the releases which are available at <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/prescription-drugs/downloads/rx-releases/state-releases/state-rel-186.pdf> and <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/prescription-drugs/downloads/rx-releases/mfr-releases/mfr-rel-109.pdf>. In addition, we have also included an interim final rule with comment period to revise § 447.509(a)(4) to accurately reflect the statutory amendments to section 1927(c)(2)(C) of the Act. The interim final rule with comment period includes a 60-day comment period.

II. Responses to Public Comments on Definition and Identification of Line Extension Drugs

As discussed in the COD final rule, we decided not to finalize the proposed regulatory definition of line extension drug at § 447.502 and, instead, we requested additional comments on the definition of line extension drug noting that we may consider addressing this issue in future rulemaking (81 FR 5197). After the additional public comment period closed, CARA passed, and we issued guidance to the public on how we would apply section 1927(c)(2)(C) of the Act. While the additional comments that we received through the additional public comment period were insightful of the public's thoughts at a particular time, the comments are not informed by the current statutory framework. Therefore, we are not finalizing a definition of line extension in this final rule and interim final rule with comment period, but instead, are reiterating guidance provided in the COD final rule that manufacturers are to rely on the statutory definition of line extension at section 1927(c)(2)(C) of the Act, and where appropriate are permitted to use reasonable assumptions in their determination of whether their drug qualifies as a line extension drug (81 FR 5265). Reasonable assumptions must be consistent with the purpose of section 1927 of the Act, federal regulations, and the terms of the MDR agreement; manufacturers must maintain adequate documentation explaining any such assumptions (83 FR 12770, 12785 (March 23, 2018)). If we later decide to develop a regulatory definition of line extension drug, we will do so through our established

Administrative Procedures Act (APA) compliant rulemaking process and issue a proposed rule.

We received 31 public comments, some of which are beyond the scope of the request for comments on the definition of line extension drugs. Relevant public comments on the definition of line extension drugs related to the scope of the definition of line extension drug, included concerns regarding the process and establishment of a final definition of line extension drug, and proposed mechanisms suggested to define the term. We appreciate the comments and again note that we are not finalizing a definition of line extension drug at this time in this final rule or interim final rule with comment period.

III. Interim Final Rule With Comment Period To Address Statutory Change to the Rebate Calculation for Line Extension Drugs

A. Bipartisan Budget Act of 2018 Changes the Rebate Calculation for Line Extension Drugs

As stated previously, section 53104 of the BBA of 2018 amends the applicable statute by providing a technical correction to the alternative rebate formula for line extension drugs first established under the Affordable Care Act. Specifically, it amends section 1927(c)(2)(C) of the Act such that the rebate for a line extension drug is the greater of either (a) the standard rebate (calculated as a base rebate amount plus an additional inflation-based rebate), or (b) the base rebate amount increased by the alternative formula contained in section 1927(c)(2)(C)(i) through (c)(2)(C)(iii) of the Act. This amendment applies to rebate periods beginning on or after October 1, 2018. The interim final rule with comment period revises § 447.509(a)(4) to accurately reflect the statutory language of section 1927(c)(2)(C)(i) through (c)(2)(C)(iii) of the Act, as it applies beginning October 1, 2018.

B. Regulatory and System Change Required

For rebate periods occurring after the enactment of the Affordable Care Act and prior to the enactment of the BBA of 2018, that is, drugs paid for by a state after December 31, 2009 and prior to October 1, 2018, the unit rebate amount calculation (URA) for a line extension drug is the greater of: (1) Standard URA = the basic rebate plus the additional rebate for the line extension drug or (2) Alternative URA = the product of the average manufacturer price (AMP) of the line extension drug (for each dosage

form and strength) and the highest additional rebate (calculated as a percentage of AMP) under section 1927(c) of the Act for any strength of the original single source drug or innovator multiple source drug ("initial brand name listed drug".)

Effective for rebate periods beginning on or after October 1, 2018, the URA for a line extension drug will be the greater of: (1) Standard URA = the basic rebate plus the additional rebate for the line extension drug or (2) Alternative URA = the basic rebate plus the product of the quarterly AMP of the line extension drug (for each dosage form and strength) and the highest additional rebate (calculated as a percentage of AMP) under section 1927 of the Act for any strength of the original single source drug or innovator multiple source drug.

The proposed revisions to § 447.509(a)(4) are as follows: In § 447.509(a)(4)(i), the phrase "for the rebate periods beginning January 1, 2010 through September 30, 2018" is added between "the rebate obligation" and "is the amount computed."

Additionally, § 447.509(a)(4)(ii) is redesignated as § 447.509(a)(4)(iii) and § 447.509(a)(4)(ii) is changed to state that in the case of a drug that is a line extension of a single source drug or an innovator multiple source drug that is an oral solid dosage form, the rebate obligation for the rebate periods beginning on or after October 1, 2018 is the amount computed under paragraphs (a)(1) through (3) of this section for such new drug or, if greater, the amount computed under paragraph (a)(1) of this section plus the product of the following:

- The AMP of the line extension of a single source drug or an innovator multiple source drug that is an oral solid dosage form;
- The highest additional rebate (calculated as a percentage of AMP) under this section for any strength of the original single source drug or innovator multiple source drug; and
- The total number of units of each dosage form and strength of the line extension product paid for under the State plan in the rebate period (as reported by the State).

We will modify the rebate system to incorporate the revised line extension URA calculation as part of the quarterly rebate files beginning with the fourth quarter 2018 file that will be sent to the states in early February 2019. We will provide additional operational instructions to manufacturers and states regarding the status of the system modifications. As always, while we provide states with URA information as a courtesy, in accordance with section

1927(c)(2)(C) of the Act, manufacturers remain responsible for calculating the revised line extension URA in accordance with the BBA of 2018 effective fourth quarter of calendar year 2018.

C. Illustration and Example of Calculation

Below, we are providing an illustration of the steps for the calculation of the URA and unit rebate offset amount (UROA)¹ for a line extension drug, along with an example of each calculation.

Step 1: Calculate Standard URA = Basic Unit Rebate Amount + Additional Unit Rebate Amount.

Step 2: Calculate Alternative URA = Basic Unit Rebate Amount + Product of the AMP of the line extension drug and the highest additional rebate (calculated as a percentage of AMP) under section 1927 for any strength of the initial brand name listed drug.

Step 3: Determine the URA = Greater of (1) Standard URA or (2) Alternative URA.

Step 4: Determine if the URA is greater than 100 percent of the Quarterly AMP

a. If the URA is greater than or equal to 100 percent of the Quarterly AMP, then the URA = Quarterly AMP (consistent with section 1927(c)(2)(D) of the Act.)

b. If the URA is less than 100 percent of Quarterly AMP, then use the URA.

Step 5: Calculate the UROA

a. If the Alternative URA is greater than the Standard URA, then the UROA for the line extension drug will be the difference between the Alternative URA and the Standard URA plus the Basic UROA.²

b. If the Alternative URA is less than or equal to the Standard URA, then there is no UROA for the line extension portion; however, the Basic UROA still applies.

Example

Baseline AMP (line extension) = 100.00
Best Price (line extension) = 250.00
Quarterly CPI-U = 200.00
Quarterly AMP (line extension) = 300.00

¹ Drug products are identified and reported using a unique, three-segment number, called the National Drug Code (NDC), which serves as a universal product identifier for drugs. The amount per unit of a drug at the 9-digit NDC level that is returned to the federal government is attributable to the increased amount of rebates that manufacturers are required to pay under the Medicaid drug rebate program due to changes in the rebates made in the Affordable Care Act.

² See SMDL #10-019 for additional information on CMS policy on Federal offset of rebates which is based on the increase in the minimum rebate percentage effectuated by the Affordable Care Act.

Baseline CPI-U³ = 170.00

Step 1: Calculate Standard URA

A. Basic Unit Rebate Amount is the greater of:
(a) Quarterly AMP × 23.1% = 300.00 × 23.1% = 69.30 or
(b) Quarterly AMP – Best Price = 300.00 – 250.00 = 50.00

The greater of the two results (69.30 or 50.00) is 69.30

Basic Unit Rebate Amount = 69.30

B. Additional Unit Rebate Amount = Quarterly AMP – [(Baseline AMP / Baseline CPI-U) × Quarterly CPI-U]
= 300 – [100/170 × 200]
= 300 – 117.65 = 182.35

Additional Unit Rebate Amount = 182.35

If the [(Baseline AMP / Baseline CPI-U) × Quarterly CPI-U] is equal to or greater than the Quarterly AMP, then the Additional Unit Rebate Amount is zero.

Standard URA = Basic Unit Rebate Amount + Additional Unit Rebate Amount = 69.30 + 182.35 = 251.65

Step 2: Calculate Alternative URA
Quarterly AMP (line extension) = 300.00

Best Price (line extension) = 250.00

A. Basic Unit Rebate Amount is the greater of:
(a) Quarterly AMP × 23.1% = 300.00 × 23.1% = 69.30 or
(b) Quarterly AMP – Best Price = 300.00 – 250.00 = 50.00

The greater of the two results (69.30 or 50.00) is 69.30

Basic Unit Rebate Amount = 69.30

B. Alternative Additional Unit Rebate Amount:
Product of the Quarterly AMP of the line extension drug and the highest additional rebate (calculated as a percentage of AMP) for any strength of the initial brand name listed drug.

Additional Unit Rebate Amount (initial brand name listed drug) strength A = 200.00

Additional Unit Rebate Amount (initial brand name listed drug) strength B = 125.00

Additional Unit Rebate Amount (initial brand name listed drug) strength C = 110.00

Quarterly AMP (initial brand name listed drug) strength A = 280.00

Quarterly AMP (initial brand name listed drug) strength B = 275.00

Quarterly AMP (initial brand name

listed drug) strength C = 270.00

Additional rebate ratio strength A = 200/280 = 0.7143

Additional rebate ratio strength B = 125/275 = 0.4545

Additional rebate ratio strength C = 110/270 = 0.4074

Quarterly AMP of line extension drug × highest additional rebate ratio for any strength of the initial brand name listed drug = 300 × 0.7143 = 214.29

Alternative Additional Unit Rebate Amount = 214.29

Alternative URA = Basic Unit Rebate Amount + Alternative Additional Unit Rebate Amount = 69.30 + 214.29 = 283.59

Step 3: Determine the URA = the greater of:

(Step 1) Standard URA = 251.65 or
(Step 2) Alternative URA = 283.59

URA = 283.59

Step 4: Determine if the URA is greater than or equal to 100 percent of the Quarterly AMP

100 percent of Quarterly AMP = 100% × 300.00 = 300.00

URA = 283.59

If the URA is greater than or equal to 100 percent of the Quarterly AMP, then URA = Quarterly AMP.

If the URA is less than 100 percent of the Quarterly AMP, then use the URA

283.59 is less than 300.00

URA is equal to 283.59

Step 5: Calculate total UROA = Line Extension UROA + Basic UROA of line extension drug

A. Line Extension UROA = Alternative URA – Standard URA = 283.59 – 251.65 = 31.94

If the Alternative URA is less than or equal to the Standard URA, then there is no Line Extension UROA, however, the Basic UROA still applies.

B. Basic UROA—

If Quarterly AMP – BP is greater than Quarterly AMP × 15.1% and less than Quarterly AMP × 23.1%

Quarterly AMP (line extension) = 300.00

Best Price (line extension) = 250.00

Quarterly AMP – BP = 300.00 – 250.00 = 50.00

Quarterly AMP × 15.1% = 300.00 × 15.1% = 45.30

Quarterly AMP × 23.1% = 300.00 × 23.1% = 69.3

Quarterly AMP – BP (50.00) is greater than Quarterly AMP × 15.1% (45.30) and less than Quarterly AMP × 23.1% (69.3)

Then, the Basic UROA = Quarterly

³ A measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.

$$\text{AMP} \times 23.1\% - (\text{Quarterly AMP} - \text{BP}) = 69.30 - 0.00 = 19.30$$

Consistent with our reading of the statutory offset provision in section 1927(b)(1)(B) of the Act, we have calculated the offset amount to reflect the amount attributable to the increase in the percentages affected by the Affordable Care Act amendments. In this scenario, this NDC would have both a Line Extension UROA of 31.94 and a Basic UROA of 19.30, the sum of which equals 51.24.

D. Waiver of Proposed Rulemaking and Waiver of Delay in Effective Date for Changes to the Rebate Calculation for Line Extension Drugs

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Section 553(b)(B) of the APA authorizes an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest.

Section 553(d) of the APA ordinarily requires a 30-day delay in effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, the agency may incorporate a statement of the findings and its reasons in the rule issued.

We find that there is good cause to waive the notice and comment requirements under sections 553(b)(B) of the APA as it would be unnecessary and impracticable to undergo notice and comment procedures before finalizing, on an interim basis with an opportunity for public comment, the policies described herein because the provisions of section 53104 of the BBA of 2018 are otherwise self-implementing as of the effective date required by statute, that is, for rebate periods beginning on or after October 1, 2018. The interim final rule with comment period simply revises § 447.509(a)(4) to accurately reflect the amended statutory language of section 1927(c)(2)(C)(i) through (iii) of the Act. Further, such procedures would be unnecessary, as we are not altering the calculations required expressly in statute. Rather, we are simply implementing the calculation for rebates for line extension drugs adopted by Congress. Moreover, we note that the statute, as amended by section 53104 of the BBA of 2018, already requires these

rebate calculations to apply. Thus, we are exercising no discretion in this interim final rule with comment period and emphasize that it is intended solely to ensure there is no confusion as to the rebate calculations that apply for such drugs for rebate periods beginning on or after October 1, 2018, as required by statute.

Finally, undertaking notice and comment procedures to incorporate the statutory amendments to section 1927 of the Act would be contrary to the public interest because it is in the public's interest to ensure that manufacturers are paying appropriate rebates on covered outpatient drugs, and the state Medicaid programs and the federal Medicaid program are receiving appropriate rebates to ensure efficient and economical functioning of the programs.

Therefore, we find good cause to waive the notice of proposed rulemaking as provided under section 553(b)(B) of the APA and to issue this interim final rule with an opportunity for public comment. We are providing a 60-day public comment period as specified in the **DATES** section of this document.

We are also waiving the 30-day delay in effective date for this interim final rule with comment period. We believe that a delay in the effective date is unnecessary as we are complying with statutory requirements. It is also contrary to the public interest to delay the effective date for this interim final rule with comment period beyond the statutorily mandated effective date, that is, applicability to rebate periods beginning on or after October 1, 2018. Therefore, we also find good cause to waive the 30-day delay in effective date.

IV. Provisions of the Final Rule

This final rule responds to comments on the definition and identification of line extension drugs for which we requested additional public comments in the COD final rule published on February 1, 2016. Therefore, we are reiterating our guidance provided in the COD final rule that manufacturers are to rely on the statutory definition of line extension at section 1927(c)(2)(C) of the Act, and where appropriate and consistent with the requirements of the MDR agreement, are permitted to use reasonable assumptions in their determination of whether their drug qualifies as a line extension drug (81 FR 5265).

V. Provisions of the Interim Final Rule With Comment Period

The interim final rule with comment period revises § 447.509(a)(4) to accurately reflect the applicable

statutory language describing the rebate calculation for line extension drugs, which was revised by section 53104 of the BBA of 2018.

VI. Collection of Information Requirements

The actions in this final rule and interim final rule with comment period do not impose any new or revised information collection, reporting, recordkeeping, or third-party disclosure requirements or burden on manufacturers. Manufacturers must continue to report product and pricing data to CMS using the CMS-367 forms approved by the Office of Management and Budget (OMB) under control number 0938-0578. The forms' requirements and burden figures are unaffected by this rule. Consequently, there is no need for review by OMB under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VII. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VIII. Regulatory Impact Analysis

A. Statement of Need

As stated previously, section 53104 of the BBA of 2018 amends section 1927 of the Act by providing a technical correction to the alternative rebate formula for line extension drugs that was established under the Affordable Care Act. Specifically, it amends section 1927(c)(2)(C) of the Act such that the rebate for a line extension drug is the greater of either (a) the standard rebate (calculated as a base rebate amount plus an additional inflation-based rebate), or (b) the base rebate amount increased by the alternative formula contained in section 1927(c)(2)(C)(i) through (iii) of the Act.

B. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, section 202 of the

Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

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). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering

the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. The interim final rule has been designated as an economically significant rule, under section 3(f)(1) of Executive Order 12866. We estimate that the interim final rule is “economically significant” as measured by the \$100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking. OMB has reviewed these proposed regulations, and the Departments have provided the following assessment of their impact.

C. Anticipated Effects

1. Effects on Drug Manufactures of Line Extension Drugs

Manufacturers of Line Extension Drugs will be impacted by the technical

correction that was made by section 53104 of the BBA of 2018 to the alternative rebate formula for line extension drugs that was established under the Affordable Care Act. During the drafting of this legislation, the Congressional Budget Office (CBO) scored an estimated savings for the revised line extension rebate calculation of \$1.877 billion over 5 years and \$5.65 billion over 10 years. Table 1 shows the CMS Office of the Actuary’s (OACT’s) estimated savings of \$1.64 billion over 5 year and \$3.95 billion over 10 years. OACT utilized second quarter 2018 rebate data along with first through fourth quarter 2017 state drug utilization data to conduct their analysis. Since OACT’s estimate is based on more current data we will use these estimated savings figures in the remaining regulatory impact analysis discussion. This savings will be the result of additional rebates being paid by these drug manufacturers to the federal government.

TABLE 1—SAVINGS OF THE LINE EXTENSION UNIT REBATE AMOUNT CALCULATION REVISIONS UNDER BBA 2018 *

Fiscal Year	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	Total
Federal Impact (million)	280	300	330	350	380	400	430	460	490	530	3,950

* Source: OACT, September 2018.

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small entities if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than \$7.5 million to \$38.5 million in any 1 year. Individuals and states are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this final rule and interim final rule with comment period will not have a significant economic 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 the provisions of section 604 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 of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule and interim final rule with comment period will 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 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately \$150 million. This final rule and interim final rule with comment period will have no consequential effect on state, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues 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 costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

2. Effects on Medicaid Program

The Federal Medicaid program will benefit from the technical correction that was made by section 53104 of the BBA of 2018 to the alternative rebate formula for line extension drugs that was established under the Affordable Care Act. As stated above, OACT estimated a savings of \$1.64 billion over 5 year and \$3.95 billion over 10 years. This savings will be the result of additional rebates being paid to the federal government by these drug manufacturers.

D. Alternatives Considered

The interim final rule with comment period simply revises § 447.509(a)(4) to accurately reflect the amended statutory language of section 1927(c)(2)(C)(i) through (iii) of the Act. We considered

the notice and comment rulemaking process, but as described in section III.D., Waiver of Proposed Rule Making and Waiver of Delay in Effective Date for Changes to the Rebate Calculation for Line Extension Drugs, we find that there is good cause to waive the notice and comment requirements under sections 553(b)(B) of the APA as it would be unnecessary and impracticable and contrary to the public interest to undergo notice and comment procedures before finalizing, on an

interim basis with an opportunity for public comment, the policies described herein because the provisions of the section 53104 of the BBA of 2018 are otherwise self-implementing as of the effective date required by statute, that is, for rebate periods beginning on or after October 1, 2018. The interim final rule with comment period simply revises § 447.509(a)(4) to accurately reflect the amended statutory language of section 1927(c)(2)(C)(i) through (iii) of the Act.

E. Accounting Statement

As required by OMB Circular A-4 (available at http://www.whitehouse.gov/omb/circulars_a004_a-4), we have prepared an accounting statement in Table 2 showing the classification of the transfers associated with the provisions of this final rule and interim final rule with comment period.

TABLE 2—ACCOUNTING STATEMENT

Category	Estimates	Units		
		Year dollar	Discount rate	Period covered
Transfers				
Annualized	324.6	2018	7%	2019–2023
Monetized (\$million/year)	326.5	2018	3%	2019–2023
From Whom To Whom	Drug Manufacturers to Federal Government			

F. Regulatory Reform Analysis under E.O. 13771

Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs,” was issued on January 30, 2017 and requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” It has been determined that this final rule and interim final rule with comment period are actions that primarily result in transfers and thus are not a regulatory or deregulatory action for the purposes of Executive Order 13771.

G. Conclusion

The estimated savings of the revised line extension rebate calculation is \$1.64 billion over 5 years and \$3.95 billion over 10 years. This savings will be the result of additional rebates being paid by drug manufacturers, as applicable. The analysis above, together with the remainder of this preamble, provides a Regulatory Impact Analysis. This final rule and interim final rule with comment period are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to the Congress and the Comptroller General for review. In accordance with the provisions of Executive Order 12866, this final rule and interim final rule with comment period was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs—health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 447—PAYMENTS FOR SERVICES

- 1. The authority citation for part 447 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1396r-8.

- 2. Section 447.509 is amended by revising paragraph (a)(4) to read as follows:

§ 447.509 Medicaid drug rebates (MDR).

(a) * * *

(4) *Treatment of new formulations.* (i) In the case of a drug that is a line extension of a single source drug or an innovator multiple source drug that is an oral solid dosage form, the rebate obligation for the rebate periods beginning January 1, 2010 through September 30, 2018 is the amount computed under paragraphs (a)(1) through (3) of this section for such new drug or, if greater, the product of all of the following:

(A) The AMP of the line extension of a single source drug or an innovator multiple source drug that is an oral solid dosage form.

(B) The highest additional rebate (calculated as a percentage of AMP)

under this section for any strength of the original single source drug or innovator multiple source drug.

(C) The total number of units of each dosage form and strength of the line extension product paid for under the State plan in the rebate period (as reported by the State).

(ii) In the case of a drug that is a line extension of a single source drug or an innovator multiple source drug that is an oral solid dosage form, the rebate obligation for the rebate periods beginning on or after October 1, 2018 is the amount computed under paragraphs (a)(1) through (3) of this section for such new drug or, if greater, the amount computed under paragraph (a)(1) of this section plus the product of all of the following:

(A) The AMP of the line extension of a single source drug or an innovator multiple source drug that is an oral solid dosage form.

(B) The highest additional rebate (calculated as a percentage of AMP) under this section for any strength of the original single source drug or innovator multiple source drug.

(C) The total number of units of each dosage form and strength of the line extension product paid for under the State plan in the rebate period (as reported by the State).

(iii) The alternative rebate is required to be calculated if the manufacturer of the line extension drug also manufactures the initial brand name listed drug or has a corporate relationship with the manufacturer of the initial brand name listed drug.

* * * * *

Dated: October 3, 2018.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: December 18, 2018.

Alex M. Azar, II,

Secretary, Department of Health and Human Services.

[FR Doc. 2019-06274 Filed 3-28-19; 4:15 pm]

BILLING CODE 4120-01-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 202

[Docket DARS-2019-0013]

RIN 0750-AK20

Defense Federal Acquisition Regulation Supplement: Repeal of Certain Defense Acquisition Laws (DFARS Case 2018-D059)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 812 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019. Section 812 repeals more than 60 obsolete Defense acquisition laws, most of which have been completed, have expired, or do not impact the procurement regulations. Of the obsolete laws listed in section 812, only one was implemented in the DFARS: section 815(b) of the NDAA for FY 2008 (Pub. L. 110-181). Section 815(b) required modification of the DFARS to clarify that the terms “general public” and “non-governmental entities”, with regard to sales of commercial items, do not include the Federal Government or a State, local, or

foreign government. The clarification with regard to the terms “general public” and “non-governmental entities,” as used in the definition of “commercial item,” was added to DFARS 202.101, Definitions, via a final rule published in the **Federal Register** at 75 FR 51416 on August 20, 2010 (DFARS Case 2008-D011).

Since section 812 of the NDAA for FY 2019 repealed section 815(b) of the NDAA for FY 2008, this final rule removes the clarification of the terms “general public” and “non-governmental entities” at DFARS 202.101. No other changes are required to implement section 812 of the NDAA for FY 2019.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707 entitled “Publication of Proposed Regulations.” Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because the rule merely removes a clarification to an existing definition in the FAR.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule only removes the definition of “general public” and non-governmental” entities at DFARS 202.101 Definitions. This rule does not create or revise any solicitation provisions or contract clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and E.O. 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section II. of this preamble), the analytical requirement of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 202

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 202 is amended as follows:

PART 202—DEFINITIONS

- 1. The authority citation for part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

202.101 [Amended]

- 2. Amend section 202.101 by removing the definition “General public” and “non-governmental entities”.

[FR Doc. 2019-06249 Filed 3-29-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 204 and 252**

[Docket DARS–2019–0014]

RIN 0750–AK41

Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Clause “Oral Attestation of Security Responsibilities” (DFARS Case 2019–D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a clause that is no longer necessary.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD is amending the DFARS to remove DFARS clause 252.204–7005, Oral Attestation of Security Responsibilities, and the associated clause prescription at DFARS 204.404–70. This clause is included in solicitations and contracts when the contractor may require access to classified information and requires certain cleared contractor employees to attest orally that they will conform to requisite security responsibilities by reading aloud the first paragraph of Standard Form 312, Classified Information Nondisclosure Agreement, in the presence of a person designated by the contractor and a witness. The purpose of this clause was to make individuals more aware of the significance of the access being granted to them. Upon further review, DoD subject matter experts determined that the clause is not necessary to safeguard classified information in industry. In addition, the Industrial Security Regulation and National Industrial Security Program Operating Manual contain the requisite policies and procedures to safeguard Government classified information released to contractors, licensees, and grantees of the Government. Neither of these documents require contractor employees to attest orally to their security responsibilities, as required by the clause. As such, this DFARS clause

is no longer necessary and can be removed.

The removal of this DFARS text supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, “Enforcing the Regulatory Reform Agenda,” which established a Federal policy “to alleviate unnecessary regulatory burdens” on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the **Federal Register** at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received on this clause. The DoD Task Force reviewed the requirements of DFARS clause 252.204–7005, Oral Attestation of Security Responsibilities, and determined that the DFARS coverage was unnecessary and recommended removal.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule only removes obsolete DFARS clause 252.204–7005, Oral Attestation of Security Responsibilities. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a

new regulation; rather, this rule is merely removing an obsolete clause from the DFARS.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 204 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204 and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

204.404–70 [Amended]

- 2. Amend section 204.404–70 by removing paragraph (c).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.204–7005 [Removed and Reserved]

- 3. Remove and reserve section 252.204–7005.

[FR Doc. 2019–06253 Filed 3–29–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 216

[Docket DARS–2019–0007]

RIN 0750–AK45

Defense Federal Acquisition Regulation Supplement: Repeal of Congressional Notification for Certain Task- and Delivery-Order Contracts (DFARS Case 2018–D076)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to make clarifications and updates associated with determinations to award task- or delivery-order contracts estimated to exceed \$112 million to a single source.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to clarify that the Congressional notification required at Federal Acquisition Regulation (FAR) 16.504(c)(1)(ii)(D)(2) does not apply to DoD acquisitions. Currently, FAR 16.504(c)(1)(ii)(D)(2) requires the head of the agency to notify Congress within 30 days after making a determination that it is in the public interest to award a task- or delivery-order contract in an amount exceeding \$112 million to a single source due to exceptional circumstances. This

notification requirement is codified at 41 U.S.C. 4103(d)(3)(B). 41 U.S.C. 4103 does not apply to DoD; therefore, the DFARS is being amended to clarify that this reporting requirement does not apply to DoD acquisitions.

Additionally, DFARS 216.504(c)(1)(ii)(D) requires that a copy of a written determination, made in accordance with FAR 16.504(c)(1)(ii)(D), to award a task- or delivery-order contract with a value greater than \$112 million to a single source be submitted to the Director, Defense Pricing and Contracting (DPC). DFARS 216.504(c)(1)(ii)(D)(1) prohibits these determinations from being made by an individual below the level of the senior procurement official.

The statutory requirements for DoD to report or provide notifications on these determinations have been rescinded and, as a result, there is no longer a need for a copy of these determinations to be submitted to DPC or to restrict delegation of this the authority. Therefore, this rule removes the text at DFARS 216.504(c)(1)(ii)(D) and modifies the text at DFARS 216.504(c)(1)(ii)(D)(1) to remove the restriction on the delegation of authority to make the determination.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create any new provisions or clauses or impact any existing provisions or clauses.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it simply amends and clarifies processes that are internal to the agency.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and

E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 216

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 216 is amended as follows:

PART 216—TYPES OF CONTRACTS

- 1. The authority citation for part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

- 2. Revise 216.504 to read as follows:

216.504 Indefinite-quantity contracts.

(c) *Multiple award preference*—(1) *Planning the acquisition.* (ii)(D)(1) The

senior procurement executive has the authority to make the determination authorized in FAR 16.504(c)(1)(ii)(D)(1)(i).

(i) In accordance with section 816 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), when making the determination at FAR 16.504(c)(1)(ii)(D)(1)(i), the senior procurement executive shall determine that the task or delivery orders expected under the contract are so integrally related that only a single source can “efficiently perform the work,” instead of “reasonably perform the work” as required by the FAR.

(2) The congressional notification requirement at FAR 16.504(c)(1)(ii)(D)(2) does not apply to DoD.

[FR Doc. 2019–06251 Filed 3–29–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2019–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to provide needed editorial changes.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer L. Hawes, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6115; facsimile 571–372–6094.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS as follows:

1. Corrects titles to four clauses at 225.7703–4 to remove the word “Act”.
2. Corrects DFARS clause 252.204–7007, Alternate A, Annual Representations and Certifications, to remove the representation at paragraph (d)(1)(iii) for DFARS 252.222–7007, Representation Regarding Combating Trafficking in Persons. DFARS final rule 2018–D003 (83 FR 24887) on May 30, 2018, removed representation 252.222–7007 from the DFARS; however, the cross-reference in DFARS 252.204–7007

to the representation was inadvertently omitted.

3. Corrects DFARS provision 252.225–7035, Buy American—Free Trade Agreements—Balance of Payments Program Certificate, Alternate V, in paragraph (a), by revising the reference to the “Buy American Act” by removing the word “Act”.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

■ 1. The authority citations for parts 225 and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

225.7703–4 [Amended]

■ 2. Amend section 225.7703–4 by removing, in paragraphs (f)(1), (f)(2), (f)(4), and (f)(5), “Buy American Act” and adding “Buy American” in each place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.204–7007 [Amended]

■ 3. Amend section 252.204–7007 by-

- a. Removing the clause date “(DEC 2018)” and adding “(APR 2019)” in its place;
- b. Removing paragraph (d)(1)(iii); and
- c. Redesignating paragraphs (d)(1)(iv) through (ix) as (d)(1)(iii) through (viii).

252.225–7035 [Amended]

■ 4. Amend section 252.225–7035, Alternate V, by-

- a. Removing the clause date “(NOV 2014)” and adding “(APR 2019)” in its place; and
- b. In paragraph (a) removing “Buy American Act” and adding “Buy American” in its place.

[FR Doc. 2019–06254 Filed 3–29–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 244

[Docket DARS–2019–0006]

RIN 0750–AK24

Defense Federal Acquisition Regulation Supplement: Consent To Subcontract (DFARS Case 2018–D065)

AGENCY: Defense Acquisition Regulation System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 to require, for DoD contracts with contractors that have approved purchasing systems, that a contracting officer have written approval from the program manager prior to withholding a consent to subcontract.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is issuing a final rule to amend the DFARS to implement section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which amends section 893 of the NDAA for FY 2011 (Pub. L. 111–383) regarding consent to subcontract requirements. Specifically, section 893 requires contracting officers to have written approval from the program manager prior to withholding consent to subcontract for DoD contracts with contractors that have approved purchasing systems, as defined in Federal Acquisition Regulation (FAR) 44.101.

II. Discussion and Analysis

This rule proposes to add a new paragraph (a) at DFARS 244.201–1 to include the new requirement for contracting officers to obtain written approval from the program manager prior to withholding a consent to subcontract for DoD contracts with contractors that have an approved purchasing system. Conforming changes are made to the existing text at 244.201–1, by renumbering the existing text as paragraph (S–70).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create any new provisions or clauses or impact any existing provisions or clauses. The rule only impacts the internal operating procedures of the agency. As such, the rule does not impose any new requirements on contracts at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

IV. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is 41 U.S.C. 1707 entitled "Publication of Proposed Regulations." Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because this rule merely establishes internal Government procedures for contracting officers to obtain written approval from the program manager prior to withholding a consent to subcontract on a contract with a contractor with an approved purchasing system.

V. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, or reducing costs, or harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section IV. of this preamble), the analytical requirement of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 244

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 244 is amended as follows:

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

■ 1. The authority citation for part 244 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 244.201–1 by—

■ a. Designating the existing text as paragraph (S–70); and

■ b. Adding a paragraph (a) to start the section.

The addition reads as follows:

244.201–1 Consent requirements.

(a) In accordance with section 824 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), notwithstanding the requirements in FAR 44.201–1(a), the contracting officer shall not withhold consent to subcontract without the written approval of the program manager, or comparable requiring activity official exercising program management responsibilities, if the contractor has an approved purchasing system, as defined in FAR 44.101.

* * * * *

[FR Doc. 2019–06250 Filed 3–29–19; 8:45 am]

BILLING CODE 5006–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[Docket DARS–2019–0012]

RIN 0750–AK06

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns" (DFARS Case 2018–D051)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add supplemental contact information for departments identified in an existing DFARS clause.

DATES: Effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to add department phone numbers and websites to the DFARS clause, 252.226–7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns. Included in solicitations and contracts that are for supplies and services exceeding \$500,000 in value, this clause: encourages contractors to give Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns the maximum practicable opportunity to participate in subcontracts; addresses status representations for these organizations, enterprises, and concerns; provides the name and address of the departments that that address representation matters for these organizations, enterprises, and concerns; and provides the terms and conditions under which incentive payments may be requested under the contract. In an effort to streamline the procurement process and make information more accessible to the contractor, this modification adds phone numbers and websites for both of the departments listed in the clause.

The modification of this DFARS text supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed

Executive Order (E.O.) 13777, Enforcing the Regulatory Reform Agenda, which established a Federal policy “to alleviate unnecessary regulatory burdens” on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. The DoD Task Force reviewed the requirements of DFARS clause 252.226–7001 and determined that the clause could be modified. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the **Federal Register** at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received about this clause in response to the public notice.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-The-Shelf Items

This rule provides additional methods with which to contact the departments listed in the clause. This rule does not create any new provisions or clauses or impose any new requirements. This rule does apply to contracts for commercial and commercially available off-the-shelf items, and does not apply to contracts at or below the simplified acquisition threshold.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on

contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule merely provides additional methods with which to contact the departments listed in a DFARS clause.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

- 2. Amend section 252.226–7001 by:
- a. In the clause heading, removing the date “(SEP 2004)” and adding “(APR 2019)” in its place; and
 - b. Revising paragraph (d).

The revision reads as follows:

252.226–7001 Utilization of Indian Organizations, Indian-owned Economic Enterprises, and Native Hawaiian Small Business Concerns.

* * * * *

(d) In the event of a challenge to the representation of a subcontractor, the Contracting Officer will refer the matter to—

(1)(i) For matters relating to Indian organizations or Indian-owned economic enterprises:

U.S. Department of the Interior, Bureau of Indian Affairs, Attn: Bureau Procurement Chief, 12220 Sunrise Valley Drive, Reston, VA 20191, Phone: 703–390–6433, Website: <https://www.bia.gov/>.

(ii) The BIA will determine the eligibility and will notify the Contracting Officer.

(2)(i) For matters relating to Native

Hawaiian small business concerns: Department of Hawaiian Home Lands, P.O. Box 1879, Honolulu, HI 96805, Phone: 808–620–9500, Website: <http://dhhhl.hawaii.gov/>.

(ii) The Department of Hawaiian Home Lands will determine the eligibility and will notify the Contracting Officer.

* * * * *

[FR Doc. 2019–06247 Filed 3–29–19; 8:45 am]

BILLING CODE 5001–06–P

Proposed Rules

Federal Register

Vol. 84, No. 62

Monday, April 1, 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.

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE-2018-BT-STD-0010]

RIN 1904-AE26

Energy Conservation Program: Energy Conservation Standards for General Service Lamps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Extension of public comment period.

SUMMARY: The U.S. Department of Energy (DOE) is extending the public comment period for its notice of proposed rulemaking (NOPR) to withdraw the revised definitions of General Service Lamp (GSL), General Service Incandescent Lamp (GSIL) and related terms established in two definition final rules issued on January 19, 2017. DOE published the NOPR in the **Federal Register** on February 11, 2019 establishing a 60-day public comment period ending April 12, 2019. DOE is extending the public comment period for submitting comments and data on the NOPR by 21 days to May 3, 2019.

DATES: The comment period for the proposed rule published on February 11, 2019 (84 FR 3120), is extended. DOE will accept comments, data, and information regarding this rulemaking received no later than May 3, 2019.

ADDRESSES: Interested persons are encouraged to submit comments, identified by "1904-AE26," by any of the following methods:

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

Email: GSL2018STD0010@ee.doe.gov. Include the docket number and/or RIN in the subject line of the message.

Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

Postal Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 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, Suite 600, Washington, DC 20024. Telephone: (202) 287-1445. 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.

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov/docket?D=EERE-2018-BT-STD-0010>.

The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, 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 may not be publicly available, such as those containing information that is exempt from public disclosure.

The docket web page can be found at:

<http://www.regulations.gov/docket?D=EERE-2018-BT-STD-0010>.

The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Celia Sher, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (202) 287-6122. Email: celia.sher@hq.doe.gov.

SUPPLEMENTARY INFORMATION: On February 11, 2019, DOE published a notice in the **Federal Register** soliciting public comment on its NOPR to withdraw the definitions of GSL, GSIL, and other supplemental definitions established in the final rules published on January 19, 2017. 84 FR 3120. The NOPR provided for the written submission of comments by April 12,

2019. A public meeting for the NOPR was held on February 28, 2019. At the meeting, DOE noted that it would post to the docket additional supporting background data for the lamp data analysis presented.¹ In light of the additional information to be supplied by DOE, the Appliance Standards Awareness Project requested an extension of the public comment period. DOE has reviewed the request and considered the benefit to stakeholders in providing additional time to review the supporting data and provide comments to DOE on its proposed rulemaking. Accordingly, DOE has determined that an extension of the comment period is appropriate, and is hereby extending the comment period by 21 days, until May 3, 2019.

Signed in Washington, DC, on March 26, 2019.

Daniel R. Simmons,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2019-06265 Filed 3-29-19; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2019-0187; Product Identifier 2018-NM-172-AD]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2005-20-01, which applies to all The Boeing Company Model 737-100, -200, -200C, -300, -400, and -500 series airplanes. AD 2005-20-01 requires repetitive inspections of the vertical stiffeners at left buttock line (LBL) and right buttock line (RBL) 6.15 for cracks; and replacement of both stiffeners with new, improved stiffeners if any stiffener is found cracked. Since we issued AD

¹DOE posted this supporting data to the docket at <https://www.regulations.gov/document?D=EERE-2018-BT-STD-0010-0049>.

2005–20–01, we have received reports of cracks found in the left and right side keel beam upper chords when replacing vertical stiffeners. In addition, we have determined that the replacement stiffener installation degraded the fault current bonding path and could introduce an ignition source in the fuel tank in the event of an electrical hot short or a lightning strike. This proposed AD would require, depending on airplane configuration, replacing the vertical stiffeners at LBL and RBL 6.15 on the rear spar of the wing center section, installing angle and bonding jumpers, installing brackets, applying sealant, and applying paint. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by May 16, 2019.

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet <https://www.myboeingfleet.com>. You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0187.

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0187; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations

(phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Galib Abumeri, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5324; fax: 562–627–5210; email: Galib.Abumeri@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2019–0187; Product Identifier 2018–NM–172–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

We issued AD 2005–20–01, Amendment 39–14294 (70 FR 56358, September 27, 2005) (“AD 2005–20–01”), for all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. AD 2005–20–01 requires repetitive inspections of the vertical stiffeners at LBL and RBL 6.15 for cracks; and replacement of both stiffeners with new, improved stiffeners if any stiffener is found cracked. AD 2005–20–01 also allows replacement of both stiffeners at LBL and RBL 6.15 with new, improved stiffeners, which terminates the repetitive inspections. AD 2005–20–01 resulted from reports of cracks in the aft vertical stiffeners at LBL and RBL 6.15 on the rear spar of the wing center section. We issued AD 2005–20–01 to address cracks in the vertical stiffeners at LBL and RBL 6.15, which could result in damage to the keel beam structure and consequently reduce the capability of the airplane to sustain flight loads.

Actions Since AD 2005–20–01 Was Issued

Since we issued AD 2005–20–01, Boeing discovered that the replacement stiffener installation had degraded fault current bonding because the existing

rivets (which provide an inherent bond path for fault currents and ground returns) had been replaced with non-conductive finish K-code fasteners in transition fit holes. The replacement fasteners are not adequate in maintaining required fault current bonding path and could introduce an ignition source in the fuel tank in the event of an electrical hot short or a lightning strike.

In addition to the above described electrical bonding issues, we received a report of cracks in the left side and right side keel beam upper chords when the aft vertical stiffeners were replaced. Boeing determined that the actual stresses on aft vertical stiffeners at LBL and RBL 6.15 exceed those used to design the structure and can cause fatigue cracks in the stiffeners. If the aft vertical stiffeners have cracks or are severed, the fatigue damage may extend into the adjacent keel beam structure and could reduce the limit load capability of the keel beam structure. Boeing has determined the inspections described in Boeing Alert Service Bulletin 737–57A1269, dated December 4, 2003; and Revision 1, dated September 16, 2004; do not provide sufficient inspection intervals for timely crack detection in the aft vertical stiffeners. AD 2005–20–01 requires the actions specified in Boeing Alert Service Bulletin 737–57A1269, dated December 4, 2003; and Revision 1, dated September 16, 2004. As a result, Boeing issued Alert Service Bulletin 737–57A1339 RB, dated April 16, 2018, which describes procedures for inspecting the vertical stiffeners and keel beam upper chord structures. AD 2018–10–12, Amendment 39–19288 (83 FR 23775, May 23, 2018) (“AD 2018–10–12”) requires the actions specified in Boeing Alert Service Bulletin 737–57A1339 RB, dated April 16, 2018. After we issued AD 2018–10–12, Boeing issued Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018, which provides procedures for replacing the vertical stiffeners with new, improved stiffeners.

Accomplishment of the vertical stiffener replacements at LBL and RBL 6.15, described in Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018, as specified in paragraph (g) of this proposed AD, eliminates the need to do the stiffener inspection described in Boeing Alert Service Bulletin 737–57A1339 RB, dated April 16, 2018.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 737–57A1269, Revision 2,

dated October 11, 2018. This service information describes procedures for replacing the vertical stiffeners at LBL and RBL 6.15 on the wing center section rear spar with new, improved stiffeners, installing angle and bonding jumpers, installing brackets, applying sealant, and applying paint.

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

FAA’s Determination

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

Proposed AD Requirements

This proposed AD would retain none of the requirements of AD 2005–20–01. This proposed AD would require accomplishing the actions specified in the service information described previously except as discussed under “Differences Between this Proposed AD and the Service Information,” and except for any differences identified as exceptions in the regulatory text of this proposed AD. For certain airplanes, replacing the vertical stiffeners with new, improved stiffeners, would terminate the need for the repetitive inspections required by AD 2018–10–12. For information on the procedures and compliance times, see this service information at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0187.

Differences Between This Proposed AD and the Service Information

Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018, specifies, for certain airplanes, to do a concurrent action consisting of a final one-time surface high frequency eddy current inspection of the keel beam upper chord and general visual inspection of the angle at LBL 6.50 and RBL 6.50, and all related applicable actions, as specified in Boeing Alert Requirements Bulletin 737–57A1339 RB, dated April 16, 2018. We have determined that action is already mandated by AD 2018–10–12. All requirements of AD 2018–10–12 remain in effect.

Costs of Compliance

We estimate that this proposed AD affects 171 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Stiffener replacement, angle and bonding jumper installation, bracket installation, and sealant and paint application.	Up to 257 work-hours × \$85 per hour = \$21,845.	\$14,730	Up to \$36,575	Up to \$6,254,325.

Authority for This Rulemaking

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

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

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

Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2005–20–01, Amendment 39–14294 (70 FR 56358, September 27, 2005), and adding the following new AD:

The Boeing Company: Docket No. FAA–2019–0187; Product Identifier 2018–NM–172–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by May 16, 2019.

(b) Affected ADs

This AD replaces AD 2005–20–01, Amendment 39–14294 (70 FR 56358,

September 27, 2005) (“AD 2005–20–01”). This AD terminates certain requirements of AD 2018–10–12, Amendment 39–19288 (83 FR 23775, May 23, 2018) (“AD 2018–10–12”).

(c) Applicability

This AD applies to all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of cracks in the aft vertical stiffeners at left buttock line (LBL) and right buttock line (RBL) 6.15 on the rear spar of the wing center section and of cracks found in the left and right side keel upper chords when replacing vertical stiffeners. This AD was also prompted by possible degradation of the fault current bonding path due to the replacement vertical stiffener installation. We are issuing this AD to address cracks in vertical stiffeners at LBL and RBL 6.15, which could result in damage to the keel beam structure and consequently reduce the capability of the airplane to sustain flight loads. We are also issuing this AD to address a potential ignition source in the fuel tank due to insufficient bonding, which could lead to a fuel tank explosion and subsequent loss of the airplane.

(f) Compliance

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

(g) Required Actions for Group 1 and 3 Through 8 Airplanes

For airplanes identified as Group 1 and 3 through 8 in Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018: Except as specified by paragraph (j) of this AD, at the applicable times specified in paragraph 1.E., “Compliance,” of Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018, do all applicable actions, identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018. Depending on the airplane configuration, applicable actions include replacing the vertical stiffeners at LBL and RBL 6.15 on the rear spar of the wing center section, installing angle and bonding jumpers, installing brackets, applying sealant, and applying paint.

(h) Required Actions for Group 2 Airplanes

For airplanes identified as Group 2 in Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018: Within 120 days after the effective date of this AD, do actions to correct the unsafe condition, using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(i) Terminating Action for Repetitive Inspections of Aft Vertical Stiffener Required by AD 2018–10–12

Accomplishment of the stiffener replacement required by paragraph (g) of this AD terminates only the repetitive inspections of the aft vertical stiffeners required by paragraph (h) of AD 2018–10–12 for that airplane only. All other requirements of paragraph (h) of AD 2018–10–12 remain in effect.

(j) Exceptions to Service Information Specifications

(1) For purposes of determining compliance with the requirements of this AD: Where Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018, uses the phrase “the Revision 2 date of this service bulletin,” this AD requires using “the effective date of this AD.”

(2) Where Boeing Alert Service Bulletin 737–57A1269, Revision 2, dated October 11, 2018, specifies contacting Boeing for repair instructions: This AD requires doing the repair before further flight using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(k) Credit for Previous Actions

This paragraph provides credit only for the stiffener replacement required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraph (k)(1) or (k)(2) of this AD.

(1) Boeing Alert Service Bulletin 737–57A1269, dated December 4, 2003, which is not incorporated by reference in this AD.

(2) Boeing Alert Service Bulletin 737–57A1269, Revision 1, dated September 16, 2004, which was incorporated by reference in AD 2005–20–01.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (m)(1) of this AD. Information may be emailed to: 9-ANM-LAACO-AMOC-Requests@faa.gov.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(m) Related Information

(1) For more information about this AD, contact Galib Abumeri, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5324; fax: 562–627–5210; email: Galib.Abumeri@faa.gov.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet <https://www.myboeingfleet.com>. You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on March 22, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–06031 Filed 3–29–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

Proposed Amendment of the Miami, FL, Class B Airspace; and the Fort Lauderdale, FL, Class C Airspace Areas; Public Meeting

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Meeting announcement.

SUMMARY: The FAA is announcing a fact-finding informal airspace meeting regarding a plan to modify the Miami, FL, Class B Airspace, and the Fort Lauderdale, FL, Class C Airspace areas. The purpose of the meeting is to provide interested parties an opportunity to present views, recommendations, and comments on any proposed change to the airspace. All comments received during the meeting will be considered prior to any revision or issuance of a notice of proposed rulemaking.

DATES: The meeting will be held on Wednesday, June 12, 2019, from 3:00 p.m. to 5:00 p.m. Comments must be received on or before July 12, 2019.

ADDRESSES: The meeting will be held at the following location: Broward College, South Campus Building 69, Room 133, 7200 Pines Blvd., Pembroke Pines, FL 33024.

Comments: Send comments on the proposal, in triplicate, to: Ryan Almay, Manager, Operations Support Group, Eastern Service Area, Air Traffic Organization, Federal Aviation

Administration, P.O. Box 20636, Atlanta, GA, 30320; or via email to: 9-AJV-MIAClassBComments@faa.gov.

FOR FURTHER INFORMATION CONTACT: Bob Hildebidle, Manager, Miami ATCT/TRACON, 6400 NW 22nd St., Miami, FL 33122. Telephone: (305) 869-5402.

SUPPLEMENTARY INFORMATION:

Meeting Procedures

(a) The meeting will be informal in nature and will be conducted by one or more representatives of the FAA Eastern Service Area. A representative from the FAA will present a briefing on the planned airspace modifications. Each participant will be given an opportunity to deliver comments or make a presentation, although a time limit may be imposed to accommodate closing times. Only comments concerning the plan to modify the Miami, FL, Class B Airspace, and the Fort Lauderdale, FL, Class C Airspace areas will be accepted.

(b) The meeting will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation will be asked to sign in so those time frames can be established. This will permit the panel to allocate an appropriate amount of time for each presenter. This meeting will not be adjourned until everyone on the list has had an opportunity to address the panel. This meeting may be adjourned at any time if all persons present have had an opportunity to speak.

(d) Position papers or other handout material relating to the substance of the meeting will be accepted. Participants submitting handout materials should present an original and two copies to the presiding officer. There should be an adequate number of copies for distribution to all participants.

(e) This meeting will not be formally recorded. However, a summary of the comments made at the meeting will be filed in the docket.

Information gathered through this meeting will assist the FAA in drafting a notice of proposed rulemaking (NPRM). The public will be afforded the opportunity to comment on any NPRM published on this matter.

A graphic depiction of the proposed airspace modifications may be viewed at the following URL: https://www.faa.gov/air_traffic/flight_info/aeronav/blindurls/Visual1/.

Agenda for the Meeting

—Sign-in
—Presentation of Meeting Procedures
—Informal Presentation of the Planned Airspace Modifications

—Public Presentations and Discussions
—Closing Comments

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

Issued in Washington DC, on March 25, 2019.

Rodger A. Dean, Jr.,
Manager, Airspace Policy Group.

[FR Doc. 2019-06183 Filed 3-29-19; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1000, 1002, 1010, 1020, 1040, and 1050

[Docket No. FDA-2018-N-3303]

RIN 0910-AH65

Radiological Health Regulations; Amendments to Records and Reports for Radiation Emitting Electronic Products; Amendments to Performance Standards for Diagnostic X-Ray, Laser and Ultrasonic Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is proposing to amend and repeal parts of the radiological health regulations covering recommendations for radiation protection during medical procedures, certain records and reporting for electronic products, and performance standards for diagnostic x-ray systems and their major components, laser products, and ultrasonic therapy products. The Agency is proposing this action to clarify and update the regulations to reduce regulatory requirements that are outdated and duplicate other means to better protect the public health against harmful exposure to radiation emitting electronic products and medical devices. This action is part of FDA's implementation of Executive Orders (EOs) 13771 and 13777. Under these EOs, FDA is comprehensively reviewing existing regulations to identify opportunities for repealing and amending regulations that will result in meaningful burden reduction while allowing the Agency to achieve our public health mission and fulfill statutory obligations.

DATES: Submit either electronic or written comments on this proposed rule by July 1, 2019.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before July 1, 2019. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of July 1, 2019. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA-2018-N-3303 for "Radiological Health Regulations; Amendments to Records and Reports for Radiation Emitting Electronic Products; Amendments to

Performance Standards for Diagnostic X-ray, Laser and Ultrasonic Products.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

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

FOR FURTHER INFORMATION CONTACT: Robert Ochs, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4312, Silver Spring, MD 20993, 301-796-6661, email: Robert.Ochs@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary	
A. Purpose of the Proposed Rule	
B. Summary of Major Provisions	
C. Legal Authority	
D. Costs and Benefits	
II. Table of Abbreviations/Commonly Used Acronyms in This Document	
III. Background	
A. Introduction	
B. FDA’s Current Statutory Authority Framework	
C. Need for Amendments to the Regulations	
IV. Legal Authority	
V. Description of the Proposed Rule	
A. Scope	
B. Proposed Repeal of Radiation Protection Recommendations	
C. Proposed Amendments About Applications for Variances	
D. Proposed Amendments About Records and Reports	
E. Proposed Amendments About Diagnostic X-ray Systems and Their Major Components	
F. Proposed Amendments About Laser Products	
G. Proposed Repeal of Ultrasonic Therapy Products Performance Standard	
VI. Proposed Effective Date	
VII. Preliminary Economic Analysis of Impacts	
A. Introduction	
B. Summary of Costs and Benefits	
C. Summary of Regulatory Flexibility Analysis	
VIII. Analysis of Environmental Impact	
IX. Paperwork Reduction Act of 1995	
X. Federalism	
XI. Consultation and Coordination with Indian Tribal Governments	
XII. References	

I. Executive Summary

A. Purpose of the Proposed Rule

This proposed rule would amend and repeal certain regulations for radiation emitting electronic products and medical devices because FDA has identified the regulations as being outdated and duplicative of other means for reducing radiation exposure to the public. The Agency is proposing to update the regulations to reduce regulations that are outdated and otherwise clarify requirements for protecting the public health against radiation exposure from specific electronic products and medical devices. The regulations being proposed for amending or repealing are the radiation protection recommendations for specific uses, records and reporting requirements for electronic products, applications for variances, and performance standards for diagnostic x-ray systems and their major components, laser products, and ultrasonic therapy products.

B. Summary of the Major Provisions of the Proposed Rule

This proposed rule, when finalized, will update FDA’s radiological health regulations to amend or repeal the following radiological health (21 CFR parts 1000 to 1050) parts of the general provisions:

- Repeal the radiation protection recommendations that have become outdated and unnecessary due to current FDA safety communications and other mechanisms that can provide more comprehensive recommendations to protect patients and health professionals from unnecessary radiation exposure;
- Amend the records and reporting requirements for electronic products and medical devices by removing or reducing some of the annual reports and test record requirements that are unnecessary or may be duplicative of other reporting requirements by FDA and State regulators;
- Revise the timing for submissions of reporting requirements for accidental radiation occurrences (AROs) to allow quarterly reporting for AROs that are not associated with a death or serious injury;
- Amend the applications for variances process to no longer require a manufacturer to submit two additional copies with the original documents;
- Amend the regulations to no longer require assemblers who install certified components of diagnostic x-ray systems to submit reports of assembly to the Agency. FDA is proposing to amend the regulations to require assemblers to submit assembly reports only to the purchaser, and, where applicable, to State agencies responsible for radiation protection because the Agency no longer uses the reports to plan routine inspections of newly assembled equipment;
- Amend the performance standard for laser products by reducing the regulatory requirements for: (1) Uncertified laser products that are intended to be used as a component and are incorporated into an electronic product that is then certified by the manufacturer of a finished electronic product and (2) certified and unmodified laser products that are not intended for use as a component or replacement and that are incorporated into another product; and
- Repeal the performance standards for sonic, infrasonic, and ultrasonic products because they are limited to a subset of physical therapy devices with an outdated standard. The Agency considers the premarket medical device regulations to be sufficient to ensure the

safety of ultrasonic therapy products. The current Electronic Product Radiation Control (EPRC) reporting for initial, abbreviated, and annual reports of ultrasonic products is also duplicative given the more comprehensive medical device regulations and premarket authorizations for these products.

The Agency believes the amendments in this proposed rule will help ensure that the requirements for radiation emitting electronic products and devices will continue to protect the public health and safety while reducing regulatory burdens.

C. Legal Authority

FDA is issuing this proposed rule under the same authority under which FDA initially issued these regulations, the device and general administrative provisions of the Federal Food, Drug,

and Cosmetic Act (FD&C Act) (21 U.S.C. 321, 351, 352, 360, 360e–360j, 360hh–360ss, 371, 374, and 381). FDA has the authority under section 534 of the FD&C Act (21 U.S.C. 360kk) to amend the performance standard for diagnostic x-ray systems and their major components, amend the performance standard for laser products, and repeal radiation protection recommendations and the performance standard for ultrasonic therapy products, as provided for in this proposed rule.

D. Costs and Benefits

This proposed rule will update FDA’s radiological health regulations by amending parts of the general provisions including records and reporting requirements for electronic products. Benefits are estimated in terms of cost savings. Industry cost

savings are derived by estimating the savings in reduced labor resulting from the reduction in reporting, recordkeeping, and third-party disclosure requirements. Cost savings to FDA result from the reduction in labor hours required to review reports. The total present value cost savings over a 20-year time period are \$62.8 million at a 7 percent discount rate and \$88.2 million at a 3 percent discount rate. Annualized total cost savings are \$5.93 million. We estimate the costs to read the rule for all reporting respondents. The present value costs are \$1.47 million and the annualized costs calculated over a 20-year time period are \$0.14 million at a 7 percent discount rate and \$0.10 million at a 3 percent discount rate.

II. Table of Abbreviations/Commonly Used Acronyms in This Document

Accidental Radiation Occurrences	ARO
Center for Devices and Radiological Health	CDRH
Centers for Medicare & Medicaid Services	CMS
Conference of Radiation Control Program Directors	CRCPD
Executive Order	EO
Electronic Product Radiation Control	EPRC
Environmental Protection Agency	EPA
Federal Food, Drug, and Cosmetic Act	FD&C Act
Food and Drug Administration	FDA, Agency or we
International Commission on Radiological Protection	ICRP
International Electrotechnical Commission	IEC
Medical Device Reporting	MDR
National Council on Radiation Protection and Measurements	NCRP
Radiation Control for Health and Safety Act	RCHSA
Quality Assurance	QA
Technical Electronic Product Radiation Safety Standards Committee	TEPRSSC

III. Background

A. Introduction

Pursuant to EOs 13771 and 13777 (Refs. 1–2), FDA has conducted a comprehensive review of the requirements and recommendation of electronic products based on their level of radiation exposure. FDA recognizes that some records and reporting requirements for some radiation emitting electronic products and medical devices are not necessary to protect the public health and safety in compliance with the EPRC program (see sections 532, 534(a)(1), and 537(b) of the FD&C Act; 21 U.S.C. 360ii, 360kk(a)(1), and 360nn(b)). In addition, some of the recommended protections against radiation and performance standards are now outdated and redundant to other Federal and State requirements as practitioners and industry rely on numerous current radiation guidance documents, along with industry standards, to ensure the public health. For example, FDA recognizes that submission of quarterly reports is unnecessary given certain annual

reporting requirements. The submission of initial product reports for products that are also subject to premarket authorization prior to marketing is duplicative. The recommended protections against radiation are now outdated and redundant to other Federal and State requirements and professional guidelines that apply to the education and licensing of practitioners (Refs. 3–7). Also, there are more recent standards that industry and FDA can rely on for the safety of ultrasonic therapy devices for physical medicine, for instance the International Electrotechnical Commission (IEC) standards 60601–2–5 and 61689.

In addition, in the **Federal Register** of September 8, 2017 (82 FR 42494), FDA published a notice for request for comments and information on the “Review of Existing Center for Devices and Radiological Health Regulatory and Information Collection Requirements” that could be amended, repealed or replaced to achieve meaningful burden reduction while achieving FDA’s public health mission. FDA received comments regarding the radiological health

regulations and its performance standards. As a result, FDA is proposing to amend its regulations for requirements for certain reporting and records of electronic products by removing or reducing certain reporting, as well as repealing outdated recommendations for radiation protection and performance standards, to alleviate regulatory burden to both FDA and industry.

B. FDA’s Current Statutory Framework

The FD&C Act (21 U.S.C. 301 *et seq.*), as amended, establishes a comprehensive system for the regulation of devices intended for human use.

The Safe Medical Devices Act of 1990 (Pub. L. 101–629), enacted on November 28, 1990, transferred the provisions of the Radiation Control for Health and Safety Act of 1968 (Pub. L. 90–602) (formerly 42 U.S.C. 263b through n(i) *et seq.*) from Title III of the Public Health Service Act to Chapter V, subchapter C of the FD&C Act, entitled “Electronic Product Radiation Control” (21 U.S.C. 360hh–360ss). Under these provisions, FDA administers the EPRC program to

protect the public health and safety. This authority provides for developing, amending, and administering radiation safety performance standards for electronic products.

Under the FD&C Act, the EPRC applies to any electronic product that is defined as: (a) Any manufactured or assembled product (or component, part, or accessory of such product) which, when in operation, (i) contains or acts as part of an electronic circuit and (ii) emits (or in the absence of effective shielding or other controls would emit) electronic product radiation, or (b) any manufactured or assembled article which is intended for use as a component, part or accessory of a product described in clause (A) and which when in operation emits (or in the absence of effective shielding or other controls would emit) such radiation (see section 531(2) of the FD&C Act, 21 U.S.C. 360hh(2)).

Electronic product radiation is defined as: (a) Any ionizing or non-ionizing electromagnetic or particulate radiation or (b) any sonic, infrasonic, or ultrasonic wave, which is emitted from an electronic product as the result of the operation of an electronic circuit in such product (section 531(1) of the FD&C Act). Some products may fall under the definition of both a medical device and an electronic product (see section 201(h) of the FD&C Act for definition of a device and section 531(2) of the FD&C Act for definition of electronic product). As such, these products may be subject to the provisions of the FD&C Act and FDA's regulations that apply to medical devices and electronic products.

The EPRC program also directs FDA to prescribe performance standards for electronic products to control the emission of electronic product radiation. In establishing performance standards consistent with the statute, FDA consults with the Technical Electronic Product Radiation Safety Standards Committee (TEPRSSC), established under the Radiation Control for Health and Safety Act (RCHSA). The TEPRSSC functions to provide advice and consultation to FDA on the technical feasibility, reasonableness, and practicality of all proposed performance standards for electronic products (section 534(f) of the FD&C Act) (Ref. 8). FDA submits to TEPRSSC a proposed standard or amendment of a performance standard for an electronic product before issuing a proposed regulation in the **Federal Register** containing such standard or amendment of such standard (section 534(f)(1)(A) of the FD&C Act). TEPRSSC may also recommend electronic product radiation

safety standards to FDA (section 534(f)(1)(B) of the FD&C Act).

Upon receipt of advice from TEPRSSC, responsibility for action on creating or updating performance standards rests with FDA (21 CFR 14.122(b)). Based on this advice, the creation, amendment, and revocation of performance standards for electronic products to control the emission of electronic product radiation are accomplished by rulemaking, including the opportunity for notice and comment (section 534(a)–(b) of the FD&C Act).

On October 26, 2016, a TEPRSSC meeting was held and FDA presented, for consultation with TEPRSSC, proposed certain amendments to the regulations for laser, sonic, x-ray, and other radiation emitting products to best align FDA's focus with the public health need and reduce or eliminate standards or reporting that were no longer considered necessary (§ 1040.10(a)) (Ref. 9). FDA also proposed to the TEPRSSC the removal of the ultrasonic therapy performance standard with continuing reliance on medical device review prior to marketing authorization. Items in these proposed amendments have been considered by TEPRSSC discussions as necessary.

C. Need for Amendments to the Regulations

FDA is responsible for protecting and promoting the public health regarding electronic product radiation from medical devices and electronic products. Voluntary consensus standards regarding safety and essential performance have been developed and continually improved to increase the safety of these devices. FDA believes radiation emitting electronic products and devices that comply with Federal standards provide a reasonable assurance of safety and effectiveness when properly used by trained personnel, and concern has shifted to minimizing improper uses. FDA, patients, health workers, and industry recognize that medical products that emit radiation should be used only when medically justified to answer a clinical question or to guide treatment of a disease, and that the amount of radiation used should be limited to that necessary to accomplish the clinical task. (Refs. 3, 10–12).

In 2010, FDA's Center for Devices and Radiological Health (CDRH) launched an "Initiative to Reduce Unnecessary Radiation Exposure from Medical Imaging" (Ref. 13) to protect public health by promoting the appropriate use of radiation and safety features to minimize unnecessary radiation exposure from medical imaging.

Through this initiative, FDA collaborates with other agencies and the health care professional community to mitigate factors contributing to unnecessary patient exposure to radiation during medical procedures. The range of electronic products marketed today is diverse with regards to radiation emission levels, product complexity, consumer use, and sales volume. The public risk associated with exposure to radiation from these products also varies significantly; however, the risks to patients can be mitigated by medical personnel only performing exams using radiation when necessary to answer a medical question, treat a disease or guide a procedure (Ref. 14). In accordance with FDA's directive to carry out the EPRC program, FDA has determined that the regulatory requirements can be adjusted to take account of the wide range of electronic products currently on the market and focus on products that pose a higher risk to the public.

1. Radiation Protection Recommendations

Between 1976 and 1980, FDA issued final voluntary recommendations to provide industry and practitioners with recommendations for radiological protection for specific medical procedures (see 44 FR 71728 at 71729). In the **Federal Register** of July 23, 1976 (41 FR 30327), FDA set forth recommendations for use of specific area gonad shielding on patients during medical diagnostic x-ray procedures. In the **Federal Register** of December 11, 1979 (44 FR 71728), FDA issued a final recommendation for the voluntary establishment of quality assurance (QA) programs by all diagnostic facilities. FDA encouraged each facility to implement only those recommendations that the facility determined would lead to benefits in improved image quality, reduced radiation exposure, and/or reduced costs sufficient to compensate for the costs of the action. A facility can use its QA program to optimize radiation dose for each kind of x-ray imaging examination, procedure, and medical imaging task the facility performs (Refs. 3–4, 14). In the **Federal Register** of June 17, 1980 (45 FR 40976), FDA issued a final recommendation on administratively required dental x-ray examinations. FDA recommended that dental x-ray examinations only be performed after careful consideration of the dental or other health needs of the patient, based on medical judgement necessary for diagnosis, treatment, or prevention of disease. Dental radiography is estimated to contribute much less than one percent of the total

population's exposure to all types of radiation (medical and non-medical) (Ref. 15).

Since the publication of the recommendations over the last 30 years, numerous other organizations and Federal and State agencies have developed more comprehensive recommendations on patient shielding, quality control, and the safe use of x-ray imaging in dentistry. FDA recognizes the significant and ongoing contributions that external stakeholders, such as the American Association of Physicists in Medicine, the American College of Radiology, the Health Physics Society, the Image Gently Alliance, the International Atomic Energy Agency, the Medical Imaging Technology Alliance, the Society of Interventional Radiology, the World Health Organization, and many others, have made to incorporate radiation protection into device design, practitioner training, and best practices for standards of care. There are communities of scientific and clinical experts, often with FDA collaboration, dedicated to developing radiation safety training programs and setting qualification and accreditation standards by users and facilities that are adequate to supersede FDA recommendations. For example, in 2003, the National Council on Radiation Protection and Measurements (NCRP) updated its recommendations on radiation protection in dentistry (Ref. 4). In 2012, the American Dental Association, in conjunction with FDA, updated its selection criteria for dental imaging with guidelines for the frequency of dental radiographs and radiation exposure recommendations (Ref. 5). In 2014, the Environmental Protection Agency's (EPA) Working Group on Medical Radiation, with active FDA participation, published a document entitled "Federal Guidance Report No. 14. Radiation Protection Guidance for Diagnostic and Interventional X-Ray Procedures" (Guidance Report No. 14), which provides comprehensive recommendations for radiation protection to medical and dental facilities (Ref. 3).

Also, over the last decade FDA has been actively engaged with other State agencies to develop and publish more modern recommendations than those identified under FDA's regulations to promote and protect public health by reducing unnecessary radiation exposure from medical imaging (part 1000 (21 CFR part 1000)). These efforts were in response to increasing use of ionizing radiation for medical imaging highlighted in the NCRP Report No. 160 (Ref. 15). FDA strives to promote patient

safety through the principles of radiation protection developed by the International Commission on Radiological Protection (ICRP) (Ref. 16). For example, FDA actively works with States, which have the authority to regulate diagnostic radiology facilities. FDA routinely provides input into the model State regulations (the Suggested State Regulations) developed by the Conference of Radiation Control Program Directors (CRCPD), which include suggested regulations relating to the use of x-ray imaging in medicine and dentistry and diagnostic imaging quality assurance (Ref. 17). In addition, the Centers for Medicare & Medicaid Services (CMS) requires advanced diagnostic imaging services to be accredited by a designated accrediting organization in order to receive Medicare reimbursement. Practitioner training and radiation safety are part of the accreditation requirements (Ref. 18).

FDA has and will continue to participate actively in the development and maintenance of safety standards related to radiation protection, including IEC standards for radiography and fluoroscopy, computed tomography, interventional fluoroscopy, dental radiography, radiation therapy, laser products, and microwave ovens, among others. Manufacturers are required to conform with these standards in order to market their device in some countries, including China and Europe. Our participation in standards development is critical to advocating for industry-wide implementation of radiation protection safety features that result in a benefit to the public health and facilitates global harmonization of safety measures for radiation therapies. FDA also has and retains its authority over medical device premarket reviews, surveillance, and compliance programs—as well as the other EPRC reporting requirements and performance standards—to address radiation safety issues with respect to medical devices.

In view of FDA's continuous collaboration with States, other Federal agencies, and professional organizations, FDA has determined that the recommendations in FDA's current regulations for radiation protection during medical procedures (part 1000) are obsolete and do not address many aspects of modern radiation control and QA as articulated in more contemporary guidelines and is proposing that the recommendations be repealed. For example, the regulations for radiation emitting products provide recommendations for QA programs for imaging using film, but almost no current facilities still use film (§ 1000.55(c)(3)). FDA is proposing that

it is unnecessary to revise the film quality control recommendations for new digital imaging equipment because FDA performs premarket authorization review of the digital x-ray equipment, which includes a review of the manufacturer's device labeling proposed to support a reasonable assurance of safety and effectiveness (see 21 CFR part 892). The performance standards that apply to the x-ray imaging products also still apply (see §§ 1020.30 and 1020.31 (21 CFR 1020.30 and 1020.31)). When used as intended by trained practitioners, FDA believes that digital equipment can provide more reliable high-quality images with greater potential to lower radiation exposure. As discussed above, FDA believes there are adequate recommendations and guidelines available to provide sufficient guidance on the safe use of medical x-ray modalities.

Therefore, FDA is proposing to repeal the radiation protection recommendations in the regulation because these recommendations have become outdated and there is no longer a need for FDA to specify and maintain a set of recommendations for practitioners. FDA encourages practitioners to review and apply the most current guidelines developed by professional societies (see the list of agencies and societies listed earlier in this section), along with the medical device labeling to ensure radiation protection. In addition to continued active participation in consensus standards development, FDA can also utilize its authority over device labeling and will continue to review device labeling for adequate directions for use of the product (see § 801.5 (21 CFR 801.5)). FDA will also continue its participation on collaborative efforts with stakeholders who are engaged in developing radiation safety education and standards for patient care. FDA will continue to amend specific FDA performance standards as appropriate to include aspects of radiation protection or reporting that are not already addressed by consensus standards.

2. Applications for Variances

FDA may grant a variance from one or more provisions of any performance standard under certain conditions. Upon application of variances or for amendments or extensions of variances, FDA requires manufacturers or assemblers to submit one original and two copies of the application to the Agency (§ 1010.4(b) (21 CFR 1010.4(b))). When FDA receives a new application for variance, the Agency's Dockets Management Staff will scan the original application electronically into the

docket for a specific submission. FDA has determined that the requirement for multiple copies is no longer necessary because the docket maintains an electronic version of the application and it is an unnecessary regulatory burden on manufacturers to require additional copies. Therefore, FDA is proposing to amend the applications for variances section to only require a manufacturer to submit the original to the Dockets Management Staff.

3. Records and Reports

The range of electronic products marketed today is diverse regarding radiation emission levels, product complexity, consumer use, and sales volume. FDA receives a large volume of records and reports both annually and quarterly from manufacturers of electronic products (§ 1002.1 (21 CFR 1002.1)). Industry has previously raised concerns about redundancy of information that FDA requires to be submitted to comply with both the medical device regulations and EPRC regulations for products that are both medical devices and electronic products. In the **Federal Register** of September 19, 1995 (60 FR 48374), FDA issued a final rule amending the regulations regarding requirements for recordkeeping and reporting of adverse events and other information related to radiation emitting electronic products. This rule reduced the recordkeeping and reporting requirements for some products, required only abbreviated reporting for other products, and clarified certain requirements.

Based on additional experience with these products and knowledge of their radiation risks, FDA has concluded that the record and reporting requirements for these products should be tailored to focus upon products that have the potential to pose greater risk, while reducing regulatory burdens on manufacturers, dealers and distributors of radiation emitting electronic products that pose less risk to public health (§ 1002.1). FDA also considered what categories of EPRC reports were duplicative of information that would be submitted to FDA in a premarket review of the safety and effectiveness of a new medical device. For example, an initial or abbreviated product report for an ultrasound or x-ray system is duplicative if the firm is also expected to submit a premarket 510(k) notification for a new ultrasound or x-ray system that contains the same (or more detailed) information related to radiation safety features and performance. In general, current record and reporting requirements will remain for those products that emit the highest

radiation levels or are sold in the largest quantities because they present the greatest potential risks to public health. For those products that present the least public health risk or for categories of medical devices that FDA considers the EPRC reporting to be duplicative given the medical device regulations, FDA is proposing to reduce reporting requirements.

In addition, FDA has identified medical and non-medical sonic products for which FDA believes record and reporting requirements should no longer be required. FDA believes the current record and reporting requirements for some electronic products, including ultrasonic therapy products, are an unnecessary burden and a source of confusion for these products. As a result, FDA is proposing to amend the record and reporting requirements to no longer require product reports, supplemental reports, abbreviated reports, annual reports, test records, or distribution records for certain products (see revised table 1 of § 1002.1).

FDA is proposing to remove the requirement for manufacturers to report model numbers of new models of a model family that do not involve changes in radiation emission or requirements of a performance standard in quarterly updates to their annual reporting (§ 1002.13 (21 CFR 1002.13(c))). FDA has determined that quarterly reporting of new models is unnecessary. The submission of annual reports is sufficient to provide FDA with periodic information to regulate these products, and the submission of quarterly reports has been an unnecessary burden on industry. Generally, FDA requires specified product manufacturers to submit annual reports to the Agency that summarize certain manufacturing records (see § 1002.13(a) and (b)). FDA is not amending these annual report requirements; however, FDA has determined that requiring select manufacturers to submit quarterly updates to FDA in addition to the annual report, is no longer necessary to protect the public health and safety.

FDA believes that the revisions to the reporting and recordkeeping are reasonable based on the risk of certain product categories (§ 1002.1). However, FDA is seeking public comments on other possible revisions to table 1 that may simplify the reporting requirements based on a reduction of unnecessary or duplicative reporting (§ 1002.1).

Lastly, FDA is proposing amendments to AROs by allowing any manufacturer of a radiation emitting electronic product to submit quarterly summary

reports of AROs that are not associated with a death or serious injury (21 CFR 803.3(w)) and not required to be reported under the medical device reporting regulations (§ 1002.20 (21 CFR 1002.20); 21 CFR part 803).

Manufacturers of electronic products are currently required, where reasonable grounds are suspected, to immediately report to FDA all AROs reported to or otherwise known to the manufacturer and arising from the manufacturing, testing, or use of any product introduced or intended for introduction into commerce by the manufacturer (§ 1002.20). FDA believes that amending the regulations to allow summary reporting for AROs not associated with a death or serious injury for electronic products extends the approach of eliminating or reducing duplicative reporting requirements beyond the medical device arena and promotes harmonization between this reporting and the new voluntary malfunction summary reporting program for medical devices (see part 803). In the **Federal Register** of August 17, 2018, FDA published the “Voluntary Malfunction Summary Reporting Program” Notice identifying the criteria and format for summary reporting in the quarterly reports for device malfunctions that will also be applicable to AROs (83 FR 40973). FDA is seeking public comments from manufacturers as to whether quarterly summary reports would reduce burden, and whether manufacturers have additional suggestions as to the specificity in the format, content, or timing of summary reports.

4. Diagnostic X-Ray Systems and Their Major Components

The purpose of the performance standard for diagnostic x-ray systems is to protect the public health by reducing unnecessary exposure to ionizing radiation while assuring the clinical utility of the images produced. In the **Federal Register** of June 10, 2005 (70 FR 33998), the FDA issued a final rule to amend the Federal performance standard for diagnostic x-ray systems and their major components (*i.e.*, the performance standards). Under those regulations, the performance standard requires that assemblers who install certified components of diagnostic x-ray systems must assemble, install, adjust, and test the certified components according to the instructions of the component manufacturer when these certified components are installed into a diagnostic x-ray system (§ 1020.30(d)). In addition, assemblers are responsible for filing a report of the assembly that affirms the manufacturer’s instructions

were followed in the assembly or that the certified components as assembled into the system meet all applicable requirements of §§ 1020.30 through 1020.33 (§ 1020.30(d)(1)).

Currently, all assembler reports must be on a form prescribed by CDRH and submitted to the Director of CDRH, to the purchaser, and, where applicable, to the State agency responsible for radiation protection within 15 days following assembly. FDA has determined that the reports of assembly are important for State agencies and the purchasers, but reporting to FDA is an unnecessary additional burden to the manufacturer as FDA is no longer using these reports to plan routine inspections of newly assembled equipment. Therefore, FDA is proposing to amend the regulation to remove the requirement that a manufacturer must submit a report of assembly of a certified component to the Agency. While FDA no longer needs the report to plan routine inspections of installed x-ray systems, other requirements in the performance standard for x-ray systems and their major components are unchanged. FDA also plans routine inspections of the x-ray equipment manufacturers for compliance with the quality system regulations (see 21 CFR part 820).

X-ray systems and certain components are still subject to FDA premarket review (see part 892). Compliance with FDA regulations and post-market surveillance allows monitoring the safety of installed equipment through medical device reporting (MDRs) (part 803), recalls (see 21 CFR part 806), notifications of defects (see 21 CFR part 1003), and reporting of accidental radiation occurrences (see § 1002.20). FDA believes that, as was previously described, the history of continuous efforts to reduce unnecessary radiation among manufacturers and practitioners, consensus standards development, and other regulatory authorities for compliance and surveillance all support FDA's conclusion that reports of assembly no longer need to be submitted to FDA. FDA has found the information received and reviewed in MDRs, recalls, and other means to be sufficient for ongoing efforts to inform consensus standards development, guidance, or collaboration on improved education as a better use of resources to result in a broader impact to reduce unnecessary radiation exposure and protect the public health and safety.

5. Laser Products

On December 18, 1989, in response to numerous questions regarding the

applicability of regulations on laser products, and modification of a certified laser product, in situations in which a firm purchases a certified Class I laser product and incorporates it into another product for sale (§ 1040.10(i) (21 CFR 1040.10(i))), FDA issued "Laser Notice No. 42—Clarification of Compliance Requirements for Certain Manufacturers Who Incorporate Certified Class I Laser Products Into Their Products" (Laser Notice No. 42) (Ref. 19). In Laser Notice No. 42, FDA announced its policy that it will consider firms that incorporate unmodified, certified Class I laser products into another product to be distributors of laser products certified and reported by other manufacturers provided certain conditions were met. If this proposed rule is finalized, the exception from applicability of laser performance standards will be expanded to include all classes of certified and unmodified laser products (Class I, II, IIa, IIIa, IIIb, and IV) that are not intended for use as a component or replacement and that are incorporated into another product (see proposed amendment § 1040.10(a)(2)). These amendments, if finalized, will further streamline the regulation of finished certified laser products that are installed into another product, while providing for the same protection of the public health and safety from electronic product radiation from laser products as originally certified.

The proposed rule does not change the requirements for distributors of laser products. Distributors of laser products need not submit initial and annual reports nor apply new certification and identification labels to the outside of the final product (§§ 1010.2 and 1010.3), which remain the responsibility of the manufacturer. Instead, distributors of laser products must only comply with the recordkeeping requirements (§§ 1002.40 and 1002.41 (21 CFR 1002.40 and 21 CFR 1002.41)).

At the same time, FDA is retaining the exception from applicability of the laser product performance standard for uncertified laser products intended to be used as a component or replacement for an electronic product that is then certified by the manufacturer of such finished electronic product (see § 1040.10(a)). Specifically, the laser product performance standards will still not apply to manufacturers of uncertified laser products intended to be used as a component or replacement in a finished electronic product that is then certified by the manufacturer, subject to certain conditions (see proposed amendment § 1040.10(a)(1)(i)–(iii)). To clarify, § 1040.10(a)(1), as proposed to be amended, describing

laser products intended for use as components and excepted from the laser performance standard and the associated reporting and recordkeeping requirements found in part 1002 remain unchanged by these amendments.

Such exception from the laser product performance standards continues to not apply to removable laser systems, which must comply with the laser product performance standards as well as applicable reporting and recordkeeping requirements. Removable laser systems are designed to be incorporated in such a way that they may be removed without modification and still be capable of producing laser radiation when powered by a general energy source, such as those provided by wall transformers, batteries, or other AC or DC power (see § 1040.10(c)(2)).

Lastly, FDA is amending the Agency's address for registration and listing for manufacturers of uncertified laser products that are intended to be used as a component and are incorporated into an electronic product (see proposed amendment § 1040.10(a)(1)(iii)(A)).

6. Ultrasonic Therapy Products

Ultrasonic therapy products are both devices, under section 201(h) of the FD&C Act, and electronic products, under section 531(2) of the FD&C Act. In the **Federal Register** of February 17, 1978 (43 FR 7166), FDA issued a final rule establishing a radiation performance standard for ultrasonic therapy products for use in physical therapy manufactured on or after February 17, 1979. The standard applies to any device intended to generate and emit ultrasonic radiation for therapeutic purposes at frequencies above 16 kilohertz and to generators or applicators designed or specifically designed for use in such devices. Ultrasonic therapy devices currently must comply with the general performance standards for electronic products (part 1010), and the performance standard for ultrasonic therapy products (§ 1050.10 (21 CFR 1050.10)). The performance standard for ultrasonic therapy products only applies to ultrasonic therapy products for use in physical therapy, but not the range of other therapeutic medical ultrasound devices. Ultrasonic therapy products, also known as diathermy products, are intended to generate therapeutic deep heat within body tissues for the treatment of selected medical conditions. The safety profile of medical ultrasound products is reviewed prior to marketing authorization to consider their intended uses by trained professionals who follow the manufacturer's labeling, which labeling

is required to provide adequate directions for use (§ 801.5).

Since the time that ultrasonic therapy performance standards were finalized in 1979, other regulations now apply to the safety and effectiveness of ultrasonic therapy products. The products are subject to premarket authorization (see § 890.5300 (21 CFR 890.5300)). Additionally, FDA can perform routine inspections of the device manufacturers for compliance with quality system regulations (see part 820). Compliance with FDA's regulations and post-market surveillance also allow monitoring for the safety of equipment through medical device reporting (MDRs) (see part 803) and recalls (see part 806). EPRC notifications of defects (see part 1003) and reporting of accidental radiation occurrences (see § 1002.20) still apply. FDA finds that the history of safe use, consensus standards development, and other regulatory authorities for compliance and surveillance are adequate to reduce the burden of also needing to comply with outdated performance standards.

The basis for development of the ultrasonic therapy performance standards in 1979 is no longer relevant because FDA has since gained authority to sufficiently monitor the quality and safety of ultrasonic therapy products under the device premarket authorization review process. The premarket authorization review can take into consideration recognized IEC consensus standards and recommendations in applicable FDA's guidance document(s) as an alternative to conformance with the EPRC performance standards for the evaluation of the safety and effectiveness of such products (Ref. 9). The premarket review can determine substantial equivalence of the device performance and labeling to a predicate product or premarket approval to demonstrate a reasonable assurance of safety and effectiveness and adequate directions for use (see § 801.5).

As a result, FDA is proposing to repeal the ultrasonic therapy products performance standards because industry may conform to the recognized IEC standards for these products, which provides at least the same level of protection of the public health and safety from electronic radiation as FDA performance standards, and provides greater flexibility for changes in technology for ultrasonic therapy products. The Agency has recommended through guidance that industry should conform with IEC standards 60601–2–5 and 61689 to address the performance standards for ultrasonic therapy (part 1050). Most of

industry already comply with these FDA recognized consensus standards. FDA has published an ultrasonic diathermy device guidance entitled, "Policy Clarification and Premarket Notification [510(k)] Submissions for Ultrasonic Diathermy Devices; Guidance for Industry and Food and Drug Administration Staff" (Ref. 20). The guidance outlines a policy that, if firms provide a declaration of conformity with the relevant provisions of the current FDA recognized versions of the IEC 60601–2–5 and IEC 61689 standards, FDA does not intend to consider whether firms comply with certain regulatory requirements (see § 1050.10).

FDA believes that the foregoing regulatory controls, such as medical device premarket review, as well as quality controls, surveillance, and recall authorities are adequate to monitor and address safety issues that arise from any reports of adverse events with these products. As a result, FDA is proposing to repeal the performance standards for ultrasonic therapy products because these standards apply to a limited subset of devices used in physical therapy (see § 890.5300) for which safety issues devices have been and will continue to be handled through premarket regulatory review processes as well as under other medical device regulatory authorities, such as MDRs and device recalls.

IV. Legal Authority

FDA is issuing this proposed rule under the same authority under which FDA initially issued these regulations, the device and general administrative provisions of the FD&C Act (21 U.S.C. 321, 351, 352, 360, 360e–360j, 360hh–360ss, 371, 374, and 381). FDA has the authority under section 534 of the FD&C Act to amend the performance standard for diagnostic x-ray systems and their major components, amend the performance standard for laser products, and repeal radiation protection recommendations and the performance standard for ultrasonic therapy products, as provided for in this proposed rule.

V. Description of the Proposed Rule

A. Scope

We are proposing to amend and repeal the parts of the radiological health regulations covering recommendations for radiation protection (part 1000), certain reporting and records of electronic products (parts 1002, 1010, and 1020), and performance standards of laser products (part 1040) and ultrasonic therapy devices (part 1050). These proposed changes to the

regulations are intended to reduce regulatory requirements that are outdated and otherwise clarify requirements for protecting the public health against exposure to specific radiation emitting electronic products and medical devices. This action is part of FDA's implementation of EOs 13771 and 13777.

B. Proposed Repeal of Radiation Protection Recommendations

As stated above in section III, FDA believes there are adequate recommendations from FDA, interagency work groups, and professional organizations as well as State and accreditation/certification requirements on practitioners and facilities to mitigate patients' and health professionals' exposure to radiation from medical imaging. The recommendations found in FDA's current regulations are now outdated and can be removed without impacting public health, and practitioners and industry can rely on more recent and comprehensive recommendations. FDA is proposing to repeal the following regulations for radiation protection recommendations: (1) Recommendation for the use of specific area gonad shielding on patients during medical diagnostic x-ray procedures (§ 1000.50), (2) recommendation for QA programs in diagnostic radiology facilities (§ 1000.55), and (3) recommendation on administratively required dental x-ray examinations (§ 1000.60). Also, FDA is proposing to repeal the definition of phototherapy products because it is no longer necessary with the removal of certain reporting requirements identified in records and reports for radiation emitting electronic products (§ 1000.3(s); see table 1 of § 1002.1).

C. Proposed Amendment About Applications for Variances

FDA has determined that it is unnecessary for manufacturers submitting an application for variance to submit two copies of the application in addition to the original (§ 1010.4(b)). Upon receipt of a new application for variance by mail, FDA's Dockets Management Staff will scan the original application electronically into the docket for a specific submission; therefore, FDA is proposing to amend this regulation by removing the requirement for manufacturers to submit two additional copies of the application to Dockets Management Staff. Applications for variance can also be submitted electronically through the *Regulations.gov* website to Docket No. FDA–2013–S–0610 (<https://www.regulations.gov/docket?D=FDA->

2013-S-0610) as a new comment with an upload of the variance application materials.

D. Proposed Amendments About Records and Reports

FDA has reviewed the regulations and is proposing that certain electronic product recordkeeping and reporting requirements are unnecessary for protecting the public health and safety, and therefore is proposing to simplify the applicability of the recordkeeping and reporting requirements (part 1002). In addition, FDA is proposing to change the frequency of some reports and recordkeeping, such as quarterly reporting, because they are unnecessary requirements.

1. Table 1 Revision to Applicability

FDA is proposing to amend the list of records and reports in table 1 to revise the applicability of the recordkeeping and reporting requirements for some products (§ 1002.1). FDA recognizes that, for some products, meeting the preexisting recordkeeping and reporting requirements are not necessary for protection of the public health and safety. The revisions will eliminate some requirements, clarify others, and combine some reporting requirements identified in the table. For instance, receiving reports for x-ray systems and ultrasonic systems is redundant to the medical device premarket review, which provides FDA more information on safety and effectiveness of an electronic product and medical device. These proposed amendments, if finalized, will improve protection of the public health and safety while reducing regulatory burdens on manufacturers, dealers, and distributors of radiation emitting electronic products. The amendments will remove reports that FDA no longer considers necessary low-risk products, which will allow better utilization of resources on high-priority aspects of radiation safety for products with greater risk. Therefore, FDA proposes to reduce recordkeeping and reporting requirements for some products and clarify the applicability of certain requirements for other products. The proposed revisions to table 1 are:

a. Remove the following products from all of the record and reporting requirements under part 1002: (a) Television products (§ 1020.10) with <25 kilovolt (kV) and ≥25kV and <0.1 milliroentgens per hour (mR/hr) isosexposure rate limit curve (IRLC), (b) phototherapy products, and (c) acoustic products including ultrasonic therapy (§ 1050.10), diagnostic ultrasound,

medical ultrasound other than therapy or diagnostic, and nonmedical ultrasound. However, these proposed amendments do not remove the general notification of defect requirements for all electronic products (21 CFR part 1003) by manufacturers. FDA believes removing the records and reporting requirements for these types of low risk products will not undermine the protection of the public health and safety. The medical device reporting requirements (21 CFR part 803) and premarket notification requirements (21 CFR part 807, subpart E) still apply to phototherapy products and ultrasonic medical products. In the event there is an issue with the product, FDA's general notification of defect requirements and medical device regulations are sufficient for providing FDA with necessary information.

b. Remove the following products from the requirements for product reports, supplemental reports and annual reports: (a) Computed tomography, (b) x-ray systems, (c) tube housing assembly, (d) x-ray control, (e) x-ray high voltage generator, (f) beam-limiting devices, (g) spot-film devices and image intensifiers manufactured after April 26, 1977, and (h) T lamps. However, these proposed amendments do not remove the general notification of defect requirements for all electronic products (21 CFR part 1003) by manufacturers. These devices continue to be regulated under the medical device regulations, including reporting requirements (21 CFR part 803) and premarket notification requirements (21 CFR part 807, subpart E) for computed tomography and x-ray systems. The reporting for T lamps is being made consistent with R lamps as FDA believes the abbreviated reporting for R and T lamps is sufficient for protection of the public health and safety.

c. Remove the following products from the requirements for abbreviated reports: (a) X-ray table or cradle, (b) x-ray film charger, (c) vertical cassette holders mounted in a fixed location and cassette holders with front panels, (d) cephalometric devices manufactured after February 25, 1978, and (e) image receptor support devices for mammographic x-ray systems manufactured after September 5, 1978. However, these proposed amendments do not remove the general notification of defect requirements for all electronic products (21 CFR part 1003) by manufacturers. These devices continue to be regulated under the medical device regulations, including reporting requirements (21 CFR part 803) and

premarket notification requirements (21 CFR part 807, subpart E) for diagnostic x-ray systems and products. FDA believes that submission of test records and distribution records and continued regulation as medical devices is sufficient for protection of the public health and safety.

d. Remove the following products from the requirements for abbreviated reports and annual reports: PRODUCTS INTENDED TO PRODUCE PARTICULATE RADIATION OR X-RAYS OTHER THAN DIAGNOSTIC OR CABINET DIAGNOSTIC X-RAY (Medical). This reporting category is intended to cover other medical devices that emit radiation, such as linear accelerators. However, because there are no EPRC performance standards for this category, these reporting requirements were primarily informational only. FDA believes this reporting is unnecessary given other FDA regulations to review and classify medical devices, including premarket review to evaluate safety and effectiveness.

e. Remove the following products from the requirements for supplemental reports: (a) Television with ≥0.1mR/hr IRLC 5, (b) microwave ovens (§ 1030.10), and (c) class IIa, II, IIIa lasers and products other than class I products containing such lasers. Manufacturers of these products will continue to submit product reports and annual reports, which FDA believes is sufficient for protection of the public health and safety. FDA believes supplemental reporting is unnecessary given the information reviewed in the product reports and the relatively lower-risk of these products.

f. Remove the T lamps products from the requirements for product reports, supplemental reports, and annual reports and transfer the product to the same category as R lamps. Manufacturers of T lamps products will now instead be required to submit abbreviated reports, which FDA believes promotes consistency for the two types of lamps and provides sufficient oversight for protection of the public health and safety.

g. Remove “diagnostic” from “Cabinet Diagnostic X-ray” to match the name of the standard “Cabinet X-Ray.”

The following proposed changes to table 1 of § 1002.1 include deletions that are indicated in a bold font and by a strikethrough and replacements shown in bold font:

Table 1.--Record and Reporting Requirements by Product

Products	Manufacturer						Dealer & Distributor
	Product reports 1002.10	Supplemental reports 1002.11	Abbreviated reports 1002.12	Annual reports 1002.13	Test records 1002.30(a) ¹	Distribution records 1002.30(b) ²	Distribution records 1002.40 and 1002.41
DIAGNOSTIC X-RAY ³ (1020.30, 1020.31, 1020.32, 1020.33)							
Computed tomography	X	X		X	X	X	X
X-ray system ⁴	X	X		X	X	X	X
Tube housing assembly	X	X		X	X	X	
X-ray control	X	X		X	X	X	X
X-ray high voltage generator	X	X		X	X	X	X
X-ray table or cradle			X		X	X	X
X-ray film changer			X		X	X	
Vertical cassette holders mounted in a fixed location and cassette holders with front panels			X		X	X	X
Beam-limiting devices	X	X		X	X	X	X
Spot-film devices and image intensifiers manufactured after April 26, 1977	X	X		X	X	X	X
Cephalometric devices manufactured after February 25, 1978			X		X	X	
Image receptor support devices for mammographic X-ray systems manufactured after September 5, 1978			X		X	X	X
CABINET X-RAY (1020.40)							
Baggage inspection	X	X		X	X	X	X
Other	X	X		X	X	X	

Products	Manufacturer						Dealer & Distributor
	Product reports 1002.10	Supplemental reports 1002.11	Abbreviated reports 1002.12	Annual reports 1002.13	Test records 1002.30(a) ¹	Distribution records 1002.30(b) ²	Distribution records 1002.40 and 1002.41
PRODUCTS INTENDED TO PRODUCE PARTICULATE RADIATION OR X-RAYS OTHER THAN DIAGNOSTIC OR CABINET DIAGNOSTIC X-RAY							
Medical			X	X	X	X	
Analytical			X	X	X	X	
Industrial			X	X	X	X	
TELEVISION PRODUCTS (1020.10)							
<25 kilovolt (kV)- and <0.1 milliroentgen per hour (mR/hr) IRLC ⁵ ⁶			X ⁸	X ⁶			
≥25kV and <0.1mR/hr IRLC ⁵	X	X		X			
≥0.1mR/hr IRLC ⁵	X ⁸	X		X	X	X	
MICROWAVE/RF							
MW ovens (1030.10)	X ⁸	X		X	X	X	
MW diathermy			X				
MW heating, drying, security systems			X				
RF sealers, electromagnetic induction and heating equipment, dielectric heaters (2-500 megahertz)			X				
OPTICAL							
Phototherapy products	X	X					
Laser products (1040.10, 1040.11)							
Class I lasers and products containing such lasers ⁷	X ⁸			X	X		

Products	Manufacturer						Dealer & Distributor
	Product reports 1002.10	Supplemental reports 1002.11	Abbreviated reports 1002.12	Annual reports 1002.13	Test records 1002.30(a) ¹	Distribution records 1002.30(b) ²	Distribution records 1002.40 and 1002.41
Class I laser products containing class IIa, II, IIIa, lasers ⁷	X			X	X	X	
Class IIa, II, IIIa lasers and products other than class I products containing such lasers ⁷	X	X		X	X	X	X
Class IIIb and IV lasers and products containing such lasers ⁷	X	X		X	X	X	X
Sunlamp products (1040.20)							
Lamps only	X						
Sunlamp products	X	X		X	X	X	X
Mercury vapor lamps (1040.30)							
T lamps	X	X		X			
R lamps and T lamps			X				
ACOUSTIC							
Ultrasonic therapy (1050.10)	X	X		X	X	X	X
Diagnostic ultrasound			X				
Medical ultrasound other than therapy or diagnostic	X	X					
Nonmedical ultrasound			X				

¹ However, authority to inspect all appropriate documents supporting the adequacy of a manufacturer's compliance testing program is retained.

² The requirement includes §§ 1002.31 and 1002.42, if applicable.

³ Report of Assembly (Form FDA 2579) is required for diagnostic x-ray components; see § 1020.30(d)(1)-(3).

⁴ Systems records and reports are required if a manufacturer exercises the option and certifies the system as permitted in § 1020.30(c).

⁵ Determined using the isoexposure rate limit curve (IRLC) under phase III test conditions (§ 1020.10(c)(3)(iii)).

⁶ Annual report is for production status information only.

⁷ Determination of the applicable reporting category for a laser product shall be based on the worst-case hazard present within the laser product.

⁸ Manufacturers are exempt from product reports (§ 1002.10) and abbreviated reports (§ 1002.12), except the first product or abbreviated report for each category of: television products; microwave ovens; and Class I laser products that do not by virtue of their design allow human access to laser radiation in excess of the accessible emission limits of Class I specified in § 1040.10(d), as determined in accordance with § 1040.10(e), under any condition of operation, maintenance, service, or failure (e.g., Class I optical disc products, laser printers).

FDA is seeking public comments on other revisions to table 1 that may simplify the table and reduce unnecessary or duplicative reporting (§ 1002.1).

2. Eliminating citation reserved.

FDA is proposing to eliminate the citation reserve under § 1002.2 because it is no longer necessary.

3. Eliminating quarterly updates to the annual reports.

FDA is proposing to eliminate the requirement for manufacturers to report model numbers of new models of a model family that do not involve changes in radiation emission or requirements of a performance standard in quarterly updates to their annual reporting (§ 1002.13(c)). Generally, other subsections require specified product manufacturers to submit annual reports to FDA which summarize certain manufacturing records (§ 1002.13(a) and (b)). FDA is not amending these annual reporting requirements.

4. Reporting of AROs.

FDA is proposing to amend the timing for submission of reporting requirements for AROs that are not associated with a death or serious injury (§ 1002.20). The proposed amendment will allow manufacturers of a radiation emitting electronic product to submit quarterly summary reports of AROs that are not associated with a death or serious injury and not required to be reported under the medical device reporting regulations (§ 1002.20; part 803). FDA believes that amending the regulations to allow summary reporting for AROs for electronic products extends the approach of eliminating or reducing duplicative reporting beyond the medical device arena and promotes harmonization between this reporting and the new voluntary malfunction summary reporting program for medical devices (part 803; 83 FR 40973).

E. Proposed Amendment About Diagnostic X-ray Systems and Their Major Components

FDA is proposing to amend the reports of assembly requirements for major components of diagnostic x-ray systems to no longer require assemblers who install certified components to submit a report of assembly, Form FDA 2579, to CDRH (Ref. 21) (§ 1020.30(d)). FDA will withdraw the language to require submission to “the Director” in this subsection, but will still publish a PDF form online for assemblers to download, complete, and provide to applicable States and purchasers as required.

F. Proposed Amendments About Laser Products

FDA is proposing to amend the laser product regulations to clarify and add exceptions to the applicability of the laser product performance standards (see §§ 1040.10 and 1040.11) to: (1) Uncertified laser products that are intended to be used as a component and are incorporated into an electronic product that is then certified by the manufacturer of a finished electronic product and (2) a manufacturer who incorporates an unmodified laser product into another product when such laser product is not intended for use as a component or replacement and such laser product is certified by the manufacturer of such laser product, subject to certain conditions (§ 1040.10(a)). In addition, FDA is amending the Agency’s address for registration and listing for manufacturers of uncertified laser products that are intended to be used as a component and are incorporated into an electronic product (§ 1040.10(a)(1)). The new address that manufacturers are required to submit their registration and listing is the Director, Division of Radiological Health, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G609, Silver Spring, MD 20993–0002. Alternatively, reports may be submitted electronically through FDA’s eSubmitter (Ref. 22).

G. Proposed Repeal of Ultrasonic Therapy Products Performance Standard

FDA is proposing to repeal the performance standard for ultrasonic therapy products (§ 1050.10). The standard can be repealed because it is limited to a subset of physical therapy devices with an outdated standard in FDA’s current regulations (see § 890.5300), but for which safety issues for these devices have been and will continue to be handled through medical device premarket regulatory processes, as well as under other medical device regulatory authorities, such as MDRs and device recalls.

VI. Proposed Effective Date

FDA proposes that any final rule that may issue based on this proposal become effective 30 days after the date of publication of the final rule in the **Federal Register**.

VII. Preliminary Economic Analysis of Impacts

A. Introduction

We have examined the impacts of the proposed rule under E.O. 12866, E.O.

13563, E.O. 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). EOs 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). E.O. 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations” (Ref. 1). We believe that this proposed rule is not a significant regulatory action as defined by E.O. 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. This proposed rule will reduce regulations that are outdated and otherwise clarify existing requirements. Because the proposed rule does not impose any additional regulatory burdens, we certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$150 million, using the most current (2017) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

B. Summary of Costs and Benefits

Benefits are estimated in terms of cost savings. Industry cost savings are derived by estimating the savings in reduced labor resulting from the reduction in reporting, recordkeeping, and third-party disclosure requirements. Cost savings to FDA result from the reduction in labor hours required to review reports. The total present value cost savings over a 20-year time period are \$62.8 million at a 7 percent discount rate and \$88.2 million at a 3 percent discount rate. Annualized total cost savings are \$5.93 million. We estimate the costs to read the rule for all reporting respondents. The present

value costs are \$1.47 million and the annualized costs calculated over a 20-year time period are \$0.14 million at a

7 percent discount rate and \$0.10 million at a 3 percent discount rate.

TABLE 2—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Year dollars	Discount rate (%)	Period covered (years)	Notes
Benefits:							
Annualized Monetized \$millions/year	\$5.93 \$5.93	\$5.93 \$5.93	\$5.93 \$5.93	2016 2016	7 3	20 20	
Annualized Quantified .....	.....	.....	.....	.....	7 3	.....	None.
Qualitative .....	.....	.....	.....	.....	.....	None.	
Costs:							
Annualized Monetized \$millions/year	\$0.14 \$0.10	\$0.14 \$0.10	\$0.14 \$0.10	2016 2016	7 3	20 20	
Annualized Quantified .....	.....	.....	.....	.....	7 3	.....
Qualitative							
Transfers:							
Federal Annualized Monetized \$millions/year ....	.....	.....	.....	.....	7	.....	None.
.....	.....	.....	.....	3	.....	.....
From/To	From:			To:			
Other Annualized Monetized \$millions/year .....	.....	.....	.....	.....	7	.....	None.
.....	.....	.....	.....	3	.....	.....
From/To	From:			To:			
Effects:							
State, Local, or Tribal Government: No estimated effect.	.....					
Small Business: No estimated effect. ....	.....					
Wages: No estimated effect. ....	.....					
Growth: No estimated effect. ....	.....					

In line with E.O. 13771, in table 3 we estimate present and annualized values of costs and cost savings over an infinite

time horizon. Based on these cost savings, this proposed rule would be

considered a deregulatory action under E.O. 13771.

TABLE 3—EO 13771 SUMMARY TABLE
[In \$ millions 2016 dollars, over a perpetual time horizon]

	Primary (7%)	Lower bound (7%)	Upper bound (7%)	Primary (3%)	Lower bound (3%)	Upper bound (3%)
Present Value of Costs	\$1.47	\$1.47	\$1.47	\$1.47	\$1.47	\$1.47
Present Value of Cost Savings	84.65	84.65	84.65	197.52	197.52	197.52
Present Value of Net Costs	-83.18	-83.18	-83.18	-196.05	-196.05	-196.05
Annualized Costs	0.10	0.10	0.10	0.04	0.04	0.04
Annualized Cost Savings	5.93	5.93	5.93	5.93	5.93	5.93
Annualized Net Costs	-5.82	-5.82	-5.82	-5.88	-5.88	-5.88

C. Summary of Regulatory Flexibility Analysis

FDA has examined the economic implications of the proposed rule as required by the Regulatory Flexibility Act. If a rule will have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities. Because the proposed

rule does not impose any additional regulatory burdens, we certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 23) and at [https://](https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm)

www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.

VIII. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(h) and (i) and 25.34(c) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an

environmental impact statement is required.

IX. Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520). The collections of information in parts 1002 through 1050 have been approved under OMB control number 0910–0025, Electronic Products. The amendments in this proposed rule, if finalized, necessitate revisions to OMB control number 0910–0025. A description of revisions to the annual reporting, recordkeeping, and third-party disclosure burden estimates is given in the PRA, *Description* section of this document. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

Tables 4, 5, and 6 describe revisions to the burden estimates, as well as the other information collections currently approved under OMB control number 0910–0025. For the convenience of the reader, we have noted for each information collection whether we are requesting revision.

FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Electronic Products.

Description: FDA is proposing to amend its regulations for requirements for certain reporting and records of electronic products by removing specific reporting, as well as repealing outdated recommendations for radiation protection and performance standards, and removing submission requirements for copies of certain applications and forms to alleviate regulatory burden to both FDA and industry.

The records and reporting requirements for electronic products and medical devices include annual reports and test records depending upon the specific type of electronic product. FDA has determined upon review of the records and reporting requirements that some of the requirements are unnecessary or may be duplicative of other reporting requirements by FDA and State regulators.

Description of Respondents: The respondents to this information collection are electronic product manufacturers, importers, and assemblers of electronic products from private sector, for-profit businesses.

TABLE 4—ESTIMATED ANNUAL REPORTING BURDEN ¹

Activity; 21 CFR section	FDA form	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours ²
Product reports— 1002.10(a)–(k) ³ .	3639—Cabinet x-ray	1,149	2.2	2,529	24	60,685
	3632—Laser.					
	3640—Laser light show.					
	3630—Sunlamp.					
	3659—TV.					
	3660—Microwave oven.					
Product safety or testing changes—1002.11(a)– (b) ³ .	3801—UV lamps.	440	2.5	1,100	0.5 (30 minutes)	550
	Abbreviated reports— 1002.12 ³ .	3629—General abbreviated report.	54	1.8	97	5	485
Annual reports— 1002.13(a)–(b) ³ .	3663—Microwave products (non-oven).					
	3628—General	1,410	1.3	1,833	18	32,994
	3634—TV					
	3641—Cabinet x-ray.					
	3643—Microwave oven.					
	3636—Laser.					
Accidental radiation occur- rence reports—1002.20 ³ .	3631—Sunlamp.					
	3649—ARO	75	4	300	2	600
Exemption requests— 1002.50(a) and 1002.51 ⁴ .	3642—General correspond- ence.	4	1.3	5	1	5
Product and sample infor- mation—1005.10 ⁴ .	2767—Sample product	5	1	5	0.1 (6 minutes)	1
Identification information and compliance status— 1005.25 ⁴ .	2877—Imports declaration	12,620	2.5	31,550	0.2 (12 minutes)	6,310
	.....	1	2	2	5	10
Alternate means of certifi- cation—1010.2(d) ⁴.	.....				
	Variance—1010.4(b) ⁴	350	1.1	385	1.2	462
	3633—General variance re- quest.					
	3147—Laser show variance request.					
	3635—Laser show notifica- tion.					

TABLE 4—ESTIMATED ANNUAL REPORTING BURDEN ¹—Continued

Activity; 21 CFR section	FDA form	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours ²
Exemption from performance standards—1010.5(c) and (d) ⁴	1	1	1	22	22
Alternate test procedures—1010.13 ⁴	1	1	1	10	10
Microwave oven exemption from warning labels—1030.10(c)(6)(iv) ⁴	1	1	1	1	1
Laser products registration—1040.10(a)(3)(i) ⁴ .	3637—Original equipment manufacturer (OEM) report.	70	2.9	203	3	609
Total	102,744

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

² Total hours have been rounded.

³ We request revision of this information collection.

⁴ The burden estimate for this information collection is currently approved and included for the convenience of the reader. We do not request revision of this line item at this time.

TABLE 5—ESTIMATED ANNUAL RECORDKEEPING BURDEN ¹

Activity; 21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours ²
Manufacturers records—1002.30 and 1002.31(a) ³	1,409	1,650	2,324,850	0.12 (7 minutes)	278,982
Dealer/distributor records—1002.40 and 1002.41 ³	2,909	50	145,450	0.05 (3 minutes)	7,273
Information on diagnostic x-ray systems—1020.30(g) ⁴	50	1	50	0.5 (30 minutes)	25
Laser products distribution records—1040.10(a)(3)(ii) ⁴	70	1	70	1	70
Total .....	.....	.....	.....	.....	286,350

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

² Total hours have been rounded.

³ We request revision of this information collection.

⁴ The burden estimate for this information collection is currently approved and included for the convenience of the reader. We do not request revision of this line item at this time.

TABLE 6—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN ¹

Activity; 21 CFR Section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours ²
Technical and safety information for users—1002.3 ³	1	1	1	12	12
Dealer/distributor records—1002.40 and 1002.41 ³	30	3	90	1	90
Television receiver critical component warning—1020.10(c)(4) ³	1	1	1	1	1
Cold cathode tubes—1020.20(c)(4) ³	1	1	1	1	1
Report of assembly of diagnostic x-ray components—1020.30(d), (d)(1)–(2) (Form FDA 2579—Assembler report) ⁴	1,230	34	41,820	0.3 (18 minutes)	12,546
Information on diagnostic x-ray systems—1020.30(g) ³	6	1	6	55	330
Statement of maximum line current of x-ray systems—1020.30(g)(2) ³	6	1	6	10	60
Diagnostic x-ray system safety and technical information—1020.30(h)(1)–(4) ³	6	1	6	200	1,200
Fluoroscopic x-ray system safety and technical information—1020.30(h)(5)–(6) and 1020.32(a)(1), (g), and (j)(4) ³	5	1	5	25	125
CT equipment—1020.33(c)–(d), (g)(4), and (j) ³	5	1	5	150	750
Cabinet x-ray systems information—1020.40(c)(9)(i)–(ii) ³ ..	6	1	6	40	240
Microwave oven radiation safety instructions—1030.10(c)(4) ³	1	1	1	20	20
Microwave oven safety information and instructions—1030.10(c)(5)(i)–(iv) ³	1	1	1	20	20

TABLE 6—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN ¹—Continued

Activity; 21 CFR Section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours ²
Microwave oven warning labels—1030.10(c)(6)(iii) ³	1	1	1	1	1
Laser products information—1040.10(h)(1)(i)–(vi) ⁴	2	1	2	20	40
Laser product service information—1040.10(h)(2)(i)–(ii) ⁴	2	1	2	20	40
Medical laser product instructions—1040.11(a)(2) ³	2	1	2	10	20
Sunlamp products instructions—1040.20 ³	1	1	1	10	10
Mercury vapor lamp labeling—1040.30(c)(1)(ii) ³	1	1	1	1	1
Mercury vapor lamp permanently affixed labels—1040.30(c)(2) ³	1	1	1	1	1
Total					15,508

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

² Total hours have been rounded.

³ The burden estimate for this information collection is currently approved and included for the convenience of the reader. We do not request revision of this line item at this time.

⁴ We request revision of this information collection.

The proposed revised estimates were generated from discussions with subject matter experts at FDA.

FDA is proposing to revise the applicability of the recordkeeping and reporting requirements for some products (§ 1002.1). We revised the burden estimates for product reports, abbreviated reports, and annual reports by reducing the number of respondents to reflect the revised applicability of the recordkeeping and reporting requirements. We also proposed to revised Form FDA 3646 “Mercury Vapor Lamp Products Radiation Safety Report” (now listed under Abbreviated Reports consistent with the revision of § 1002.1) and removed the following forms:

- Form FDA 3626, “A Guide for the Submission of Initial Reports on Diagnostic X-Ray Systems and Their Major Components”
- Form FDA 3627, “Diagnostic X-Ray CT Products Radiation Safety Report”
- Form FDA 3638, “Guide for Filing Annual Reports for X-Ray Components and Systems,”
- Form FDA 3644, “Guide for Preparing Product Reports for Ultrasonic Therapy Products”
- Form FDA 3645, “Guidance for Preparing Annual Reports for Ultrasonic Therapy Products,”
- Form FDA 3647, “Guide for Preparing Annual Reports on Radiation Safety Testing of Mercury Vapor Lamps”
- Form FDA 3661, “Guide for the Submission of an Abbreviated Report on X-ray Tables, Cradles, Film Changers or Cassette Holders Intended for Diagnostic Use”
- Form FDA 3662, “Guide for Submission of an Abbreviated Radiation Safety Reports on Cephalometric Devices Intended for Diagnostic Use”

The proposed revised applicability of the recordkeeping and reporting requirements for dealer/distributor records (see §§ 1002.40 and 1002.41) may result in a small decrease in the number of respondents. However, upon calculating and rounding the estimated annual number of respondents, we have determined there is no change to the current burden estimate for this information collection.

FDA is eliminating requirements for manufacturers to report model numbers of new models of a model family that do not involve changes in radiation emission or requirements of a performance standard in quarterly updates to their annual reporting (§ 1002.13(c)). We have removed the burden estimate associated with § 1002.13(c). Generally, other subsections require specified product manufacturers to submit annual reports to FDA which summarize certain manufacturing records (§ 1002.13(a) and (b)). FDA is not amending these annual report requirements.

FDA is proposing to amend the timing for submission of reporting requirements for AROs that are not associated with a death or serious injury (§ 1002.20). The proposed amendment will allow manufacturers of a radiation emitting electronic product to submit quarterly summary reports of AROs that are not associated with a death or serious injury and not required to be reported under the medical device reporting regulations (§ 1002.20; part 803). FDA believes that amending the regulations to allow summary reporting for AROs for electronic products extends the approach of eliminating or reducing duplicative reporting requirements beyond the medical device arena and promotes harmonization between this reporting and the new

voluntary malfunction summary reporting for medical devices (see part 803; “Medical Devices and Device-Led Combination Products; Voluntary Malfunction Summary Reporting Program for Manufacturers” (83 FR 40973, August 17, 2018)).

FDA is also proposing to amend the applications for variances process (§ 1010.4(b)) to no longer require a manufacturer to submit two additional copies with the original documents. While this amendment would not generate any substantive change to the information collection, respondents may realize a small monetary savings from the usual and customary administrative expenses associated with the preparation of the copies.

FDA is proposing to amend the reports of assembly requirements for major components of diagnostic x-ray systems to no longer require assemblers who install certified components to submit a report of assemblies, Form FDA 2579, to CDRH (§ 1020.30(d)(1)) (Ref. 22). FDA also proposes to withdraw the language to require submission to “the Director” in this subsection, but will still publish a PDF form online for assemblers to download, complete, and provide to applicable States and purchasers as required. We have moved the corresponding information collection burden estimate from reporting to third-party disclosure burden and revised Form FDA 2579.

FDA is proposing to amend the laser products regulation to add an exception to the applicability of the laser product performance standards (see §§ 1040.10 and 1040.11) to a manufacturer who incorporates an unmodified laser product into another product when such laser product is not intended for use as a component or replacement and such laser product is certified by the

manufacturer of such laser product, subject to certain conditions (§ 1040.10(a)). We have reduced the number of respondents in our burden estimate to reflect the amendment.

FDA is proposing to repeal the performance standards for ultrasonic therapy products (§ 1050.10). We have removed the burden estimate associated with § 1050.10.

To ensure that comments on information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB (see **ADDRESSES**). All comments should be identified with the title of the information collection.

In compliance with the PRA (44 U.S.C. 3407(d)), the Agency has submitted the information collection provisions of this proposed rule to OMB for review. These revisions will not be effective until FDA obtains OMB approval. FDA will publish a notice concerning OMB approval of these revisions in the **Federal Register**.

X. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in E.O. 13132. We have determined that this proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

We note that the current performance standards at § 1040.10 issued under section 534 of the FD&C Act preempt the States from establishing or continuing in effect any standard that is not identical to the Federal standard pursuant to section 542 of the FD&C Act (21 U.S.C. 360ss). Those standards were issued before the E.O. We believe this preemption is consistent with section 4(a) of the E.O. which requires agencies to “construe . . . a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.” Federal law includes an express preemption provision at section 542 of the FD&C Act that preempts the States from

establishing, or continuing in effect, any standard with respect to an electronic product which is applicable to the same aspect of product performance as a Federal standard prescribed pursuant to section 534 of the FD&C Act and which is not identical to the Federal standard. (See *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008)). Section 542 of the FD&C Act does allow States to impose a more restrictive standard regarding emissions of radiation from electronic products under certain circumstances.

This proposed rule does not impose any new performance standard requirements. This proposed rule prescribes more defined exceptions from the applicability of Federal standards (under proposed amendments to § 1040.10(a)) and a reduction in Federal standards (through repeal of § 1050.10) pursuant to section 534 of the FD&C Act. To the extent that the proposed rule, if finalized, removes or excludes applicability of certain Federal standards, any State issued performance standards are no longer preempted.

XI. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in E.O. 13175. We have tentatively determined that the rule does not contain policies that would have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The Agency solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

XII. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at <https://www.regulations.gov>. References without asterisks are not on public display at <https://www.regulations.gov> because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. They also can be purchased as a pdf or as hard copy (or both together, at a discounted price) from NCRP (www.ncrponline.org). FDA has verified the website addresses, as of the date this

document publishes in the **Federal Register**, but websites are subject to change over time.

- *1. E.O. 13771 (January 30, 2017), available at <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>.
- *2. E.O. 13777 (February 24, 2017), available at <https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda>.
- *3. EPA, Interagency Working Group on Medical Radiation, Federal Guidance Report No. 14, “Radiation Protection Guidance for Diagnostic and Interventional X-Ray Procedures,” 2014, available at <https://www.epa.gov/sites/production/files/2015-05/documents/fgr14-2014.pdf>.
4. NCRP, “Radiation Protection in Dentistry,” Report No. 145, 2003, available at <https://ncrponline.org/publications/reports/ncrp-reports-145/>.
- *5. American Dental Association and FDA, “Dental Radiographic Examinations: Recommendations for Patient Selection and Limiting Radiation Exposure,” Revised: 2012, available at http://www.ada.org/-/media/ADA/Member%20Center/Files/Dental_Radiographic_Examinations_2012.pdf.
- *6. CRCPD, “Part F—Medical Diagnostic and Interventional X-ray Imaging and Systems,” available at https://c.ymcdn.com/sites/www.crcpd.org/resource/resmgr/docs/SSRCRs/F_Part_2015.pdf.
- *7. The American College of Radiology publishes and regularly updates Practice Parameters, Technical Standards, and Appropriateness Criteria®, available at <https://www.acr.org/Quality-Safety/Appropriateness-Criteria>.
- *8. Department of Health and Human Services, FDA, Charter for Technical Electronic Product Radiation Safety Standards Committee, available at <https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Radiation-EmittingProducts/TechnicalElectronicProductRadiationSafetyStandardsCommittee/UCM537440.pdf>.
- *9. 2016 TEPRSSC Meeting, October 25–26, 2016, available at <https://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/Radiation-EmittingProducts/TechnicalElectronicProductRadiationSafetyStandardsCommittee/ucm526004.htm>.
10. NCRP, Radiation Dose Management for Fluoroscopically-Guided Interventional Procedures, Report No.168, 2010, available at <https://ncrponline.org/publications/reports/ncrp-report-168/>.
- *11. ICRP, “Radiological Protection in Medicine.” Publication 105. Ann ICRP. 2007;37(6): 1–63, available at <http://www.icrp.org/publication.asp?id=ICRP%20Publication%20105>.
12. NCRP, Reference levels and achievable doses in medical and dental imaging: recommendations for the United States, Report No. 172, 2012, available at

- <https://ncrponline.org/publications/reports/ncrp-report-172/>.
- *13. FDA, CDRH Health, Initiative to Reduce Unnecessary Radiation Exposure from Medical Imaging (2010), available at <https://www.fda.gov/Radiation-EmittingProducts/RadiationSafety/RadiationDoseReduction/ucm2007191.htm>.
- *14. FDA, Medical X-ray Imaging, available at <https://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/MedicalImaging/MedicalX-Rays/default.htm>.
- *15. NCRP, "Ionizing Radiation Exposure of the Population of the United States," Report No. 160, 2009, available at <https://ncrponline.org/publications/reports/ncrp-report-160-2/>.
- *16. ICRP, "The 2007 Recommendations of the International Commission on Radiological Protection. ICRP publication 103." Ann ICRP. 2007;37(2-4): 1-332, available at <http://www.icrp.org/publication.asp?id=ICRP%20Publication%20103>.
- *17. CRCPD, Suggested State Regulations for Control of Radiation, available at <https://www.crcpd.org/page/ssrcrs>.
- *18. Centers for Medicare & Medicaid Services, Accreditation of Advanced Diagnostic Imaging Suppliers, available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Accreditation-of-Advanced-Diagnostic-Imaging-Suppliers.html>.
- *19. FDA, "Laser Notice No. 42—Clarification of Compliance Requirements for Certain Manufacturers Who Incorporate Certified Class I Laser Products Into Their Products," December 18, 1989, available at <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM095307.pdf>.
- *20. FDA, "Policy Clarification and Premarket Notification [510(k)]

Submissions for Ultrasonic Diathermy Devices; Final Guidance for Industry and Food and Drug Administration Staff," available at <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM573663.pdf>.

- *21. FDA, Report of Assembly of Diagnostic X-ray System, Form FDA 2579, available at <https://www.fda.gov/ForIndustry/FDAeSubmitter/ucm107879.htm>.
- *22. FDA eSubmitter, available at <https://www.fda.gov/forindustry/fdaesubmitter/default.htm>.
- *23. Preliminary Economic Analysis of Impacts: Radiological Health Regulations; Amendments to Records and Reports for Radiation Emitting Electronic Products; Amendments to Performance Standards for Diagnostic X-ray, Laser and Ultrasonic Products, available at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

List of Subjects

21 CFR Part 1000

Electronic products, Radiation protection, Reporting and recordkeeping requirements, X-rays.

21 CFR Part 1002

Electronic products, Radiation protection, Reporting and recordkeeping requirements, X-rays.

21 CFR Part 1010

Administrative practice and procedure, Electronic products, Exports, Radiation protection.

21 CFR Part 1020

Electronic products, Medical devices, Radiation protection, Reporting and recordkeeping requirements, Television, X-rays.

21 CFR Part 1040

Electronic products, Labeling, Lasers, Medical devices, Radiation protection, Reporting and recordkeeping requirements.

21 CFR Part 1050

Electronic products, Medical devices, Radiation protection.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, we propose that 21 CFR parts 1000, 1002, 1010, 1020, 1040, and 1050 be amended as follows:

PART 1000—GENERAL

- 1. The authority citation for part 1000 continues to read as follows:

Authority: 21 U.S.C. 360hh–360ss.

§ 1000.3 [Amended]

- 2. Revise § 1000.3 by removing paragraph (s) and redesignating paragraphs (t) and (u) as paragraphs (s) and (t).

Subpart C—[Removed]

- 3. Remove subpart C, consisting of §§ 1000.50, 1000.55, and 1000.60.

PART 1002—RECORDS AND REPORTS

- 4. The authority citation for part 1002 continues to read as follows:

Authority: 21 U.S.C. 352, 360, 360i, 360j, 360hh–360ss, 371, 374.

- 5. Amend § 1002.1 by revising table 1 to read as follows:

§ 1002.1 Applicability.

* * * * *

BILLING CODE 4164-01-P

Table 1.--Record and Reporting Requirements by Product

Manufacturer							Dealer & Distributor
Products	Product reports 1002.10	Supplemental reports 1002.11	Abbreviated reports 1002.12	Annual reports 1002.13	Test records 1002.30(a) ¹	Distribution records 1002.30(b) ²	Distribution records 1002.40 and 1002.41
DIAGNOSTIC X-RAY ³ (1020.30, 1020.31, 1020.32, 1020.33)							
Computed tomography					X	X	X
X-ray system ⁴					X	X	X
Tube housing assembly					X	X	
X-ray control					X	X	X
X-ray high voltage generator					X	X	X
X-ray table or cradle					X	X	X
X-ray film changer					X	X	
Vertical cassette holders mounted in a fixed location and cassette holders with front panels					X	X	X
Beam-limiting devices					X	X	X
Spot-film devices and image intensifiers manufactured after April 26, 1977					X	X	X
Manufacturer							Dealer & Distributor
Products	Product reports 1002.10	Supplemental reports 1002.11	Abbreviated reports 1002.12	Annual reports 1002.13	Test records 1002.30(a) ¹	Distribution records 1002.30(b) ²	Distribution records 1002.40 and 1002.41
Cephalometric devices manufactured after February 25, 1978					X	X	
Image receptor support devices for mammographic X-ray systems manufactured after September 5, 1978					X	X	X
CABINET X RAY (1020.40)							
Baggage inspection	X	X		X	X	X	X
Other	X	X		X	X	X	
PRODUCTS INTENDED TO PRODUCE PARTICULATE RADIATION OR X-RAYS OTHER THAN DIAGNOSTIC OR CABINET X-RAY							
Medical					X	X	
Analytical			X	X	X	X	

Industrial			X	X	X	X	
TELEVISION PRODUCTS (1020.10)							
<0.1 milliroentgen per hour (mR/hr) IRLC ⁵			X ⁸	X ⁶			
≥0.1mR/hr IRLC ⁵	X ⁸			X	X	X	
MICROWAVE/RF							
MW ovens (1030.10)	X ⁸			X	X	X	
MW diathermy			X				
MW heating, drying, security systems			X				
RF sealers, electromagnetic induction and heating equipment, dielectric heaters (2-500 megahertz)			X				
OPTICAL							
Laser products (1040.10, 1040.11)							
Class I lasers and products containing such lasers ⁷	X ⁸			X	X		
Manufacturer							Dealer & Distributor
Products	Product reports 1002.10	Supplemental reports 1002.11	Abbreviated reports 1002.12	Annual reports 1002.13	Test records 1002.30(a) ¹	Distribution records 1002.30(b) ²	Distribution records 1002.40 and 1002.41
Class I laser products containing class IIa, II, IIIa, lasers ⁷	X			X	X	X	
Class IIa, II, IIIa lasers and products other than class I products containing such lasers ⁷	X			X	X	X	X
Class IIIb and IV lasers and products containing such lasers ⁷	X	X		X	X	X	X
Sunlamp products (1040.20)							
Lamps only	X						
Sunlamp products	X	X		X	X	X	X
Mercury vapor lamps (1040.30)							
R lamps and T lamps			X				

¹ However, authority to inspect all appropriate documents supporting the adequacy of a manufacturer's compliance testing program is retained.

² The requirement includes §§ 1002.31 and 1002.42, if applicable.

³ Report of Assembly (Form FDA 2579) is required for diagnostic x-ray components; see § 1020.30(d)(1)-(3) of this chapter.

⁴ Systems records and reports are required if a manufacturer exercises the option and certifies the system as permitted in § 1020.30(c) of this chapter.

⁵ Determined using the isoexposure rate limit curve (IRLC) under phase III test conditions (§ 1020.10(c)(3)(iii)) of this chapter.

⁶ Annual report is for production status information only.

⁷ Determination of the applicable reporting category for a laser product shall be based on the worst-case hazard present within the laser product.

⁸ Manufacturers are exempt from product reports (§ 1002.10) and abbreviated reports (§ 1002.12), except the first product or abbreviated report for each category of: television products; microwave ovens; and Class I laser products that do not by virtue of their design allow human access to laser radiation in excess of the accessible emission limits of Class I specified in § 1040.10(d) of this chapter, as determined in accordance with § 1040.10(e), under any condition of operation, maintenance, service, or failure (e.g., Class I optical disc products, laser printers).

BILLING CODE 4164-01-C

§ 1002.2 [Removed]

■ 6. Remove reserved § 1002.2.

§ 1002.13 [Amended]

■ 7. Amend § 1002.13 by removing paragraph (c).

■ 8. Revise § 1002.20 to read as follows:

§ 1002.20 Reporting of accidental radiation occurrences.

(a) Manufacturers of electronic products shall, where reasonable grounds for suspecting that such an incident has occurred, report to the Director, Center for Devices and Radiological Health, all accidental radiation occurrences reported to or otherwise known to the manufacturer and arising from the manufacturing, testing, or use of any product introduced or intended to be introduced into commerce by such manufacturer. Reasonable grounds include, but are not necessarily limited to, professional, scientific, or medical facts or opinions documented or otherwise, that conclude or lead to the conclusion that such an incident has occurred.

(b) Such reports shall be submitted electronically through Center for Devices and Radiological Health eSubmitter or addressed to Food and Drug Administration, Center for Devices and Radiological Health, ATTN: Accidental Radiation Occurrence Reports, Document Mail Center, 10903 New Hampshire Ave., Bldg. 66, Rm. G609, Silver Spring, MD 20993-0002, and the reports and their envelopes shall be distinctly marked "Report on 1002.20" and shall contain all of the following information where known to the manufacturer:

(1) The nature of the accidental radiation occurrence;

(2) The location at which the accidental radiation occurrence occurred;

(3) The manufacturer, type, and model number of the electronic product or products involved;

(4) The circumstances surrounding the accidental radiation occurrence, including causes;

(5) The number of persons involved, adversely affected, or exposed during the accidental radiation occurrence, the nature and magnitude of their exposure and/or injuries and, if requested by the Director, Center for Devices and Radiological Health, the names of the persons involved;

(6) The actions, if any, which may have been taken by the manufacturer, to control, correct, or eliminate the causes and to prevent reoccurrence; and

(7) Any other pertinent information with respect to the accidental radiation occurrence.

(c) If a manufacturer:

(1) Is required to report to the Director under paragraph (a) of this section and also is required to report under part 803 of this chapter, the manufacturer shall report in accordance with part 803; or

(2) Is required to report to the Director under paragraph (a) of this section and is not required to report under part 803 of this chapter, the manufacturer shall:

(i) Immediately report incidents associated with a death or serious injury in accordance with paragraphs (a) and (b) of this section; and

(ii) Either immediately report incidents not associated with a death or serious injury individually or compile such incidents for submission in a quarterly summary report with tracking and trending analysis of that data in accordance with paragraphs (a) and (b) of this section. A manufacturer need not file a separate report under this section if an incident involving an accidental radiation occurrence is associated with a defect or noncompliance and is reported pursuant to § 1003.10 of this chapter.

PART 1010—PERFORMANCE STANDARDS FOR ELECTRONIC PRODUCTS: GENERAL

■ 9. The authority citation for part 1010 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 360, 360e-360j, 360hh-360ss, 371, 381.

■ 10. Section 1010.4 is amended by revising paragraph (b) introductory text to read as follows:

§ 1010.4 Variances.

* * * * *

(b) *Applications for variances.* If you are submitting an application for variances or for amendments or extensions thereof, you must submit an original copy by mail to the Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Applications for variance can also be submitted electronically through the *Regulations.gov* website under Docket Number FDA-2013-S-0610 as a new comment with an upload of the variance application materials.

* * * * *

PART 1020—PERFORMANCE STANDARDS FOR IONIZING RADIATION EMITTING PRODUCTS

■ 11. The authority citation for part 1020 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 360e-360j, 360hh-360ss, 371, 381.

■ 12. Section 1020.30 is amended by revising paragraph (d)(1) to read as follows:

§ 1020.30 Diagnostic x-ray systems and their major components.

* * * * *

(d) * * *

(1) *Reports of assembly.* All assemblers who install certified components shall file a report of assembly, except as specified in paragraph (d)(2) of this section. The report will be construed as the assembler's certification and identification under §§ 1010.2 and 1010.3 of this chapter. The assembler shall affirm in the report that the manufacturer's instructions were followed in the assembly or that the certified components as assembled into the system meet all applicable requirements of §§ 1020.30 through 1020.33. All assembler reports must be on a form prescribed by the Director, Center for Devices and Radiological Health. Completed reports must be submitted to the purchaser and, where applicable, to the State agency

responsible for radiation protection within 15 days following completion of the assembly.

* * * * *

PART 1040—PERFORMANCE STANDARDS FOR LIGHT-EMITTING PRODUCTS

■ 13. The authority citation for part 1040 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 360, 360e–360j, 360hh–360ss, 371, 381.

■ 14. Section 1040.10 is amended by revising paragraph (a) to read as follows:

§ 1040.10 Laser products.

(a) *Applicability.* The provisions of this section and § 1040.11, are applicable to all laser products, except when:

(1) Incorporation of an uncertified laser product intended to be used as a component or replacement for an electronic product—The provisions of this section and § 1040.11 are not applicable to an uncertified laser product that is incorporated into an electronic product that is then certified by the manufacturer of such finished electronic product in accordance with § 1010.2 of this chapter, when:

(i) Such a laser product is either sold to a manufacturer of an electronic product for use as a component (or replacement) in such electronic product, or

(ii) Sold by or for such a manufacturer of an electronic product for use as a component (or replacement) in such electronic product, provided that such laser product:

(A) Is accompanied by a general warning notice that adequate instructions for the safe installation of the laser product are provided in servicing information available from the complete laser product manufacturer under paragraph (h)(2)(ii) of this section, and should be followed,

(B) Is labeled with a statement that it is designated for use solely as a component of such electronic product and therefore does not comply with the appropriate requirements of this section and § 1040.11 for complete laser products, and

(C) Is not a removable laser system as described in paragraph (c)(2) of this section; and

(iii) The manufacturer of such a laser product, if manufactured after August 20, 1986:

(A) Registers, and provides a listing by type of such laser products manufactured that includes the product name, model number and laser medium or emitted wavelength(s), and the name and address of the manufacturer. The

manufacturer must submit the registration and listing to the Director, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G609, Silver Spring, MD 20993–0002. Alternatively, reports may be submitted electronically through Center for Devices and Radiological Health eSubmitter.

(B) Maintains and allows access to any sales, shipping, or distribution records that identify the purchaser of such a laser product by name and address, the product by type, the number of units sold, and the date of sale (shipment). These records shall be maintained and made available as specified in § 1002.31 of this chapter.

(2) Incorporation of a certified laser product into another product—The provisions of this section and § 1040.11 are applicable to a manufacturer of a laser product and are not applicable as specified to a manufacturer who incorporates such laser product manufactured or assembled after August 1, 1976, into another product, when:

(i) The manufacturer of such incorporated laser product is not a laser product intended for use as a component or replacement as described in paragraphs (a)(1)(i) and (ii) of this section,

(ii) The manufacturer of the incorporated laser product certifies such a laser product under § 1010.2 of this chapter,

(iii) The incorporated laser product is not modified as defined in paragraph (i) of this section,

(iv) The incorporated laser product is installed in accordance with the instructions for the incorporated laser product as provided by the manufacturer of the incorporated laser product,

(v) The manufacturer of the incorporating product provides with the incorporating product the user information required under paragraph (h) of this section,

(vi) The labeling requirements of §§ 1010.3 of this chapter and 1040.10(g) for the incorporated laser product would be met when the incorporated laser product is removed from the incorporating product,

(vii) The labeling requirements of § 1040.10(g) for the incorporated laser product would be met in any service configuration of the incorporated laser product, even when that incorporated laser product could be serviced without removal from the incorporating product, and

(viii) The manufacturer of the incorporating product otherwise meets the requirements under this subchapter

applicable to distributors of laser products (§§ 1002.40 and 1002.41 of this chapter).

* * * * *

PART 1050—[REMOVED AND RESERVED]

■ 15. Remove and reserve part 1050.

Dated: March 19, 2019.

Scott Gottlieb,

Commissioner of Food and Drugs.

[FR Doc. 2019–05822 Filed 3–29–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–124627–11]

RIN 1545–BK43

Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws a notice of proposed rulemaking that would have provided guidance on how to determine whether certain transactions satisfy the continuity of interest (COI) requirement under § 1.368–1(e), applicable to certain corporate reorganizations described in section 368 of the Internal Revenue Code of 1986 (Code). The proposed regulations being withdrawn would have affected corporations and their shareholders.

DATES: As of April 1, 2019, the proposed amendment to § 1.368–1 in the notice of proposed rulemaking (REG–124627–11) that was published in the **Federal Register** (76 FR 78591) on December 19, 2011, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Jean R. Broderick at (202) 317–6848 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The provisions of subchapter C, chapter 1, of the Code generally provide nonrecognition treatment for corporate transactions that are described as reorganizations in section 368. The COI requirement is one of a number of requirements that a transaction must satisfy in order to qualify as a reorganization. The COI requirement

prevents transactions that resemble sales from qualifying as reorganizations. *Pinellas Ice & Cold Storage Co. v. Commissioner*, 287 U.S. 462 (1933).

The COI requirement requires that, in substance, a substantial part of the value of the target corporation (Target) shareholders' proprietary interests (*i.e.*, stock) in Target be preserved. Section 1.368-1(e)(1)(i); *John A. Nelson Co. v. Helvering*, 296 U.S. 374 (1935). A Target shareholder's proprietary interest in Target is preserved to the extent it is exchanged for either the stock of the acquiring corporation (Acquiror) or, in the case of a triangular reorganization (as defined in § 1.358-6(b)(2)), the stock of a corporation in control (within the meaning of section 368(c)) of Acquiror (in either case, Issuing Corporation stock). To the extent the Target shareholders' proprietary interests are exchanged for money or other property, their proprietary interests are not preserved. Section 1.368-1(e)(1)(i).

To determine whether a substantial part of the Target shareholders' proprietary interests has been preserved, the value of the Issuing Corporation stock the Target shareholders received is compared to the aggregate value of the consideration the Target shareholders received. Prior to 2011, the determination of whether the COI requirement is satisfied had been based on the value of the Issuing Corporation stock "as of the effective date of the reorganization" (Closing Date). Rev. Proc. 77-37 (1977-2 C.B. 568).

On December 19, 2011, the Department of the Treasury (Treasury Department) and the IRS issued final regulations (TD 9565, 76 FR 78540) that include a special rule (Signing Date Rule) that applies if a binding contract to effect a potential reorganization provides for fixed consideration (as defined in § 1.368-1(e)(2)(iii)(A)) to be exchanged for the Target shareholders' proprietary interests. Section 1.368-1(e)(2)(i). If the Signing Date Rule applies, the consideration is valued as of the end of the last business day before the first date there is a binding contract (Pre-signing Date), rather than on the Closing Date.

On the same date, the Treasury Department and the IRS published proposed regulations (2011 Proposed Regulations) (REG-124627-11, 76 FR 78591) that identified situations, other than those covered by the Signing Date Rule, in which the value of Issuing Corporation stock could be determined based on a value other than its actual trading price on the Closing Date. In one of these situations, the 2011 Proposed Regulations would have allowed the parties to use an average of the trading

prices of Issuing Corporation stock over a number of days, in lieu of its actual trading price on the Closing Date, for purposes of determining whether the COI requirement is satisfied.

The Treasury Department and the IRS have determined that current law generally provides sufficient guidance to taxpayers with respect to the COI requirement. Therefore, the Treasury Department and the IRS have decided to withdraw the 2011 Proposed Regulations. However, after considering comments received on the 2011 Proposed Regulations, the IRS has concluded that, in certain circumstances, taxpayers should be able to rely on certain average stock valuation methods for purposes of measuring COI. Accordingly, the IRS issued a revenue procedure effective January 23, 2018, that provides the circumstances under which the IRS will not challenge a taxpayer's use of certain stock valuation methods to value certain Issuing Corporation stock for purposes of determining whether the COI requirement is satisfied. *See* Rev. Proc. 2018-12, I.R.B. 2018-6.

Statement of Availability of IRS Documents

Rev. Proc. 2018-12 is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

Drafting Information

The principal author of this withdrawal notice is Jean Broderick of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Withdrawal of Notice of Proposed Rulemaking

■ Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-124627-11) that was published in the **Federal Register** (76 FR 78591) on December 19, 2011, is withdrawn.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2019-06159 Filed 3-29-19; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 775

[Docket No. USN-2018-HQ-0001]

RIN 0703-AB01

Policies and Responsibilities for Implementation of the National Environmental Policy Act Within the Department of the Navy

AGENCY: Department of the Navy, Department of Defense.

ACTION: Proposed rule.

SUMMARY: The Department of the Navy (DoN) proposes to revise portions of its internal regulations that establish the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA). An agency may determine that certain classes of actions normally do not individually or cumulatively have significant environmental impacts and therefore do not require further review under NEPA. Establishing these categories of activities, called categorical exclusions (CATEXs), in the agency's NEPA implementing procedures is a way to reduce unnecessary paperwork and delay. This revision clarifies what types of activities fall under CATEXs and normally do not require additional NEPA analysis.

DATES: Comments must be received by May 1, 2019.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <https://www.regulations.gov/>. Follow the instructions for submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: Mr. J. Dan Cecchini, Office of the Deputy Assistant Secretary of the Navy (Environment), 703-614-1173.

SUPPLEMENTARY INFORMATION:**Executive Summary**

This action would revise certain DoN procedures for implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). NEPA establishes national policy and goals for protection of the environment. Section 102(2) of NEPA contains certain procedural requirements directed toward the attainment of such goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decision making and to prepare detailed environmental statements on recommendations or reports significantly affecting the quality of the human environment.

The proposed rule revises the DoN's implementing regulations, 32 CFR part 775, that were originally published on August 20, 1990 (55 FR 33898), as revised on February 23, 2004 (69 FR 8108). The 2004 changes revised and added to DoN's list of approved categorical exclusions (CATEXs); revised criteria for disallowing the application of listed CATEXs (*i.e.*, hereinafter "extraordinary circumstances") in which a normally excluded action may have a significant environmental effect; and assigned certain responsibilities to the Assistant Secretary of the Navy (Research, Development and Acquisition), the General Counsel of the Navy, and the Judge Advocate General of the Navy.

Over time, through study and experience, agencies may identify activities—such as routine facility maintenance—that do not need to undergo detailed environmental analysis because the activities do not individually or cumulatively have a significant effect on the human environment. Agencies can define and exclude from further review categories of such activities, called CATEXs, in their NEPA implementing procedures as a way to reduce unnecessary paperwork and delay.

Authority for This Regulatory Action

Authorities for this rule are 5 U.S.C. 301, NEPA, and 40 CFR parts 1500–1508. Under 5 U.S.C. 301, the head of a military department may prescribe regulations for the government of the department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. As noted above, NEPA requires Federal agencies to analyze their proposed actions to determine if they could have significant

environmental effects. The White House Council on Environmental Quality (CEQ) implementing regulations (40 CFR 1507.3) require Federal agencies to adopt supplemental NEPA implementing procedures, including agency-specific CATEXs, either in the form of agency policy or a regulation, and to provide opportunity for public review prior to adoption.

Expected Impact of the Proposed Rule

This rule revises internal procedures allowing for consistent implementation across the DoN for its responsibilities under NEPA. Promulgating CATEXs will reduce government spending on compliance as well as shorten project approval timelines for those activities which do not need detailed environmental analysis. The DoN currently prepares approximately 3,000 CATEXs annually (approximately 2,000 by the U.S. Navy and approximately 1,000 by the U.S. Marine Corps).

Development Process

In 2015, the Office of the Deputy Assistant Secretary of the Navy for Environment directed a review of 32 CFR 775.6(e) and (f), which identify the DoN's criteria for excluding application of listed CATEXs and list the DoN's CATEXs, respectively. A review panel (hereinafter "panel") was formed to provide administrative support and expertise to inform the efforts. The professionals comprising the panel were current DoN environmental practitioners with numerous years of NEPA planning and compliance experience, including the preparation of environmental documentation such as CATEX decision documents, environmental assessments (EAs), environmental impact statements (EISs), findings of no significant impact, and records of decision. The panel was supported by a legal working group comprised of experienced environmental law attorneys from the DoN's Office of the General Counsel and Office of the Judge Advocate General with advanced education and experience providing legal and policy advice to Federal agency decision makers, managers, and practitioners on environmental planning and compliance responsibilities.

The panel reviewed and analyzed the supporting rationale, scope, applicability, and wording of each existing CATEX and extraordinary circumstance set forth in 32 CFR 775.6(e) and (f). The panel developed and deliberated on each proposed new CATEX and extraordinary circumstance change, balancing the resulting increase in administrative efficiency in NEPA

implementation and compliance against the risk of misinterpretation and misapplication. During that process, numerous environmental professionals, representing various constituencies within the DoN, supported the panel's review and participated in meetings and conference calls over the course of 18 months to reach agreement on this proposed rule.

In accordance with CEQ's regulations and its 2010 CATEX guidance, "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act," the DoN substantiated the proposed new and revised CATEXs by reviewing EA and EIS analyses to identify the environmental effects of previously implemented actions; benchmarking other Federal agencies' experiences; and leveraging the expertise, experience, and judgment of DoN professional staff. The panel noted that other Department of Defense (DoD) entities and numerous other Federal agencies have CATEXs for activities that are similar in nature, scope, and impact on the human environment as those undertaken by the DoN. The panel reviewed many of those CATEXs before proposing changes to 32 CFR 775.6(e) and (f).

In addition, the panel recognized that all Federal agencies, including the DoD as a whole, with very few limitations, must meet the same requirements to consider environmental issues in decisionmaking with an ultimate goal to protect the environment. Based on experience with, or on behalf of, other Federal agencies, the panel determined that the characteristics of many of the DoN's activities were not significantly different from those performed by other Federal agencies, including other entities within the DoD.

The CEQ was integral in the process to ensure that proposed changes to the DoN's CATEXs meet NEPA requirements. The DoN provided the CEQ with proposed draft changes and justifications for each proposed change to 32 CFR 775.6(e) and (f). Many of the changes that the DoN is proposing are administrative in nature to clarify application of a particular CATEX. On July 7, 2017, the CEQ concurred with the DoN proceeding to formal rulemaking on these proposed changes.

Proposed Revisions Generally

Through the development process discussed in this preamble, the panel determined that the proposed changes to DoN's CATEXs and extraordinary circumstances encompass activities that normally do not individually or cumulatively have a significant impact on the human environment. Only the

provisions discussed below are proposed for substantive revision. In addition, minor clarifications that do not change the CATEX meaning are proposed.

Proposed Revisions to Extraordinary Circumstances [32 CFR 775.6(e)]

The DoN's criteria for disallowing the application of listed CATEXs are set forth in 32 CFR 775.6(e). This proposed rule substantially revises paragraph (e) to provide specific introductory guidance regarding those circumstances under which use of a CATEX is inappropriate, reflecting a determination by the DoN that further environmental analysis is needed. Under this proposed change, a determination whether a CATEX is appropriate for a proposed action, even if one or more extraordinary circumstances are present, should focus on the action's potential effects and consider the environmental significance of those effects in terms of both context (*i.e.*, consideration of the affected region, interests, and resources) and intensity (*i.e.*, severity of impacts). This proposed change provides discretion that is missing from the current regulation and which can be applied when considering whether a CATEX is appropriate. This proposed change mirrors the extraordinary circumstances introductory language contained in National Oceanic and Atmospheric Administration (NOAA) and U.S. Forest Service NEPA regulations.

The proposed rule adds a new paragraph (e)(2) which states that if a decision is made to apply a CATEX to a proposed action that is more than administrative in nature, the decision must be formally documented per existing Navy and Marine Corps policy. For actions with a documented CATEX where one or more extraordinary circumstances are present, a copy of the executed CATEX decision document (*e.g.*, Record of CATEX or Decision Memorandum) must be forwarded for review to Navy Headquarters or Marine Corps Headquarters, as appropriate, before the action is implemented. This new requirement to send the documented CATEX to headquarters for review will end two years from the date of the final rule implementing the DoN's revised extraordinary circumstances and CATEXs.

The proposed rule would amend and re-number current paragraphs (e)(1) through (5) as (e)(1)(i) through (v). The proposed rule would not revise paragraphs (e)(1) through (4) but they would be re-numbered (e)(1)(i) through (iv). Regarding the enumerated extraordinary circumstances set forth in

paragraphs (e)(5)(i) through (v) (that would be re-numbered (e)(1)(v)(A) through (E)), the proposed rule revises paragraphs (e)(5)(i), (iii), and (iv) (and would re-number them (e)(1)(v)(A), (e)(1)(v)(C), and (e)(1)(v)(D)). Paragraph (e)(5)(i) (which would be renumbered as (e)(1)(v)(A)) would be revised to address those actions that, as determined after coordination with subject matter experts within the agency and, if appropriate with resources agencies (*e.g.*, National Marine Fisheries Service, United States Fish and Wildlife Service), would have more than a negligible or discountable effect on Federally protected species under the Endangered Species Act, or would require issuance of an Incidental Harassment Authorization or Letter of Authorization under the Marine Mammal Protection Act. The current regulation only addresses those actions which have an adverse effect on Federally listed endangered or threatened species or marine mammals without consideration of the degree of effect. This change would provide flexibility to use a CATEX even if impacts under the Endangered Species Act or Marine Mammal Protection Act may be adverse. For the Endangered Species Act, this change mirrors language contained in NOAA's NEPA regulations. For the Marine Mammal Protection Act, this change links the trigger for this existing extraordinary circumstance to the specific regulatory threshold language of Marine Mammal Protection Act guidelines. Specifically, the panel determined that the use of the term "adverse effect" in the current regulation is incongruent with the prevailing resource management handbooks and guidelines of the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS).

Regarding those actions adversely affecting the size, function, or biological value of wetlands, paragraph (e)(5)(iii) (to be re-numbered as (e)(1)(v)(C)) is revised to clarify that general permits are issued on a nationwide, regional, or state basis for particular categories of activities. This administrative change clarifies, but does not change the effect of, the existing extraordinary circumstance.

Regarding those actions having an adverse effect on archaeological resources or resources listed or determined to be eligible for listing on the National Register of Historic Places (including, but not limited to, ships, aircraft, vessels, and equipment), paragraph (e)(5)(iv) (to be re-numbered as (e)(1)(v)(D)) is revised to include those circumstances where compliance with Section 106 of the National

Historic Preservation Act has not been resolved through an agreement executed between the DoN and the appropriate historic preservation office and other appropriate consulting parties. This proposed change will eliminate the need to prepare an EA for an action whose sole impact is tied to a potential adverse impact on a historic structure. This approach is consistent with guidance contained in the March 2013 CEQ and Advisory Council on Historic Preservation document "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106."

Proposed Revisions to Categorical Exclusions [32 CFR 775.6(f)]

32 CFR 775.6(f)(1) through (45) lists the 45 CATEXs currently promulgated by the DoN. This proposed rule would revise six CATEXs (*i.e.*, #8, #11, #14, #32, #34, and #36), delete one CATEX (#15), and add five new CATEXs. CATEX #32 would be relocated and re-numbered as CATEX #29. Finally, current CATEXs #1 through #45 would be re-numbered as #1 through #44 as a result of the proposed deletion of CATEX #15 and re-numbering of CATEX #32, and the proposed new CATEXs would be numbered as #45 through #49.

CATEX #8 (32 CFR 775.6(f)(8)): This proposed change would add ranges to the list of items subject to routine repair and maintenance. While the DoN regularly encounters routine repair and maintenance requirements on its ranges, this proposed revision would cover the repair and maintenance of existing range assets; it would not cover the conversion to a new range capability or a change in the use of the range (*e.g.*, adding additional infrastructure to support new targets). The panel also determined that the use of new examples such as "general building/structural repair, landscaping, and grounds maintenance" would further clarify the types of activities covered by this CATEX.

CATEX #11 (32 CFR 775.6(f)(11)): This proposed rule would add submarines and ground assets to the list of mobile asset examples to clarify application of this CATEX. The panel added the term "home basing" to provide the appropriate terminology for aircraft or ground asset reassignment not covered by the term "homeporting," which is used only in reference to ship or vessel reassignments. The panel determined that the use of new examples such as temporary reassignments and dismantling or disposal in this CATEX would further clarify application of this CATEX. CATEX #14 (32 CFR 775.6(f)(14)) and

CATEX #15 (32 CFR 775.6(f)(15)): This proposed change would combine CATEX #14 and CATEX #15 into a single CATEX #14.

CATEX #32 (32 CFR 775.6(f)(32)): This proposed change would delete “renewals” from the current CATEX, because renewal actions are covered by CATEX #31 (to be re-numbered as CATEX #30). Furthermore, the proposed rule would re-number existing CATEX #32 as CATEX #29 so that initial real estate in grants would precede “renewals” in the CATEX list.

CATEX #34 (32 CFR 775.6(f)(34)): The proposed rule would revise CATEX #34 (to be re-numbered as #33) to cover new construction that is similar to or compatible with existing land use (*i.e.*, site and scale of construction are consistent with those of existing adjacent or nearby facilities) and, when completed, the use or operation of which complies with existing regulatory requirements (*e.g.*, a building within a cantonment area with associated discharges and runoff within existing handling capacities). As an example, for the proposed construction of a building in a previously disturbed cantonment area where this would be the first building of its type, as long as the building is generally consistent with the designated land use of the area, this revised CATEX could be applied (assuming no other extraordinary circumstances). The test for whether this CATEX can be applied should focus on whether the proposed action generally fits within the designated land use of the proposed site. This proposed change would clarify the term “similar to existing land use” in the current CATEX, which the panel determined is often confusing and prone to overly narrow interpretation.

CATEX #36 (32 CFR 775.6(f)(36)): The proposed rule would revise CATEX #36 (to be re-numbered as #35) by adding “modernization” and “repair” to clarify application of this CATEX. The panel felt it was important to include these terms to support energy resilience, alternative energy, and renewable energy projects given the DoN’s emphasis on energy management throughout the Department.

Proposed New Categorical Exclusions

CATEX #45: (32 CFR 775.6(f)(45)): With the re-numbering of current CATEX #45 as #44, this proposed new CATEX would cover natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulation by Federal, State, or local organizations having management responsibility and authority over the natural resources in

question, including, but not limited to, prescribed burning, invasive species actions, timber harvesting, and hunting and fishing during seasons established by state authorities pursuant to their State fish and game management laws. This proposed new CATEX would require that the natural resources management actions must be consistent with the overall management approach of the property as documented in an Integrated Natural Resources Management Plan (INRMP) or other applicable natural resources management plan. This is a reinstatement of a former CATEX #27 that was eliminated as unnecessary by the DoN in 2004 (69 FR 8108, 8109) that covered routine maintenance of timber stands, including down-wood firewood permits, hazardous tree removal, and sanitation salvage. It was assumed at that time that forest management activities would occur under the auspices of an INRMP for which an EA or EIS had been prepared and a CATEX would therefore be unnecessary. (A memorandum dated August 12, 1998, from the Assistant Secretary of the Navy for Installations and Energy to the Vice Chief of Naval Operations and Assistant Commandant of the Marine Corps required an EA or EIS be prepared for INRMPs.) The DoN prepares INRMPs on its installations and ranges that the USFWS and the appropriate State fish and wildlife agency review and approve. In accordance with DoN policy, a NEPA review (typically an EA) is conducted for each INRMP. Individual projects may receive additional, site-specific NEPA review, and existing CATEX #8 or #42 may apply. Individual projects are typically conducted in a single season, are limited in geographic scope, and benefit native vegetation and species habitat. Any indirect impacts to soils, wetlands, or riparian habitat should be minor and temporary and should result in an overall beneficial effect on the natural resources being managed. Review by the DoN of previous actions, NEPA analyses, and other agency CATEXs shows that no individually or cumulatively significant effects are typically attributable to the types of activities included in the proposed reinstatement of this CATEX. In reinstating this CATEX, the panel noted that INRMP coverage may not be robust or detailed enough with respect to certain practices in the field (*e.g.*, invasive species control or controlled burns), noting that EAs for INRMPs have historically included only general discussions of these activities. This reinstated CATEX would cover certain

natural resources management practices not discussed in detail in an INRMP, but which through experience are known to have no significant impacts on the environment.

CATEX #46 (32 CFR 775.6(f)(46)): This proposed new CATEX would cover minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events that threaten public health or safety, property, or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-approved condition (*i.e.*, the previous state) without intervention. Covered activities must be completed within one year of the causal event and may not include the construction of new permanent roads or new permanent infrastructure. Such activities include, but are not limited to the repair of existing essential erosion control structures or installation of temporary erosion controls; replacement or repair of storm water conveyance structures, roads, trails, fences, and minor facilities; revegetation; construction of protection fences; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, or streams. During the development process summarized above, DoN entities recommended the panel develop a new CATEX that addressed minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events. The DoN is proposing this CATEX which is similar to the Bureau of Land Management’s (BLM’s) categorical exclusion I (Departmental Manual, Part 516, 11.9 https://www.doi.gov/sites/doi.gov/files/uploads/doi_and_bureau_categorical_exclusions_feb2018.pdf). The DoN consulted with the BLM and found no record of significant impacts, either individually or cumulatively, resulting from the types of activities included in BLM’s CATEX. When wildfires, floods, earthquakes, landslides, and severe weather events occur, the DoN, often on short notice, is required to execute immediate repairs to protect personnel and resources. These repairs typically consist of minor, localized, and temporary actions to stabilize a specific situation. Examples include stabilizing slopes with berms and earthwork after wildfires and heavy rains to preclude large erosion events; fixing culverts, roads, and fences; and removing damaged trees and other debris. In most cases, the intended purpose of the activity is to stabilize a threatening situation so that overall resource impacts are minimized. Any impacts on soils, wetlands, or other natural

resources are typically minor and temporary and should result in an overall beneficial effect on installation resources.

CATEX #47 (32 CFR 775.6(f)(47)):
This proposed new CATEX would cover the modernization (upgrade) of range and training areas, systems, and associated components that supports current testing and training levels and requirements. It would not cover those actions which would include a substantial change in the type or tempo of operation, or the nature of the range (*i.e.*, creating an impact area in an area where munitions had not been previously used). During the development process described above, DoN entities recommended the panel develop a new CATEX that covered the modernization and upgrade of range and training area systems and components. Rather than provide policy guidance advising environmental planners to use another existing CATEX for such projects (*e.g.*, CATEX #8), the panel determined that a new CATEX would be appropriate and would help to reduce the number of EAs being prepared for activities that DoN has in the past found not to have individual or cumulative significant impacts on the human environment. This CATEX is intended to cover upgrades to range assets within existing range footprints and would complement the proposed change to the DoN's existing CATEX #8, to which this proposed rule adds the term "ranges." Any actions taken under this new CATEX cannot result in a significant change in how the range is used, thus reducing the potential for any new operational impacts. Under this new CATEX, any impacts to soils, wetlands, or other natural resources would be minor and temporary, and the exclusionary criteria set forth in 32 CFR 775.6(e) related to wetlands, endangered species, and cultural resources would require the preparation of an EA or EIS. The DoN's review of previous actions and NEPA analyses shows that no individually or cumulatively significant effects are typically attributable to the types of activities covered by this proposed new CATEX.

CATEX #48 (32 CFR 775.6(f)(48)):
This proposed new CATEX would cover revisions or updates to INRMPs that do not involve substantially new or different land use or natural resources management activities and for which an EA or EIS was previously prepared that does not require supplementation pursuant to 40 CFR 1502.9(c)(1). This new CATEX would reduce the number of EAs being unnecessarily prepared for

activities that inherently do not have individually or cumulatively significant impacts on the human environment. This new CATEX would also document (via the CATEX process) that the INRMP update is covered by the original NEPA documentation. Current DoN guidance requires an installation to conduct informal INRMP reviews each year and formal INRMP reviews every five years with the USFWS (and NMFS, as appropriate) and State partners. Necessary INRMP modifications and updates that are identified during an annual review can usually be accomplished under the initial NEPA documentation. Upon presentation of a proposed INRMP update, the NEPA practitioner may consider the proposal as a within-scope modification. Thus, the responsible command would be comparing a proposed revision against the original action as documented (per existing NEPA processes). Under many circumstances, the conclusion may be that the update is not out of scope and the action is covered by the original NEPA documentation. Proposed INRMP updates with significant differences from the original INRMP would call for additional NEPA analysis via revision or new documentation, usually at the EA level. The DoN has prepared comprehensive EAs for INRMPs for all Navy and Marine Corps properties with significant natural resources. In many cases, installations/bases have gone through four or five formal, five-year INRMP reviews and updates. The overall management strategy for most Navy and Marine Corps facilities is well established. After reviewing a number of NEPA documents for INRMP updates and revisions, it is clear that NEPA documents are not uncovering new environmental impacts and are adding little, if any, value to the decision-making process. There should be only minor impacts to natural resources from non-substantial management adjustments. Additionally, there should be an overall beneficial effect on the natural resources from the implementation of an INRMP that has been approved by the USFWS and/or NMFS, as appropriate, and relevant state agencies. The DoN review of previous NEPA analyses shows that no individually or cumulatively significant effects are typically attributable to the types of activities covered by this new CATEX.

CATEX #49 (32 CFR 775.6(f)(49)):
This proposed new CATEX would cover DoN actions that occur on another Military Service's property where the action qualifies for a CATEX of that

Service, or for actions on property designated as a Joint Base or Joint Region that would qualify for a CATEX of any of the Services included as part of the Joint Base or Joint Region. If the DoN action proponent chooses to use another Service's CATEX to cover a proposed action, the DoN must get written confirmation the other Service does not object to using their CATEX to cover the DoN action. The DoN official making the CATEX determination must ensure the application of the CATEX is appropriate and that the DoN proposed action was of a type contemplated when the CATEX was established by the other Service. Use of this CATEX would require preparation of a Record of CATEX or Decision Memorandum. This new CATEX leverages the thorough administrative record reviews undertaken by other Military Services that perform similar covered actions across the DoD, which is becoming more "purple" (*i.e.*, bases that host multiple Military Services). For Navy and Marine Corps actions that occur on either Army or Air Force property, given that CATEXs were established for categories (or types) of activities, use of the CATEX by another Military Service should not have significant impacts if the activity clearly fits the intent and wording of that CATEX. Currently eight out of twelve joint bases throughout the DoD involve the DoN: (1) Joint Base McGuire-Dix-Lakehurst, New Jersey (Naval Air Engineering Station Lakehurst, Fort Dix, and McGuire Air Force Base (AFB)); (2) Joint Base Andrews-Naval Air Facility Washington, Maryland (Naval Air Facility Washington and Andrews AFB); (3) Joint Base Anacostia-Bolling, DC (Bolling AFB and Naval Station Anacostia); (4) Joint Base Myer-Henderson Hall, Virginia (Henderson Hall (USMC) and Fort Myer); (5) Joint Base Pearl Harbor-Hickam, Hawaii (Hickam AFB, Hawaii and Naval Station Pearl Harbor); (6) Joint Base Charleston, South Carolina (Naval Weapons Station Charleston and Charleston AFB); (7) Joint Expeditionary Base Little Creek-Fort Story, Virginia (Fort Story and Naval Expeditionary Base Little Creek); and (8) Joint Region Marianas, Guam (Andersen AFB and Naval Base Guam). The Department of the Army has a CATEX ((b)(13)) that is very similar to this proposed new CATEX (32 CFR Appendix B to Part 651). The DoN used Army experience with this CATEX as a benchmark.

Regulatory Reviews

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

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, it has been reviewed by the Office of Management and Budget (OMB).

Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule is expected to be related to agency organization, management, or personnel.

National Environmental Policy Act

The CEQ does not direct agencies to prepare a NEPA analysis before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. The DoN NEPA procedures assist in the fulfillment of its responsibilities under NEPA, but are not final determinations of what level of NEPA analysis is required for particular actions. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff’d*, 230 F.3d 947, 954–55 (7th Cir. 2000).

Paperwork Reduction Act

The proposed action does not contain a collection-of-information requirement subject to review and approval by the OMB under the Paperwork Reduction Act.

Regulatory Flexibility Act

The DoN has determined that this action is not subject to the relevant

provisions of the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)).

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 proposed rule does not impose any mandates on small entities. This action addresses the DoN’s internal procedures for implementing the procedural requirements of the NEPA.

Executive Order 13132: Federalism

The DoN has determined that this action does not contain policies with Federalism or “takings” implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively. This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This action contains no federal mandates for state and local governments and does not impose any enforceable duties on state and local governments. This action addresses only internal DoN procedures for implementing NEPA.

List of Subjects in 32 CFR Part 775

Environmental impact statements.

Accordingly, 32 CFR part 775 is proposed to be amended to read as follows:

PART 775—POLICIES AND RESPONSIBILITIES FOR IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT WITHIN THE DEPARTMENT OF THE NAVY

■ 1. The authority for part 775 continues to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 4321–4361; 40 CFR parts 1500–1508.

■ 2. Amend § 775.6 by revising paragraphs (e) and (f) as follows:

§ 775.6 Planning considerations.

* * * * *

(e) A categorical exclusion (CATEX), as defined and listed in this regulation, may be used to satisfy NEPA, eliminating the need for an Environmental Assessment or an Environmental Impact Statement. Extraordinary circumstances are those circumstances for which the Department of the Navy has determined that further environmental analysis may be required

because an action normally eligible for a CATEX may have significant environmental effects. The presence of one or more extraordinary circumstances does not automatically preclude the application of a CATEX. A determination of whether a CATEX is appropriate for an action, even if one or more extraordinary circumstances are present, should focus on the action’s potential effects and consider the environmental significance of those effects in terms of both context (consideration of the affected region, interests, and resources) and intensity (severity of impacts).

(1) Before applying a CATEX, the decision maker must consider whether the proposed action:

(i) Would adversely affect public health or safety;

(ii) Involves effects on the human environment that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial;

(iii) Establishes precedents or makes decisions in principle for future actions that have the potential for significant impacts;

(iv) Threatens a violation of Federal, State, or local environmental laws applicable to the Department of the Navy; or

(v) Involves an action that may:

(A) Have more than a negligible or discountable effect on Federally protected species under the Endangered Species Act or involves an action that would require issuance of an Incidental Harassment Authorization or Letter of Authorization under the Marine Mammal Protection Act;

(B) Have an adverse effect on coral reefs or on Federally designated wilderness areas, wildlife refuges, marine sanctuaries, or parklands;

(C) Adversely affect the size, function, or biological value of wetlands and is not covered by a general (nationwide, regional, or state) permit;

(D) Have an adverse effect on archaeological resources or resources listed or determined to be eligible for listing on the National Register of Historic Places (including, but not limited to, ships, aircraft, vessels, and equipment) where compliance with Section 106 of the National Historic Preservation Act has not been resolved through an agreement executed between the Department of the Navy and the appropriate historic preservation office and other appropriate consulting parties; or

(E) Result in an uncontrolled or unpermitted release of hazardous substances or require a conformity determination under standards of the Clean Air Act General Conformity Rule.

(2) If a decision is made to apply a CATEX to a proposed action that is more than administrative in nature, the decision must be formally documented per existing Navy and Marine Corps policy. For actions with a documented CATEX where one or more extraordinary circumstances are present, a copy of the executed CATEX decision document (*e.g.*, Record of CATEX or Decision Memorandum) must be forwarded for review to Navy Headquarters or Marine Corps Headquarters, as appropriate, before the action is implemented. This new requirement to send the documented CATEX to headquarters for review will end two years from the date of the final rule implementing the DoN's revised extraordinary circumstances and CATEXs.

(f) *Categorical exclusions.* Subject to the criteria in paragraph (e) above, the following categories of actions are excluded from further analysis under NEPA. The CNO and CMC shall determine whether a decision to forego preparation of an EA or EIS on the basis of one or more categorical exclusions must be documented in an administrative record and the format for such record.

(1) Routine fiscal and administrative activities, including administration of contracts;

(2) Routine law and order activities performed by military personnel, military police, or other security personnel, including physical plant protection and security;

(3) Routine use and operation of existing facilities, laboratories, and equipment;

(4) Administrative studies, surveys, and data collection;

(5) Issuance or modification of administrative procedures, regulations, directives, manuals, or policy;

(6) Military ceremonies;

(7) Routine procurement of goods and services conducted in accordance with applicable procurement regulations, executive orders, and policies;

(8) Routine repair and maintenance of buildings, facilities, vessels, aircraft, ranges, and equipment associated with existing operations and activities (*e.g.*, localized pest management activities, minor erosion control measures, painting, refitting, general building/structural repair, landscaping, or grounds maintenance);

(9) Training of an administrative or classroom nature;

(10) Routine personnel actions;

(11) Routine movement of mobile assets (such as ships, submarines, aircraft, and ground assets for repair, overhaul, dismantling, disposal,

homeporting, home basing, temporary reassignments; and training, testing or scientific research) where no new support facilities are required;

(12) Routine procurement, management, storage, handling, installation, and disposal of commercial items, where the items are used and handled in accordance with applicable regulations (*e.g.*, consumables, electronic components, computer equipment, pumps);

(13) Routine recreational and welfare activities;

(14) Alterations of and additions to existing buildings, facilities, and systems (*e.g.*, structures, roads, runways, vessels, aircraft, or equipment) when the environmental effects will remain substantially the same and the use is consistent with applicable regulations.

(15) Routine movement, handling and distribution of materials, including hazardous materials and wastes that are moved, handled, or distributed in accordance with applicable regulations;

(16) New activities conducted at established laboratories and plants (including contractor-operated laboratories and plants) where all airborne emissions, waterborne effluent, external ionizing and non-ionizing radiation levels, outdoor noise, and solid and bulk waste disposal practices are in compliance with existing applicable Federal, state, and local laws and regulations;

(17) Studies, data, and information gathering that involve no permanent physical change to the environment (*e.g.*, topographic surveys, wetlands mapping, surveys for evaluating environmental damage, and engineering efforts to support environmental analyses);

(18) Temporary placement and use of simulated target fields (*e.g.*, inert mines, simulated mines, or passive hydrophones) in fresh, estuarine, and marine waters for the purpose of non-explosive military training exercises or research, development, test and evaluation;

(19) Installation and operation of passive scientific measurement devices (*e.g.*, antennae, tide gauges, weighted hydrophones, salinity measurement devices, and water quality measurement devices) where use will not result in changes in operations tempo and is consistent with applicable regulations;

(20) Short-term increases in air operations up to 50 percent of the typical operation rate, or increases of 50 operations per day, whichever is greater. Frequent use of this CATEX at an installation requires further analysis to

determine there are no cumulative impacts;

(21) Decommissioning, disposal, or transfer of Navy vessels, aircraft, vehicles, and equipment when conducted in accordance with applicable regulations, including those regulations applying to removal of hazardous materials;

(22) Non-routine repair and renovation, and donation or other transfer of structures, vessels, aircraft, vehicles, landscapes or other contributing elements of facilities listed or eligible for listing on the National Register of Historic Places which will result in no adverse effect;

(23) Hosting or participating in public events (*e.g.*, air shows, open houses, Earth Day events, and athletic events) where no permanent changes to existing infrastructure (*e.g.*, road systems, parking and sanitation systems) are required to accommodate all aspects of the event;

(24) Military training conducted on or over nonmilitary land or water areas, where such training is consistent with the type and tempo of existing non-military airspace, land, and water use (*e.g.*, night compass training, forced marches along trails, roads and highways, use of permanently established ranges, use of public waterways, or use of civilian airfields);

(25) Transfer of real property from the Department of the Navy to another military department or to another Federal agency;

(26) Receipt of property from another Federal agency when there is no anticipated or proposed substantial change in land use;

(27) Minor land acquisitions or disposals where anticipated or proposed land use is similar to existing land use and zoning, both in type and intensity;

(28) Disposal of excess easement interests to the underlying fee owner;

(29) Initial real estate in grants and out grants involving existing facilities or land with no significant change in use (*e.g.*, leasing of Federally owned or privately owned housing or office space, and agricultural out leases).

(30) Renewals and minor amendments of existing real estate grants for use of Government-owned real property where no significant change in land use is anticipated;

(31) Land withdrawal continuances or extensions that establish time periods with no significant change in land use;

(32) Grants of license, easement, or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles (not to include significant

increases in vehicle loading); electrical, telephone, and other transmission and communication lines; water, wastewater, storm water, and irrigation pipelines, pumping stations, and facilities; and for similar utility and transportation uses;

(33) New construction that is similar to or compatible with existing land use (*i.e.*, site and scale of construction are consistent with those of existing adjacent or nearby facilities) and, when completed, the use or operation of which complies with existing regulatory requirements (*e.g.*, a building within a cantonment area with associated discharges and runoff within existing handling capacities). The test for whether this CATEX can be applied should focus on whether the proposed action generally fits within the designated land use of the proposed site.

(34) Demolition, disposal, or improvements involving buildings or structures when done in accordance with applicable regulations including those regulations applying to removal of asbestos, PCBs, and other hazardous materials;

(35) Acquisition, installation, modernization, repair or operation of utility (including, but not limited to, water, sewer, and electrical) and communication systems (including, but not limited to, data processing cable and similar electronic equipment) that use existing rights of way, easements, distribution systems, and facilities.

(36) Decisions to close facilities, decommission equipment, or temporarily discontinue use of facilities or equipment, where the facility or equipment is not used to prevent or control environmental impacts);

(37) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site;

(38) Relocation of personnel into existing Federally-owned or commercially leased space that does not involve a substantial change affecting the supporting infrastructure (*e.g.*, no increase in vehicular traffic beyond the capacity of the supporting road network to accommodate such an increase);

(39) Pre-lease upland exploration activities for oil, gas or geothermal reserves, (*e.g.*, geophysical surveys);

(40) Installation of devices to protect human or animal life (*e.g.*, raptor electrocution prevention devices, fencing to restrict wildlife movement onto airfields, and fencing and grating to prevent accidental entry to hazardous areas);

(41) Reintroduction of endemic or native species (other than endangered or threatened species) into their historic habitat when no substantial site preparation is involved;

(42) Temporary closure of public access to Department of the Navy property in order to protect human or animal life;

(43) Routine testing and evaluation of military equipment on a military reservation or an established range, restricted area, or operating area; similar in type, intensity and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the Department of the Navy was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment;

(44) Routine military training associated with transits, maneuvering, safety and engineering drills, replenishments, flight operations, and weapons systems conducted at the unit or minor exercise level; similar in type, intensity and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the Department of the Navy was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment.

(45) Natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulation by Federal, State, or local organizations having management responsibility and authority over the natural resources in question, including, but not limited to, prescribed burning, invasive species actions, timber harvesting, and hunting and fishing during seasons established by State authorities pursuant to their State fish and game management laws. The natural resources management actions must be consistent with the overall management approach of the property as documented in an Integrated Natural Resources Management Plan (INRMP) or other applicable natural resources management plan.

(46) Minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events that threaten public health or safety, security, property, or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-

approved condition (*i.e.*, the previous state) without intervention. Covered activities must be completed within one year following the event and cannot include the construction of new permanent roads or other new permanent infrastructure. Such activities include, but are not limited to: repair of existing essential erosion control structures or installation of temporary erosion controls; repair of electric power transmission infrastructure; replacement or repair of storm water conveyance structures, roads, trails, fences, and minor facilities; revegetation; construction of protection fences; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, or streams.

(47) Modernization (upgrade) of range and training areas, systems, and associated components (including, but not limited to, targets, lifters, and range control systems) that supports current testing and training levels and requirements. Covered actions do not include those involving a substantial change in the type or tempo of operation, or the nature of the range (*i.e.*, creating an impact area in an area where munitions had not been previously used).

(48) Revisions or updates to INRMPs that do not involve substantially new or different land use or natural resources management activities and for which an EA or EIS was previously prepared that does not require supplementation pursuant to 40 CFR 1502.9(c)(1).

(49) Department of the Navy actions that occur on another Military Service's property where the action qualifies for a CATEX of that Service, or for actions on property designated as a Joint Base or Joint Region that would qualify for a CATEX of any of the Services included as part of the Joint Base or Joint Region. If the DoN action proponent chooses to use another Service's CATEX to cover a proposed action, the DoN must get written confirmation the other Service does not object to using their CATEX to cover the DoN action. The DoN official making the CATEX determination must ensure the application of the CATEX is appropriate and that the DoN proposed action was of a type contemplated when the CATEX was established by the other Service. Use of this CATEX requires preparation of a Record of CATEX or Decision Memorandum.

Dated: March 26, 2019.

M.S. Werner,

*Commander, Judge Advocate General's Corps,
U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2019-06156 Filed 3-29-19; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2019–1096]

RIN 1625–AA08

Special Local Regulations; Charlevoix Venetian Night Boat Parade Charlevoix, MI

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the special local regulation for the Charlevoix Venetian Night Boat Parade in Michigan by increasing the length of effective period of the existing special local regulation to allow the Patrol Commander additional time to clear vessels from anchoring in the regulated area during the event. In order for the Coast Guard to clear vessel traffic to ensure safety in sufficient time in advance of the event, the Coast Guard proposes to change the effective period broadly to “a date in late July.” We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before July 1, 2019.

ADDRESSES: You may submit comments identified by docket number USCG–2019–1096 using the Federal e-Rulemaking Portal at <http://www.regulations.gov>. Type the docket number (USCG–2019–1096) in the “SEARCH” box and click “SEARCH.” See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MST2 Blackledge, Waterways Management, Coast Guard Sector Sault Sainte Marie, U.S. Coast Guard; telephone 906–253–2443, email Onnalee.A.Blackledge@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

The Charlevoix Venetian Night Boat Parade Charlevoix, MI. event features a

parade on the perimeter of Round Lake with a low fireworks show in the middle of the lake. In order to ensure safety in sufficient time of the event the Coast Guard Patrol Commander clears any vessel traffic and any vessels anchored in Round Lake from the fireworks fallout zone and the parade route.

The legal basis for this proposed rulemaking is found in 33 U.S.C. 1233.

III. Discussion of Proposed Rule

The Captain of the Port Sault Sainte Marie (COTP) has determined that the existing rule does not allow adequate time for the Patrol Commander to ensure the safety of any anchored vessels in the regulated area. This change allows the Coast Guard Patrol Commander the additional time needed to contact vessel owners to relocate their vessels out of the affected area.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and time-of-day for the regulated area. Vessel traffic will be able to safely transit through the regulated area which will impact a small designated area within the COTP zone for a short duration of time. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The

term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have

a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves creating a regulated area for several days each year in a small area. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

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

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

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. In § 100.908, revise paragraph (c) to read as follows:

§ 100.908 Charlevoix Venetian Night Boat Parade; Charlevoix, MI.

* * * * *

(c) Effective date. This section is effective annually on a date in late July.

Dated: February 7, 2019.

P.S. Nelson,

Captain, U.S. Coast Guard, Captain of the Port Sault Sainte Marie.

[FR Doc. 2019–06229 Filed 3–29–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 216, 217, 225, 234, and 235

[Docket DARS–2019–0008]

RIN 0750–AJ32

Defense Federal Acquisition Regulation Supplement: Use of Fixed-Price Contracts (DFARS Case 2017–D024)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DOD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that requires the preference for the use of fixed-price contracts in the determination of contract type, requires review and approval for certain cost-reimbursement contract types at specified thresholds and established time periods, and requires the use of firm fixed-price contract types for foreign military sales unless an exception or waiver applies.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 31, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D024, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2017–D024.” Select “Comment Now” and follow the instructions provided to submit a comment. Please cite “DFARS Case 2017–D024” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2017–D024 in the subject line of the message.

- *Fax:* 571–372–6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 571-372-6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement sections 829 and 830 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017. Section 829 of the FY 2017 NDAA requires contracting officers to first consider fixed-price contracts, to include fixed-price incentive contracts, when determining contract type and to obtain approval from the head of the contracting activity for—

- Cost-reimbursement contracts in excess of \$50 million to be awarded after October 1, 2018, and before October 1, 2019; and

- Cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019.

Section 830 provides requirements, exceptions, and waiver authority for the use of firm-fixed-price contracts for foreign military sales (FMS). It requires contracting officers to use firm fixed-price contracts unless specified exceptions or a waiver applies. Contracting officers are required to use a different contract type if the FMS customer has established in writing a preference for a different contract type or has requested in writing that a different contract type be used for a specific FMS. The waiver authorizes contracting officers the ability to use other than firm-fixed-price contract type on a case by case basis when determined it is in the best interest of the United States and American taxpayers.

II. Discussion and Analysis

The following changes to the DFARS are proposed to implement sections 829 and 830 of the NDAA for FY 2017:

DFARS section 202.101 adds the definition of “milestone decision authority” since the definition is used in multiple DFARS parts.

DFARS 216.102(1) adds a reference to section 829 to inform contracting officers on the new requirements when selecting contract types and includes a reference to DFARS 216.301-3(2) for the

approval requirements on the use of cost-reimbursement contracts. DFARS 216.102(3) is added to provide a reference to DFARS 225.7301-1 for the requirements on the use of fixed-price contracts for FMS sales in accordance with section 830 of the FY 2017 NDAA.

DFARS 216.104-70 includes a reference to DFARS 235.006(b) for the new research and development (R&D) contract type approval requirements.

DFARS 216.301-3(2) is added to incorporate the exception on the use of cost-reimbursement contracts for R&D as provided in DFARS 235.006(b).

Paragraph (2) also provides the statutory requirements of section 829 on the use of cost-reimbursement contracts over the established thresholds and timelines and establishes the approval level on the use of cost-reimbursement contracts as the head of the contracting activity.

DFARS 217.202 incorporates PGI references for guidance on the use of options for FMS requirements and for sole source major systems for U.S. and U.S./FMS combined procurements.

DFARS 225.7301-1 is added to implement section 830 of the NDAA for FY 2017. Paragraph (a) incorporates a new requirement to use firm-fixed price contracts for FMS requirements unless a preference for a different contract type is established in writing or requests in writing that a different contract type be used for a specific FMS. It also provides a reference to guidance in DFARS PGI 217.202(2) on the use of priced options for FMS requirements. DFARS 225.7301-1(b) establishes a waiver process for the use of firm-fixed-price contract requirements if the chief of the contracting office determines a different contract type is in the best interest of the Government, on a case by case basis.

DFARS 225.7301-2 provides guidance on the review requirements, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system with a contract value exceeding \$500 million, in accordance with the Defense Pricing and Contracting (DPC) (formerly Defense Procurement and Acquisition Policy) policy memorandum dated June 28, 2018. It also includes a reference link to PGI 216.403-1(1)(ii)(B) and (C) for procedures on the use of fixed-price incentive (firm target) (FPIF) contracts.

DFARS 234.004(2)(ii)(A) revises “USD(AT&L)” to reflect the new organization Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) (throughout the proposed rule text) and clarifies the existing approval and certification requirements for contract type selection and determination in the acquisition strategies and acquisition plans for

MDAPs, which include the milestone decision authority (MDA) when the MDA is the service acquisition executive of the military department managing the program, as specified in section 848 of the NDAA for FY 2017. DFARS 234.004(2)(iii) provides a reference to DFARS 216.301-3 for the additional approval requirements on cost-reimbursement contracts for major system acquisitions. DFARS 234.004(2)(iv) provides a reference to PGI 216.403-1(1)(ii)(B) and (C) for procedures on the use of FPIF contracts.

DFARS 235.006(b)(i) incorporates the approval by USD(A&S) on the authority to use cost-reimbursement contracts for R&D in excess of \$25 million if the contracting officer executes a written determination and findings that the risk level does not permit realistic pricing and it is not possible to allocate that risk equitably between the Government and the contractor. Risks associated with a program is a major factor and consideration point for choosing the contract type. Since development efforts are inherently risky and do not lend themselves to a fixed-price type of contract; a cost-reimbursement contract is more appropriate and customary for most development programs. DFARS 235.006(b)(i)(B) is revised to reflect the revision to the notification requirements of an intent not to exercise a fixed-price production option on a development contract for a major weapon system prior to expiration of the option period; updated to reflect the MDA instead of the former USD(AT&L) now USD(A&S).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new DFARS clauses or amend any existing DFARS clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This

rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule is mainly impacting the internal operations of the government for review and approval on the use of certain contract types. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DOD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections 829 and 830 of the National Defense Authorization Act for Fiscal Year 2017 that requires the preference for the use of firm fixed-price contract types for foreign military sales (FMS) with exceptions and waiver authority in accordance with sections 830(b) and (c). Section 829 requires review and approval for certain cost-reimbursement contract types at specified thresholds and established time periods.

The objective of this proposed rule is to require contracting officers to establish a preference for fixed-price and fixed-price incentive contracts during the consideration of contract type and require the use of firm fixed-price contracts for FMS, unless an exception applies or a waiver is executed.

Small business statistics were obtained from the Federal Procurement Data System for fiscal year 2017 data identifying the DoD cost-reimbursement awards issued, including task and delivery orders under single award indefinite delivery indefinite quantity (IDIQ) contracts as of August 8, 2018.

Of the 2,120 contract awards over \$25 million (includes \$50 million), only 206 awards, or approximately ten percent, were made to unique small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small entities and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2017–D024), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 202, 216, 217, 225, 234, and 235

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 202, 216, 217, 225, 234, and 235 are proposed to be amended as follows:

- 1. The authority citation for 48 CFR parts 202, 216, 217, 225, 234, and 235 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 202—DEFINITION OF WORDS AND TERMS

- 2. Amend section 202.101 by adding in alphabetical order a definition for “Milestone decision authority” to read as follows:

202.101 Definitions.

* * * * *

Milestone decision authority, with respect to a major defense acquisition program, major automated information system, or major system, means the official within the Department of Defense designated with the overall responsibility and authority for acquisition decisions for the program or system, including authority to approve entry of the program or system into the next phase of the acquisition process (10 U.S.C. 2431a).

* * * * *

PART 216—TYPES OF CONTRACTS

- 3. Amend section 216.102 by—
 - a. Designating the text as paragraph (2); and
 - b. Adding paragraphs (1) and (3).
 The additions read as follows:

216.102 Policies.

(1) In accordance with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), the contracting officer shall first consider the use of fixed-price contracts, including fixed-price incentive contracts, in the determination of contract type. See 216.301–3(2) for approval requirements for certain cost-reimbursement contracts.

* * * * *

(3) See 225.7301–1 for the requirement to use fixed-price contracts for acquisitions for foreign military sales.

216.104–70 [Amended]

- 4. Amend section 216.104–70 by removing “contract type” and adding “contract type and see 235.006(b) for additional approval requirements” in its place.
- 5. Amend section 216.301–3 by—
 - a. Designating the text as paragraph (1); and
 - b. Adding paragraph (2).
 The addition reads as follows:

216.301–3 Limitations.

* * * * *

(2) Except as provided in 235.006(b), in accordance with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), approval of the head of the contracting activity is required prior to awarding the following:

(i) Cost-reimbursement contracts in excess of \$50 million to be awarded after October 1, 2018, and before October 1, 2019.

(ii) Cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019.

PART 217—SPECIAL CONTRACTING METHODS

- 6. Amend section 217.202 by adding paragraphs (1)(i) and (ii) to read as follows:

217.202 Use of options.

(1) * * *

(i) See PGI 217.202(1) for guidance on the use of options with foreign military sales (FMS).

(ii) See PGI 217.202(2) for the use of options with sole source major systems for U.S. and U.S./FMS combined procurements.

* * * * *

PART 225—FOREIGN ACQUISITION

- 7. Add section 225.7301–1 to read as follows:

225.7301-1 Requirement to use firm-fixed-price contracts.

(a) *Requirement.* In accordance with section 830 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 14-328), a firm-fixed-price contract shall be used for FMS, unless the foreign country that is the counterparty to FMS—

(1) Has established in writing a preference for a different contract type; or

(2) Requests in writing that a different contract type be used for a specific FMS. See PGI 217.202(2) on the use of priced options for FMS requirements.

(b) *Waiver.* The requirement in paragraph (a) of this section may be waived, if the chief of the contracting office determines, on a case-by-case basis, that a different contract type is in the best interest of the United States and American taxpayers.

■ 8. Add section 225.7301-2 to read as follows:

225.7301-2 Solicitation approval for sole source contracts.

The contracting officer shall coordinate through agency channels with the Principal Director, Defense Pricing and Contracting, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system that has an estimated contract value that exceeds \$500 million. See also 201.170 and PGI 216.403-1(1)(ii)(B) and (C).

PART 234—MAJOR SYSTEM ACQUISITION

■ 9. Amend section 234.004—

■ a. In paragraphs (2)(i)(A) and (2)(i)(C) introductory text, by removing “Milestone Decision Authority” and adding “milestone decision authority” in both places;

■ b. By revising paragraph (2)(ii)(A) introductory text;

■ c. In paragraph (2)(ii)(A)(2), by removing the word “when”; and

■ d. By adding paragraphs (2)(iii) and (2)(iv).

The revision and addition read as follows:

234.004 Acquisition strategy.

* * * * *

(2) * * *

(ii) * * *

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), or the milestone decision authority when the milestone decision authority is the service acquisition executive of the military department

that is managing the program, submits to the congressional defense committees—

* * * * *

(iii) See 216.301-3 for additional contract type approval requirements for cost-reimbursement contracts.

(iv) For fixed-price incentive (firm target) contracts, contracting officers shall comply with the guidance provided at PGI 216.403-1(1)(ii)(B) and (C).

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

■ 10. Amend section 235.006—

■ a. By redesignating paragraphs (b)(i) and (b)(ii) as paragraphs (b)(ii) and (b)(iii);

■ b. In newly redesignated paragraph (b)(ii)(B) introductory text, by removing “Under Secretary of Defense (Acquisition, Technology, and Logistics (USD(AT&L)))” and adding “milestone decision authority” in its place;

■ c. In newly redesignated paragraphs (b)(iii)(A)(3) introductory text and (b)(iii)(A)(3)(i) and (ii), by removing “(b)(ii)(A)(1)”, “USD(AT&L)”, and “(b)(ii)(A)(3)(i)” and adding “(b)(iii)(A)(1)”, “USD(A&S)”, and “(b)(iii)(A)(3)(i)” in their places, respectively;

■ d. In the newly redesignated paragraph (b)(iii)(B) introductory text, by removing “USD(AT&L)” and adding “USD(A&S) in two places; and

■ e. By adding new paragraph (b)(i).

The addition reads as follows:

235.006 Contracting methods and contract type.

(b)(i) Consistent with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) has determined that the use of cost-reimbursement contracts for research and development in excess of \$25 million is approved, if the contracting officer executes a written determination and findings that—

(A) The level of program risk does not permit realistic pricing; and

(B) It is not possible to provide an equitable and sensible allocation of program risk between the Government and the contractor.

* * * * *

[FR Doc. 2019-06246 Filed 3-29-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 204, 215, 226, and 252**

[Docket DARS-2019-0009]

RIN 0750-AK19

Defense Federal Acquisition Regulation Supplement: Demonstration Project for Contractors Employing Persons With Disabilities (DFARS Case 2018-D058)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that requires the DFARS to be updated to include an instruction on a demonstration project for contractors employing persons with disabilities.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 31, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D058, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2018-D058.” Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2018-D058” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D058 in the subject line of the message.

- *Fax:* 571-372-6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Jennifer D. Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to revise the DFARS to implement section 888 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 888 requires that the DFARS be updated to include an instruction on the demonstration project authorized by section 853 of the NDAA for FY 2004 (Pub. L. 108–136, 10 U.S.C. 2302 note), as amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199).

Section 853 of the NDAA for FY 2004 authorized a Demonstration Project for Contractors Employing Persons with Disabilities in order to provide defense contracting opportunities for entities employing individuals who are severely disabled. To participate in the Demonstration Project, an entity must meet the definition of “eligible contractor” provided in the proposed rule. Specifically, individuals with severe disabilities must comprise no less than 33 percent of the entity’s total workforce over the 12-month period prior to issuance of the solicitation; this percentage must be one of the evaluation factors used to evaluate offers for a contract under the Demonstration Project. In addition, the entity must pay not less than the minimum wage to those individuals and must provide for its employees’ health insurance and a retirement plan comparable to those provided by similar entities. The entity may be operated on a for-profit or nonprofit basis.

Contracts awarded under the Demonstration Project will be credited toward DoD’s small business goals established pursuant to the Small Business Act (15 U.S.C. 644(g)(1)). Subcontracts awarded to eligible contractors under these contracts will be credited toward DoD’s small business subcontracting goals.

II. Discussion and Analysis

This rule proposes to add coverage of the Demonstration Project in a new subpart in DFARS part 226, Other Socioeconomic Programs. The proposed new subpart 226.7X, Demonstration Project for Contractors Employing Persons with Disabilities, includes definitions and guidance for the contracting workforce regarding the Demonstration Project. Definitions are proposed for the terms “eligible contractor” and “severely disabled individual,” based on those provided in section 853 of the NDAA for FY 2004.

In addition, the new subpart provides a prescription for a new solicitation provision, 252.226–7XXX,

Representation for Demonstration Project for Contractors Employing Persons with Disabilities. This provision defines the terms “eligible contractor” and “severely disabled individual,” explains the purpose of the Demonstration Project, and requires the offeror to represent whether it is or is not an eligible contractor.

Offerors will complete the representation as part of their annual representations and certifications in the System for Award Management (SAM). Therefore, the new provision 252.226–7XXX is added to DFARS 204.1202, Solicitation provision, in the list of provisions that are not included separately in a solicitation when the provision at Federal Acquisition Regulation (FAR) 52.204–7, System for Award Management, is included in the solicitation. The new provision is also added to the provision at DFARS 252.204–7007, Alternate A, Annual Representations and Certifications. The contracting officer must check the appropriate box when the new provision 252.226–7XXX applies to a solicitation.

Contractors under the Demonstration Project may be required to have subcontracting plans per FAR 19.702. Therefore, this rule proposes to amend the clause at DFARS 252.219–7003, Small Business Subcontracting Plan (DoD Contracts), to define the term “eligible contractor” and to specify that subcontracts awarded to subcontractors who also meet the definition of eligible contractor under the Demonstration Project may be counted toward the prime contractor’s small disadvantaged business subcontracting goal.

To increase the visibility of the Demonstration Project, this rule proposes to add at DFARS 215.304, Evaluation factors and significant subfactors, a reference to new section 226.7X02. This section contains the requirement for contracting officers, when using the Demonstration Project, to use an evaluation factor that is the percentage of the offeror’s total workforce consisting of severely disabled individuals.

III. Expected Impact of the Proposed Rule

The Demonstration Project gives DoD a way to provide additional contracting opportunities to entities that employ individuals who are severely disabled and that may not qualify for approval by the Committee for Purchase From People Who Are Blind or Severely Disabled due to their for-profit status or for other reasons. Procurements under the Demonstration Project must be for products and services that are not

available from a mandatory source in FAR part 8, that are not on the AbilityOne Procurement List maintained by the Committee, or that are not available from AbilityOne participating nonprofit agencies in the time required.

The Demonstration Project is modeled after the Small Business Administration’s set-aside program, but uniquely includes an incentive for Federal contractors to hire people with disabilities, for whom the unemployment rate is more than twice the rate for people without disabilities. Such a demonstration project provides opportunities for severely disabled individuals to become gainfully employed taxpayers. Employing people with disabilities can be a way to offset the effects of an aging and shrinking workforce. In addition, people with disabilities bring different perspectives on solving problems and adapting to different circumstances. The Demonstration Project provides another incentive for both for-profit and nonprofit entities to recruit, employ, and retain people with disabilities.

The authority provided for the Demonstration Project has been available for use, at DoD’s discretion, since the NDAA for FY 2004 was signed into law. At the time, DoD considered the Demonstration Project to be similar to a pilot program, in that it provided a way to try a different approach without making broad changes in the way DoD buys supplies and services in general. DoD usually does not amend the DFARS to add guidance regarding pilot programs. Therefore, the DFARS was not amended to include guidance on the Demonstration Project. As noted in Section I of this preamble, DoD is proposing to amend the DFARS in order to comply with section 888 of the NDAA for FY 2019.

DoD estimates that there may be approximately 549 procurements that could be conducted under the Demonstration Project per year. This estimate is based on data obtained from the Federal Procurement Data System on the number of contracts awarded in Product Service Codes (PSCs) that may be suitable for award under the Demonstration Project. The selection of PSCs was informed by the Conference Report for the NDAA for FY 2004, which authorized the Demonstration Project. The Conference Report indicated that Congress expected opportunities to exist for the Demonstration Project in aerospace end items and components, as well as information technology products and services. Therefore, DoD obtained data

for contracts awarded in the following PSCs:

PSC	Description
1560	Airframe Structural Components.
All PSCs in Group 16.	Aerospace Craft Components and Accessories.
All PSCs in Group 70.	Information Technology Equipment (including firmware), Software, Supplies, and Support Equipment.
All PSCs in Category D3.	Information Technology and Telecommunications.

In certain PSCs, there is some overlap with the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled. The areas of overlap generally included a few items within a specific PSC, not the entire PSC. Therefore, relevant PSCs were included regardless of possible overlap with the Procurement List.

DoD also used awards to nonprofits as an indicator of suitability for the Demonstration Project because of its similarities to the AbilityOne Program, in terms of employment of individuals with severe disabilities. From FY 2016 through 2018, an average of 0.16% of those contracts (approximately 90 each year) were awarded to nonprofits. Since the Demonstration Project applies to both for-profit and nonprofit entities, DoD conservatively estimated that up to 1% of contracts (approximately 549 each year) awarded in those PSCs may be suitable for the Demonstration Project.

However, since 2004, DoD is aware of only one DoD contract issued pursuant to the Demonstration Project. The contract was awarded in 2006; Congress had provided funds specifically for this use. This limited use makes it difficult to predict the impact of the Demonstration Project. Depending on the extent to which it is used, it could create additional contract opportunities for entities employing people with severe disabilities, including service-disabled veterans. DoD invites public comment regarding whether more contractors and contracting officers will take advantage of the Demonstration Project if it is added to the DFARS.

This rule proposes to require offerors for procurements conducted under the Demonstration Project to represent whether they are or are not eligible contractors as defined in the rule. Public costs are expected to be de minimis since offerors will complete the representation in the System for Award Management.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD intends to apply the requirements of section 853 of the NDAA for FY 2004, as amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199), to contracts at or below the SAT and to contracts for the acquisition of commercial items, including COTS items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Therefore, given that the requirements of section 853 of the NDAA for FY 2004 were enacted to provide defense contracting opportunities for contractors employing persons with disabilities and since many contracts that could be awarded under the Demonstration Project are likely to be at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items (including commercially available off-the-shelf items) and is intended to limit the applicability of laws to contracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law

contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Therefore, given that the requirements of section 853 of the NDAA for FY 2004 were enacted to provide defense contracting opportunities for contractors employing persons with disabilities, and since many of the products and services offered by these contractors are commercial items, including COTS items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This proposed rule is not expected to be subject to the requirements of E.O. 13771, because it is expected to result in no more than de minimis costs.

VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601,

et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to include an instruction on the Demonstration Project for Contractors Employing Persons with Disabilities. The Demonstration Project allows DoD to provide defense contracting opportunities to entities that employ individuals who are severely disabled, even though those entities may not qualify for approval by the Committee for Purchase From People Who Are Blind or Severely Disabled. Procurements under the Demonstration Project must be for products and services that are not available from a mandatory source in Federal Acquisition Regulation part 8, that are not on the AbilityOne Procurement List maintained by the Committee, or that are not available from AbilityOne participating nonprofit agencies in the time required.

The objective of the rule is to implement section 888 of the NDAA for FY 2019 (Pub. L. 115–232) by including in the DFARS an instruction on the Demonstration Project described above. The Demonstration Project was authorized by section 853 of the NDAA for FY 2004 (Pub. L. 108–136, as amended; 10 U.S.C. 2302 note). The legal basis is section 888 of the NDAA for FY 2019 and 10 U.S.C. 2302 note.

The rule will apply to entities, including small entities, that meet the definition of “eligible contractor” in the rule and that are interested in competing for contracts under the Demonstration Project. Specifically, an eligible contractor employs severely disabled individuals at a rate of no less than 33 percent of the contractor’s workforce over the 12-month period prior to issuance of the solicitation; pays not less than the minimum wage to those individuals; and provides for its employees’ health insurance and a retirement plan comparable to those provided by similar entities. The entity may operate on a for-profit or nonprofit basis. According to data in the Federal Procurement Data System (FPDS), DoD awarded contracts to approximately 4,065 small entities each year from FY 2016 to FY 2018 in Product and Service Codes (PSCs) that may be suitable for award under the Demonstration Project, such as aerospace components and accessories and information technology equipment and services. DoD conservatively estimates that approximately 21 percent, or 870 small entities, may meet the definition of “eligible contractor” and be interested in competing for contracts under the Demonstration Project.

This rule proposes to require offerors to represent whether they are or are not eligible contractors under the Demonstration Project. This representation will be available for completion in the System for Award Management (SAM) and will be completed on an annual basis. This rule does not impose any new recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternative approaches to the proposed rule that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2018–D058), in correspondence.

VIII. Paperwork Reduction Act

The rule affects the information collection requirements in the provision at FAR 52.204–7, System for Award Management, and in the clause at FAR 52.204–13, System for Award Management Maintenance, currently approved under OMB Control Number 9000–0159, entitled System for Award Management Registration, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because the cost of providing the additional representation in the System for Award Management is de minimis and is within the estimate of public burden approved for OMB Control Number 9000–0159.

List of Subjects in 48 CFR Parts 204, 215, 226, and 252

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 215, 226, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 215, 226, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

■ 2. Amend section 204.1202 by

- a. Redesignating paragraphs (2)(xi), (xii), and (xiii) as paragraphs (2)(xii), (xiii), and (xiv), respectively; and
- b. Adding new paragraph (xi).

The addition reads as follows:

204.1202 Solicitation provision.

* * * * *
(2) * * *
(xi) 252.226–7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

■ 3. Amend section 215.304 by adding paragraph (c)(vi) to read as follows:

215.304 Evaluation factors and significant subfactors.

(c) * * *
(vi) See 226.7X02 for an additional evaluation factor required in solicitations when using the Demonstration Project for Contractors Employing Persons with Disabilities.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

■ 4. Add subpart 226.7X, consisting of 226.7X00 through 226.7X03, to read as follows:

SUBPART 226.7X—DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING PERSONS WITH DISABILITIES

Sec.
226.7X00 Scope of subpart.
226.7X01 Definitions.
226.7X02 Policy and procedures.
226.7X03 Solicitation provision.

SUBPART 226.7X—DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING PERSONS WITH DISABILITIES

226.7X00 Scope of subpart.

This subpart implements section 853 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, 10 U.S.C. 2302 note), as amended.

226.7X01 Definitions.

As used in this subpart—
Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

- (1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;
- (2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and
- (3) Provides for its employees’ health insurance and a retirement plan

comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

Severely disabled individual means an individual with a disability (as defined in 42 U.S.C. 12102) who has a severe physical or mental impairment that seriously limits one or more functional capacities.

226.7X02 Policy and procedures.

(a) Contracting officers may use this demonstration project to award one or more contracts to an eligible contractor for the purpose of providing defense contracting opportunities for entities that employ severely disabled individuals. To determine if there are eligible contractors capable of fulfilling the agency's requirement, conduct market research as described in 210.002 and FAR 10.002. For services, see also PGI 210.070.

(b) When using this demonstration project, one of the evaluation factors shall be the percentage of the offeror's total workforce that consists of severely disabled individuals employed by the offeror. Contracting officers may use a rating method in which a higher percentage of the offeror's total workforce consisting of severely disabled individuals would result in a higher rating for this evaluation factor.

(c) Contracts awarded to eligible contractors under this demonstration project may be counted toward DoD's small disadvantaged business goal.

226.7X03 Solicitation provision.

Use the provision at 252.226-7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, in solicitations when using this demonstration project.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Amend section 252.204-7007 by—
 - a. Removing clause date "(DEC 2018)" and adding "(DATE)"; and
 - b. Adding paragraph (d)(2)(vi).
 The addition reads as follows:

252.204-7007 Alternate A, Annual Representations and Certifications.

* * * * *

- (d) * * *
- (2) * * *

(vi) 252.226-7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

* * * * *

- 6. Amend section 252.219-7003 by—

- a. Removing clause date "(DEC 2018)" and adding "(DATE)" in its place;
- b. Revising paragraph (a);
- c. Redesignating paragraph (b) as paragraph (b)(1);
- d. In the newly redesignated paragraph (b)(1), adding "(section 8025 of Pub. L. 108-87)" at the end of the paragraph, before the period;
- e. Adding paragraph (b)(2); and
- f. In the Alternate I clause—
- i. Removing the clause date of "(APR 2018)" and adding "(DATE)" in its place;
- ii. Revising paragraph (a);
- iii. Redesignating paragraph (b) as paragraph (b)(1);
- iv. In the newly redesignated paragraph (b)(1), adding "(section 8025 of Pub. L. 108-87)" at the end of the paragraph, before the period; and
- v. Adding paragraph (b)(2).

The revisions and additions read as follows:

252.219-7003 Small Business Subcontracting Plan (DoD Contracts).

* * * * *

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

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

(1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;

(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and

(3) Provides for its employees' health insurance and a retirement plan comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

Summary Subcontract Report (SSR) Coordinator means the individual who is registered in the Electronic Subcontracting Reporting System (eSRS) at the Department of Defense level and is responsible for acknowledging receipt or rejecting SSRs submitted under an individual subcontracting plan in eSRS for the Department of Defense.

(b) * * *
(2) Subcontracts awarded to eligible contractors under the Demonstration Project for Contractors Employing Persons with Disabilities (see DFARS 226.7X) may be counted toward the Contractor's small disadvantaged business subcontracting goal (section 853 of Pub. L. 108-136, as amended by division H, section 110 of Pub. L. 108-199).

* * * * *

Alternate I. * * *
* * * * *

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

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

(1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;

(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and

(3) Provides for its employees' health insurance and a retirement plan comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

Summary Subcontract Report (SSR) Coordinator means the individual who is registered in the Electronic Subcontracting Reporting System (eSRS) at the Department of Defense level and is responsible for acknowledging receipt or rejecting SSRs submitted under an individual subcontracting plan in eSRS for the Department of Defense.

(b) * * *
(2) Subcontracts awarded to eligible contractors under the Demonstration Project for Contractors Employing Persons with Disabilities (see DFARS 226.7X) may be counted toward the Contractor's small disadvantaged business subcontracting goal (section 853 of Pub. L. 108-136, as amended by division H, section 110 of Pub. L. 108-199).

* * * * *

- 7. Add section 252.226-7XXX to read as follows:

252.226-7XXX Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

As prescribed in 226.7X03, use the following provision:

Representation for Demonstration Project for Contractors Employing Persons with Disabilities (Date)

(a) *Definitions.* As used in this provision—
"Eligible contractor" means a business entity operated on a for-profit or nonprofit basis that—

(1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;

(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and

(3) Provides for its employees' health insurance and a retirement plan comparable to those provided for employees by business

entities of similar size in its industrial sector or geographic region.

“Severely disabled individual” means an individual with a disability (as defined in 42 U.S.C. 12102) who has a severe physical or mental impairment that seriously limits one or more functional capacities.

(b) *Demonstration Project.* This solicitation is issued pursuant to the Demonstration Project for Contractors Employing Persons with Disabilities. The purpose of the Demonstration Project is to provide defense contracting opportunities for entities that employ severely disabled individuals. To be eligible for award, an offeror must be an eligible contractor as defined in paragraph (a) of this provision.

(c) *Representation.* The offeror represents that it is is not an eligible contractor as defined in paragraph (a) of this provision.

(End of provision)

[FR Doc. 2019-06248 Filed 3-29-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 219 and 252

[Docket DARS-2019-0015]

RIN 0750-AK39

Defense Federal Acquisition Regulation Supplement: Nonmanufacturer Rule for 8(a) Participants (DFARS Case 2019-D004)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the final rule published by the Small Business Administration implementing a section of the National Defense Authorization Act for Fiscal Year 2013 that provided revised and standardized limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including participants in the 8(a) Program.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 31, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019-D004, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2019-D004.” Select “Comment Now” and follow the

instructions provided to submit a comment. Please include “DFARS Case 2019-D004” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2019-D004 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A-S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the *Federal Register* at 81 FR 34243 on May 31, 2016. SBA’s final rule implemented the requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, 15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to Federal Acquisition Regulation (FAR) part 19, Small Business Programs.

Small business concerns must meet certain requirements when they offer to the Government an end item they did not manufacture, process, or produce. These requirements are known as the nonmanufacturer rule. For example, a small business nonmanufacturer must offer an end item that a small business manufactured, processed, or produced in the United States or its outlying areas (as defined in FAR 2.101). The clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement, includes an outdated version of these requirements. This rule proposes to update DFARS 252.219-7010 to include the revised nonmanufacturer rule provided by section 1651 and implemented in SBA’s final rule.

II. Discussion and Analysis

This rule proposes to amend DFARS 252.219-7010, paragraph (d), to replace the outdated text regarding the nonmanufacturer rule with updated text that implements section 1651 and SBA’s final rule. The proposed, updated text is consistent with the proposed FAR rule published in the *Federal Register* on December 4, 2018, at 83 FR 62540 (FAR Case 2016-011, Revision of Limitations on Subcontracting). In addition, this rule proposes to revise the title of the clause at 252.219-7010 to align with the title of FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants.

III. Expected Impact of the Proposed Rule

The clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement, currently requires 8(a) participants that offer end items they did not manufacture or produce (*i.e.*, nonmanufacturers) to offer end items manufactured or produced by small business concerns in the United States or its outlying areas. This requirement is known as the “nonmanufacturer rule.” DFARS 252.219-7010 provides an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. For these contracts, an 8(a) participant currently may offer end items manufactured or produced by any domestic firm.

SBA’s final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value. There was no exemption for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. Therefore, this rule proposes to remove that exemption from DFARS 252.219-7010. This change means the nonmanufacturer rule will apply to 8(a) contracts at any dollar value, and 8(a) participants that are nonmanufacturers will be required to offer end items manufactured, processed, or produced by small business concerns in the United States or its outlying areas.

To estimate the number of 8(a) participants that may be impacted by this change, DoD obtained data from the Federal Procurement Data System on DoD contracts, for products, awarded to 8(a) participants under the 8(a) Program. Contracts for services, including construction, were excluded because the nonmanufacturer rule only applies to products, not services. In FY 2016 through FY 2018, DoD awarded contracts for products to an average of 285 8(a) participants each year. An

average of 90 of those 8(a) participants per year were awarded approximately 2 contracts each that were valued at or below \$25,000, using simplified acquisition procedures. Therefore, DoD estimates that approximately 90 participants may be impacted by this rule. Due to the small number of 8(a) participants that may be impacted, it is expected that the cost associated with this rule will be de minimis.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-Shelf Items

DoD intends to apply the requirements of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold and to contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Therefore, given that SBA applied section 1651 to contracts and subcontracts at or below the SAT and that nearly 76 percent of the DoD contracts awarded to 8(a) participants in recent years are at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply section 1651 to contracts or subcontracts at or below the SAT. An exemption for contracts or subcontracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to contracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense (Acquisition and Sustainment) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, including COTS items, then the provision of law will apply to contracts for the acquisition of commercial items. This authority has been delegated to the Principal Director, DPC.

Therefore, given that SBA applied section 1651 to contracts for the acquisition of commercial items, including COTS items, and that approximately 72 percent of the DoD contracts awarded to 8(a) participants in recent years are for commercial items, including COTS items, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it will impact a very small number of small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to revise the DFARS to implement regulatory changes made by SBA in its final rule published in the **Federal Register** on May 31, 2016 (81 FR 34243), which implemented section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239; 15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting and the nonmanufacturer rule that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to FAR part 19, Small Business Programs.

The objective of the rule is to implement the revised nonmanufacturer rule for 8(a) Program participants by updating the clause at DFARS 252.219–7010, Notification of Competition Limited Eligible 8(a) Concerns—Partnership Agreement. The legal basis is section 1651 of the NDAA for FY 2013.

This rule will apply to 8(a) participants that contract with DoD. According to data obtained from the Federal Procurement Data System, DoD awarded contracts for products (*i.e.*, contracts to which the nonmanufacturer rule would apply) to an average of 285 8(a) participants each year during FY 2016 through FY 2018. These entities will need to familiarize themselves with this rule. The clause at DFARS 252.219–7010 currently provides an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. SBA's final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value, with no exemption for contracts at or below \$25,000. DoD awarded contracts at or below \$25,000 to an average of 90 8(a) participants each year during FY 2016 through FY 2018.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2019–D004), in correspondence.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 219 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 2019 and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 219 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 219—SMALL BUSINESS PROGRAMS

* * * * *

219.811–3 [Amended]

■ 2. Amend section 219.811–3 by removing “Eligible 8(a) Concerns” and adding “Eligible 8(a) Participants” in two places.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.219–7010—

■ a. In the section heading, by removing “Eligible 8(a) Concerns” and adding “Eligible 8(a) Participants” in its place;

■ b. In the clause heading, by removing “Eligible 8(a) Concerns” and adding “Eligible 8(a) Participants” in its place, and removing “(MAR 2016)” and adding “(DATE)” in its place;

■ c. In the paragraph (a) introductory text, by removing “in the SBA’s” and adding “in SBA’s” in its place;

■ d. In paragraph (a)(2), by removing “by the SBA” and adding “by SBA” in its place;

■ e. By redesignating paragraph (d)(2) as paragraph (e); and

■ f. By revising paragraph (d).

The revision reads as follows:

252.219–7010 Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement

* * * * *

(d)(1) Unless SBA has waived the requirements of paragraphs (d)(1)(i) through (iii) and (d)(2) of this clause in accordance with 13 CFR 121.1204, a small business concern that provides an end item it did not manufacture, process, or produce, shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for kit assemblers, see paragraph (d)(2) of this clause instead;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and (iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced by small businesses in the United States or its outlying areas.

(3) The requirements of paragraphs (d)(1)(i) through (iii) and (d)(2) of this clause do not apply to construction or service contracts.

* * * * *

[FR Doc. 2019–06252 Filed 3–29–19; 8:45 am]

BILLING CODE 5001–06–P

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Community Facilities Technical Assistance and Training Grant for Fiscal Year 2019

AGENCY: Rural Housing Service, USDA.

ACTION: Notice of solicitation of applications.

SUMMARY: This Notice announces that the Rural Housing Service (Agency) is accepting Fiscal Year (FY) 2019 applications for the Community Facilities Technical Assistance and Training (TAT) Grant program. The Agency will publish the amount of funding received in the final appropriations act on its website at <https://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas>. Awards will be made from available funding on or before September 15, 2019.

DATES: The Agency must receive applications in paper postmarked and mailed, shipped, or sent overnight by 5:00 Eastern Daylight Time on June 17, 2019. Electronic applications must be submitted via [grants.gov](http://www.grants.gov) by Midnight Eastern time on June 10, 2019. Prior to official submission of applications, applicants may request technical assistance or other application guidance from the Agency, as long as such requests are made prior to June 5, 2019. Technical assistance is not meant to be an analysis or assessment of the quality of the materials submitted, a substitute for agency review of completed applications, nor a determination of eligibility, if such determination requires in-depth analysis. The Agency will not solicit or consider scoring or eligibility information that is submitted after the application deadline. The Agency reserves the right to contact applicants to seek clarification information on materials contained in the submitted application.

ADDRESSES: Applications will be submitted to the USDA Rural Development State Office in the state where the applicant's headquarters is located. A listing of each State Office can be found at https://www.rd.usda.gov/files/CF_State_Office_Contacts.pdf. If you want to submit an electronic application, follow the instructions for the TAT funding announcement on <http://www.grants.gov>. For those applicants located in the District of Columbia, applications will be submitted to the National Office in care of Shirley Stevenson, 1400 Independence Ave. SW, STOP 0787, Room 0175-S, Washington, DC 20250. Electronic applications will be submitted via <http://www.grants.gov>. All applicants can access application materials at <http://www.grants.gov>.

FOR FURTHER INFORMATION CONTACT: The Rural Development office in which the applicant is located. A list of the Rural Development State Office contacts can be found at https://www.rd.usda.gov/files/CF_State_Office_Contacts.pdf. Applicants located in Washington DC can contact Shirley Stevenson at (202) 205-9685 or via email at Shirley.Stevenson@wdc.usda.gov.

SUPPLEMENTARY INFORMATION: The Rural Housing Service, an Agency of the United States Department of Agriculture (USDA) herein referred to as the Agency, published a final rule with comment in the **Federal Register** on January 14, 2016, implementing Section 6006 of the Agriculture Act of 2014 (Pub. L. 113-79) which provides authority to make Community Facilities Technical Assistance and Training (TAT) Grants. The final rule became effective on March 14, 2016, and is found at 7 CFR 3570, subpart F. A correction amendment was published in the **Federal Register** on May 6, 2016. The purpose of this Notice is to solicit applications for the FY 2019 TAT Grant Program.

The Agency encourages applications that will help improve life in rural America. (See information on the Interagency Task Force on Agriculture and Rural Prosperity found at www.usda.gov/ruralprosperity.) Applicants are encouraged to consider projects that provide measurable results in helping rural communities build robust and sustainable economies through strategic investments in

infrastructure, partnerships and innovation. Key strategies include:

- Achieving e-Connectivity for Rural America
- Developing the Rural Economy
- Harnessing Technological Innovation
- Supporting a Rural Workforce
- Improving Quality of Life

To combat a key threat to economic prosperity, rural workforce and quality of life, the Agency also encourages applications that will support the Administration's goal to reduce the morbidity and mortality associated with Substance Use Disorder (including opioid misuse) in high-risk rural communities by strengthening the capacity to address prevention, treatment and/or recovery at the community, county, state, and/or regional levels. See <https://www.cdc.gov/pwid/vulnerable-counties-data.html>. Key strategies include:

- **Prevention:** Reducing the occurrence of Substance Use Disorder (including opioid misuse) and fatal substance-related overdoses through community and provider education and harm reduction measures, such as the strategic placement of overdose reversing devices;
- **Treatment:** Implementing or expanding access to evidence-based treatment practices for Substance Use Disorder (including opioid misuse), such as medication-assisted treatment (MAT); and
- **Recovery:** Expanding peer recovery and treatment options that help people start and stay in recovery.

State Director and Administrator discretionary points will be awarded to applications that address these Agency Goals.

Paperwork Reduction Act

The paperwork burden has been cleared by the Office of Management and Budget (OMB) under OMB Control Number 0575-0198.

National Environmental Policy Act

All recipients under this Notice are subject to the requirements of 7 CFR part 1970. However, awards for technical assistance and training under this Notice are classified as a Categorical Exclusion according to 7 CFR 1970.53(b), and usually do not require any additional documentation. The Agency will review each grant application to determine its compliance

with 7 CFR part 1970. The applicant may be asked to provide additional information or documentation to assist the Agency with this determination.

Executive Order (E.O.) 13175 Consultation and Coordination With Indian Tribal Governments

This Executive Order imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development has determined that this Notice does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Thus, this Notice is not subject to the requirements of Executive Order 13175. Tribal Consultation inquiries and comments should be directed to RD's Native American Coordinator at aian@wdc.usda.gov or (720) 544-2911.

Overview

Federal Agency: Rural Housing Service.

Funding Opportunity Title: Community Facilities Technical Assistance and Training Grant.

Announcement Type: Notice of Solicitation of Applications (NOSA).

Catalog of Federal Domestic Assistance Number: 10.766.

Dates: To apply for funds, the Agency must receive mailed-in applications by 5:00 p.m. Eastern Daylight Time on June 17, 2019. Electronic applications must be submitted via grants.gov by Midnight Eastern time on June 10, 2019. The Agency will not consider any application received after this deadline. Prior to official submission of applications, applicants may request technical assistance or other application guidance from the Agency, as long as such requests are made prior to June 5, 2019. Technical assistance is not meant to be an analysis or assessment of the quality of the materials submitted, a substitute for agency review of completed applications, nor a determination of eligibility, if such determination requires in-depth analysis. The Agency will not solicit or consider scoring or eligibility information that is submitted after the application deadline. The Agency reserves the right to contact applicants to seek clarification information on materials contained in the submitted application.

Availability of Notice: This Notice is available through the USDA Rural Development site at: <https://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas>.

I. Funding Opportunity Description

A. Purpose

Congress authorized the Community Facilities Technical Assistance and Training Grant program in Title VI, Section 6006 of the Agricultural Act of 2014 (Pub. L. 113-79). Program regulations can be found at 7 CFR part 3570, subpart F, which are incorporated by reference in this Notice. The purpose of this Notice is to seek applications from entities that will provide technical assistance and/or training with respect to essential community facilities programs. It is the intent of this program to assist entities in rural areas in accessing funding under the Rural Housing Service's Community Facilities Programs in accordance with 7 CFR part 3570, subpart F. Funding priority will be made to private, nonprofit or public organizations that have experience in providing technical assistance and training to rural entities.

II. Award Information

Type of Awards: Grants will be made to eligible entities who will then provide technical assistance and/or training to eligible ultimate recipients.

Fiscal Year Funds: FY 2019 Technical Assistance Training (TAT) Grant funds.

Available Funds: The Agency is publishing the amount of funding received in the appropriations act on its website at <https://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas>. Up to ten percent of the available funds may be awarded to the highest scoring Ultimate Recipient(s) as long as they score a minimum score of at least 70.

Award Amounts: Grant awards for Technical Assistance Providers assisting Ultimate Recipients within one state may not exceed \$150,000. Grant awards made to Ultimate Recipients will not exceed \$50,000. The Agency reserves the right to reduce funding amounts based on the Agency's determination of available funding or other Agency funding priorities.

Award Dates: Awards will be made from available funding on or before September 15, 2019.

III. Eligibility Information

Both the applicant and the use of funds must meet eligibility requirements. The applicant eligibility requirements can be found at 7 CFR 3570.262. Eligible project purposes can be found at 7 CFR 3570.263. Ineligible project purposes can be found at 7 CFR 3570.264. Restrictions substantially similar to Sections 743, 744, 745, and 746 of the Consolidated Appropriations Act, 2016 (Pub. L. 114-113) will apply

unless noted on the Rural Development website (<https://www.rd.usda.gov/programs-services/community-facilities-technical-assistance-and-training-grant>). Any corporation (i) that has been convicted of a felony criminal violation under any Federal law within the past 24 months or (ii) that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, is not eligible for financial assistance provided with funds, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government. In addition, none of the funds appropriated or otherwise made available by this or any other Act may be available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. Additionally, no funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection."

IV. Application and Submission Information

The requirements for submitting an application can be found at 7 CFR 3570.267. All Applicants can access application materials at <http://www.grants.gov>. Applications must be received by the Agency by the due date

listed in the **DATES** section of this Notice. Applications received after that due date will not be considered for funding. Paper copies of the applications will be submitted to the State Office in which the applicant is headquartered. Electronic submissions should be submitted at <http://www.grants.gov>. A listing of the Rural Development State Offices may be found at https://www.rd.usda.gov/files/CF_State_Office_Contacts.pdf. For applicants whose headquarters are in the District of Columbia, they will submit their application to the National Office in care of Shirley Stevenson, 1400 Independence Ave. SW, STOP 0787, Room 0175-S, Washington, DC 20250. Both paper and electronic applications must be received by the Agency by the deadlines stated in the **DATES** section of this Notice. The use of a courier and package tracking for paper applications is strongly encouraged. An applicant can only submit one application for funding.

Application information for electronic submissions may be found at <http://www.grants.gov>.

Applications will not be accepted via FAX or electronic email.

V. Application Processing

Applications will be processed and scored in accordance with this NOSA and 7 CFR 3570.273. Those applications receiving the highest points using the scoring factors found at 7 CFR 3570.273 will be selected for funding. Up to 10% of the available funds may be awarded to the highest scoring Ultimate Recipient(s) as long as they score a minimum score of at least 70. In the case of a tie, the first tie breaker will go to the applicant who scores the highest on matching funds. If two or more applications are still tied after using this tie breaker, the next tie breaker will go to the applicant who scores the highest in the multi-jurisdictional category.

Once the successful applicants are announced, the State Office will be responsible for obligating the grant funds, executing all obligation documents, and the grant agreement, as provided by the agency.

VI. Federal Award Administration Information

1. Federal Award Notice. Within the limit of funds available for such purpose, the awarding official of the Agency shall make grants in ranked order to eligible applicants under the procedures set forth in this Notice and the grant regulation 7 CFR 3570, subpart F.

Successful applicants will receive a letter in the mail containing instructions

on requirements necessary to proceed with execution and performance of the award. This letter is not an authorization to begin performance. In addition, selected applicants will be requested to verify that components of the application have not changed at the time of selection and on the award date, if requested by the Agency.

The award is not approved until all information has been verified, and the awarding official of the Agency has signed Form RD 1940-1, "Request for Obligation of Funds" and the grant agreement.

Unsuccessful and ineligible applicants will receive written notification of their review and appeal rights.

2. Administrative and National Policy Requirements. Grantees will be required to do the following:

(a) Execute a Grant Agreement.

(b) Execute Form RD 1940-1.

(c) Use Form SF 270, "Request for Advance or Reimbursement" to request reimbursement. Provide receipts for expenditures, timesheets, and any other documentation to support the request for reimbursement.

(d) Provide financial status and project performance reports as set forth at 7 CFR 3570.276.

(e) Maintain a financial management system that is acceptable to the Agency.

(f) Ensure that records are maintained to document all activities and expenditures utilizing CF TAT grant funds and any matching funds, if applicable. Receipts for expenditures will be included in this documentation.

(g) Provide audits or financial information as set forth in 7 CFR 3570.277.

(h) Complete Form 400-4, "Assurance Agreement." Each prospective recipient must sign Form RD 400-4, Assurance Agreement, which assures USDA that the recipient is in compliance with Title VI of the Civil Rights Act of 1964, 7 CFR part 15 and other Agency regulations. It also assures that no person will be discriminated against based on race, color or national origin, in regard to any program or activity for which the lender receives Federal financial assistance. Finally, it assures that nondiscrimination statements are in the recipient's advertisements and brochures.

(i) Collect and maintain data provided by ultimate recipients on race, sex, and national origin and ensure Ultimate Recipients collect and maintain this data. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity,"

(62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be available upon request by the Agency.

(j) Provide a final performance report as set forth at 7 CFR 3570.276(a)(7).

(k) Identify and report any association or relationship with Rural Development employees.

(l) The applicant and the ultimate recipient must comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, Age Discrimination Act of 1975, Executive Order 12250, Executive Order 13166 Limited English Proficiency (LEP), and 7 CFR part 1901, subpart E. The grantee must comply with policies, guidance, and requirements as described in the following applicable Code of Federal Regulations and any successor regulations:

(1) 2 CFR parts 200 and 400 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards).

(2) 2 CFR parts 417 and 180 (Government-wide Debarment and Suspension (Nonprocurement)).

(m) Form AD-3031, "Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants" must be signed by corporate applicants who receive an award under this Notice.

3. Reporting.

Reporting requirements for this grant as set forth at 7 CFR 3570.276.

VII. Federal Awarding Agency Contact

Contact the Rural Development state office in the state where the applicant's headquarters is located. A list of Rural Development State Offices can be found at: https://www.rd.usda.gov/files/CF_State_Office_Contacts.pdf. For Applicants located in Washington DC, please contact Shirley Stevenson at (202) 205-9685 or via email at Shirley.Stevenson@wdc.usda.gov.

VIII. Nondiscrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/

parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.ascr.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

- (1) *By mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250-9410;
- (2) *Fax:* (202) 690-7442; or
- (3) *Email:* program.intake@usda.gov.

Richard A. Davis,

Acting Administrator, Rural Housing Service.

[FR Doc. 2019-06203 Filed 3-29-19; 8:45 am]

BILLING CODE 3410-XV-P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Rural Utilities Service (RUS) invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Thomas Dickson, Rural Development Innovation Center—Regulatory Team, U.S. Department of Agriculture, 1400

Independence Avenue SW, STOP 1522, Washington, DC 20250, Telephone: 202-690-4492, email: thomas.dickson@usda.gov.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for extension.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Thomas Dickson, Rural Development Innovation Center—Regulatory Team, U.S. Department of Agriculture, 1400 Independence Avenue SW, STOP 1522, Washington, DC 20250, Telephone: 202-690-4492, email: thomas.dickson@usda.gov.

Title: Wholesale Contracts for the Purchase and Sale of Electric Power
OMB Control Number: 0572-0089.

Type of Request: Extension of a currently approved information collection.

Abstract: Most RUS financed electric systems are cooperatives and are organized in a two-tiered structure. Retail customers are members of the distribution system that provides electricity to their homes and business. Distribution cooperatives, in turn, are members of power supply cooperatives, also known as generation and transmission cooperatives (G&T's) that generate or purchase power and transmit the power to the distribution systems.

For a distribution system, a lien on the borrower's assets generally represents adequate security. However, since most G&T revenues flow from its distribution members, RUS requires, as

a condition of a loan or loan guarantee to a G&T the long-term requirements wholesale power contract (WPC) to purchase their power from the G&T at rates that cover all the G&T's expenses, including debt service and margins. RUS considers Form 444 as an example for the G&T's to utilize as either their WPC or create their own WPC if it has all the same information as the form. The WPC is specialized based on the combined requirements of the G&T and its members. The WPC is used by RUS G&T borrowers to enter into agreement with their distribution members for purchase of power from the G&T. The WPC is prepared and executed by the G&T and each member and by RUS and the information allows RUS to determine credit quality and credit worthiness to determine repayment ability for loans and loan guarantees.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 6 hours per response.

Respondents: Small business or other for-profit; not-for-profit organizations.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 60 hours.

Copies of this information collection can be obtained from Diane M. Berger, Rural Development Innovation Center—Regulatory Team, (715) 619-3124.

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.

Bette B. Brand,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2019-06202 Filed 3-29-19; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Louisiana Advisory Committee To Discuss Civil Rights Topics in Louisiana

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Louisiana Advisory Committee (Committee) will hold a meeting on Tuesday, April 23, 2019, at 2:00:00 p.m. Central for a discussion on civil rights topics in Louisiana.

DATES: The meeting will be held on Tuesday, April 23, 2019, at 2:00 p.m. Central.

Public Call Information: Dial: 800-458-4148, Conference ID: 3056705.

FOR FURTHER INFORMATION CONTACT: David Barreras, DFO, at dbarreras@usccr.gov or 312-353-8311.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number: 800-458-4148, conference ID: 3056705. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-977-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Midwestern Regional Office, U.S. Commission on Civil Rights, 230 S Dearborn St., Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353-8324 or emailed to David Barreras at dbarreras@usccr.gov. Persons who desire additional information may contact the Midwestern Regional Office at (312) 353-8311.

Records generated from this meeting may be inspected and reproduced at the Midwestern Regional Office, as they become available, both before and after the meeting. Records of the meeting will be available via www.facadatabase.gov under the Commission on Civil Rights, Louisiana Advisory Committee link (<http://www.facadatabase.gov/committee/committee.aspx?cid=251&aid=17>). Persons interested in the work of this Committee are directed to the Commission's website, <http://www.usccr.gov>, or may contact the

Midwestern Regional Office at the above email or street address.

Agenda

Welcome and Roll Call
Discussion of civil rights topics in Louisiana
Next Steps
Public Comment
Adjournment

Dated: March 26, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019-06198 Filed 3-29-19; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Montana Advisory Committee

AGENCY: U.S. Commission on Civil Rights

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a meeting of the Montana Advisory Committee (Committee) to the Commission will be held at 12:00 p.m. (Mountain Time) Tuesday, April 9, 2019. The purpose of the meeting is for the Committee to discuss the Bordertown Discrimination Report.

DATES: The meeting will be held on Tuesday, April 9, 2019 at 12:00 p.m. MT.

Public Call Information: Dial: 877-260-1479, Conference ID: 6276680.

FOR FURTHER INFORMATION CONTACT: David Barreras at dbarreras@usccr.gov or (312) 353-8311.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 877-260-1479, conference ID number: 6276680. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period

at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012. They may be faxed to the Commission at (213) 894-0508, or emailed Angelica Trevino at atrevino@usccr.gov. Persons who desire additional information may contact the Regional Programs Unit at (213) 894-3437.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at <https://facadatabase.gov/committee/meetings.aspx?cid=259>. Please click on the "Meeting Details" and "Documents" links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, <https://www.usccr.gov>, or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome and Rollcall
II. Discussion
III. Next Steps
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 circumstance of staffing limitations that require immediate action.

Dated: March 26, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019-06197 Filed 3-29-19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-18-2019]

Foreign-Trade Zone (FTZ) 47—Boone County, Kentucky; Notification of Proposed Production Activity; BWF America, Inc. (Textile/Felt Filter Bags and Other Filter Products for Industrial Use), Hebron, Kentucky

The Greater Cincinnati Foreign Trade Zone, Inc., grantee of FTZ 47, submitted

a notification of proposed production activity to the FTZ Board on behalf of BWF America, Inc. (BWF), located in Hebron, Kentucky. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on March 21, 2019.

The applicant indicates that it will be submitting a separate application for FTZ designation at the BWF facility under FTZ 47. The facility is used for the production of textile/felt filter bags and other filter products for industrial applications. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt BWF 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, BWF would be able to choose the duty rate during customs entry procedures that applies to textile/felt industrial filter bags, press filters, drum filters, press covers, filter belts, and filter discs (duty rate 3.8%). BWF 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: Hydrated lime with fluorescent pigment tracing powder; plastic laminated film seam tape; textile rollers/rings (polyester fibers needled together and rolled into circular forms); fiberglass rolled goods (woven textile fiberglass with a polytetrafluorethylene (PTFE) membrane film laminated as a top layer on the material); and, stainless steel wire cages (wire frames used in air filtration to support the filtration bags). Foreign-sourced components also include fiberglass thread and rolled felt of polyester, polyphenylene sulfide, aramid, polyimide, PTFE, and acrylic, each of which can have any one or more combinations of the following coatings/finishes (for the purposes of product performance—primarily heat and speed of emissions)—mechanical: singe, glaze; chemical: bath treatments, Teflon, acrylic, fluorocarbon, silicone; and, lamination: PTFE and PTFE membrane. The duty rates on components/materials range from duty-free to 10.6%. 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 May 13, 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: March 25, 2019.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2019-06215 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Technical Advisory Committees; Notice of Recruitment of Members

SUMMARY: The Bureau of Industry and Security (BIS), Department of Commerce is announcing its recruitment of candidates to serve on one of its seven Technical Advisory Committees ("TACs" or "Committees"). TAC members advise the Department of Commerce on the technical parameters for export controls applicable to dual-use items (commodities, software, and technology) and on the administration of those controls. The TACs are composed of representatives from industry, academia, and the U.S. Government and reflect diverse points of view on the concerns of the exporting community. Industry representatives are selected from firms producing a broad range of items currently controlled for national security, non-proliferation, foreign policy, and short supply reasons or that are proposed for such controls. Representation from the private sector is balanced to the extent possible among large and small firms.

Six TACs are responsible for advising the Department of Commerce on the technical parameters for export controls and the administration of those controls within specified areas: Information

Systems TAC: Control List Categories 3 (electronics), 4 (computers), and 5 (telecommunications and information security); Materials TAC: Control List Category 1 (materials, chemicals, microorganisms, and toxins); Materials Processing Equipment TAC: Control List Category 2 (materials processing); Sensors and Instrumentation TAC: Control List Category 6 (sensors and lasers); Transportation and Related Equipment TAC: Control List Categories 7 (navigation and avionics), 8 (marine), and 9 (propulsion systems, space vehicles, and related equipment); and the Emerging Technology TAC (identification of emerging and foundational technologies that may be developed over a period of five to ten years with potential dual-use applications). The seventh TAC, the Regulations and Procedures TAC, focuses on the Export Administration Regulations (EAR) and procedures for implementing the EAR.

TAC members are appointed by the Secretary of Commerce and serve terms of not more than four consecutive years. TAC members must obtain secret-level clearances prior to their appointment. These clearances are necessary so that members may be permitted access to classified information that may be needed to formulate recommendations to the Department of Commerce. Applicants are strongly encouraged to review materials and information on each Committee website, including the Committee's charter, to gain an understanding of each Committee's responsibilities, matters on which the Committee will provide recommendations, and expectations for members. Members of any of the seven TACs may not be registered as foreign agents under the Foreign Agents Registration Act. No TAC member may represent a company that is majority owned or controlled by a foreign government entity (or foreign government entities). TAC members will not be compensated for their services or reimbursed for their travel expenses.

If you are interested in becoming a TAC member, please provide the following information: 1. Name of applicant; 2. affirmation of U.S. citizenship; 3. organizational affiliation and title, as appropriate; 4. mailing address; 5. work telephone number; 6. email address; 7. summary of qualifications for membership; 8. an affirmative statement that the candidate will be able to meet the expected commitments of Committee work. Committee work includes: (a) Attending in-person/teleconference Committee meetings roughly four times per year (lasting 1-2 days each); (b) undertaking

additional work outside of full Committee meetings including subcommittee conference calls or meetings as needed, and (c) frequently drafting, preparing or commenting on proposed recommendations to be evaluated at Committee meetings. Finally, candidates must provide an affirmative statement that they meet all Committee eligibility requirements.

The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Advisory Committee membership.

To respond to this recruitment notice, please send a copy of your resume to Ms. Yvette Springer at Yvette.Springer@bis.doc.gov.

Deadline: This Notice of Recruitment will be open for one year from its date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Yvette Springer on (202) 482-2813.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2019-06239 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-JT-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on Tuesday, April 30, 2019, 9:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues NW, Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Open Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the

conference, submit inquiries to Ms. Yvette Springer at Yvette.Springer@bis.doc.gov no later than April 23, 2019.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on March 12, 2019 pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d)), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482-2813.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2019-06240 Filed 3-29-19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Arnoldo Antonio Arredondo, Inmate Number: 23611-479, FCI Beaumont Medium, Federal Correctional Institution, P.O. Box 26040, Beaumont, TX 77720; Order Denying Export Privileges

On November 28, 2017, in the U.S. District Court for the Southern District of Texas, Arnoldo Antonio Arredondo (“Arredondo”) was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (“AECA”). Arredondo was convicted of violating Section 38 of the AECA by conspiring and agreeing with others to knowingly and willfully export and cause to be exported, from the United States to Mexico, .223 caliber rifles, which were designated as defense articles on the United States Munitions List, without the required U.S. Department of State licenses. Arredondo was sentenced to 46 months in prison,

three years of supervised release, and an assessment of \$100.

The Export Administration Regulations (“EAR” or “Regulations”) are administered and enforced by the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”).¹ Section 766.25 of the Regulations provides, in pertinent part, that the “Director of [BIS’s] Office of Exporter Services, in consultation with the Director of [BIS’s] Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of . . . section 38 of the Arms Export Control Act (22 U.S.C. 2778).” 15 CFR 766.25(a). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d).² In addition, pursuant to Section 750.8 of the Regulations, BIS’s Office of Exporter Services may revoke any BIS-issued licenses in which the person had an interest at the time of his/her conviction.³

BIS has received notice of Arredondo’s conviction for violating Section 38 of the AECA, and has provided notice and an opportunity for Arredondo to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Arredondo.

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its

¹ The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730-774 (2018). The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601-4623 (Supp. III 2015) (“EAA”), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 8, 2018 (83 FR 39,871 (Aug. 13, 2018)), continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (“IEEPA”). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, Title XVII, Subtitle B of Public Law 115-232, 132 Stat. 2208 (“ECRA”). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA’s date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

² See also Section 11(h) of the EAA, 50 U.S.C. 4610(h) (Supp. III 2015); Sections 1760(e) and 1768 of ECRA, Title XVII, Subtitle B of Public Law 115-232, 132 Stat. 2208, 2225 and 2233 (Aug. 13, 2018); and note 1, *supra*.

³ See notes 1 and 2, *supra*.

Director, and the facts available to BIS, I have decided to deny Arredondo's export privileges under the Regulations for a period of 10 years from the date of Arredondo's conviction. I have also decided to revoke all BIS-issued licenses in which Arredondo had an interest at the time of his conviction.

Accordingly, it is hereby *ordered*:

First, from the date of this Order until November 28, 2027, Arnoldo Antonio Arredondo, with a last known address of Inmate Number: 23611-479, FCI Beaumont Medium, Federal Correctional Institution, P.O. Box 26040, Beaumont, TX 77720, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives ("the Denied Person"), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that

has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Arredondo by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Arredondo may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Arredondo and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until November 28, 2027.

Issued this 25th day of March, 2019.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019-06186 Filed 3-29-19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Mohan L. Nirala, 8005 Moss Bank Drive, Laurel, MD 20724; Order Denying Export Privileges

On March 13, 2017, in the U.S. District Court for the Eastern District of Virginia, Mohan L. Nirala ("Nirala") was convicted of violating Section 793(e) of the Espionage Act (18 U.S.C.

792-799 (2012)) ("the Espionage Act"). Nirala was convicted of having unauthorized possession of a document relating to the national defense, namely, a forty-seven page classified document containing emails, exhibits, and PowerPoint slides, each individually marked as being classified, and willfully retaining the document and failing to deliver it to the officer and employee of the United States entitled to receive it. Nirala was sentenced to twelve (12) months and one (1) day in prison, supervised released for one (1) year and an assessment of \$100.

The Export Administration Regulations ("EAR" or "Regulations") are administered and enforced by the U.S. Department of Commerce's Bureau of Industry and Security ("BIS").¹ Section 766.25 of the Regulations provides, in pertinent part, that the "Director of [BIS's] Office of Exporter Services, in consultation with the Director of [BIS's] Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of . . . 18 U.S.C. 793, 794 or 798." 15 CFR 766.25(a). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d).² In addition, pursuant to Section 750.8 of the Regulations, BIS's Office of Exporter Services may revoke any BIS-issued licenses in which the

¹ The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730-774 (2018). The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601-4623 (Supp. III 2015) ("EAA"), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 8, 2018 (83 FR 39,871 (Aug. 13, 2018)), continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) ("IEEPA"). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, Title XVII, Subtitle B of Public Law 115-232, 132 Stat. 2208 ("ECRA"). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

² See also Section 11(h) of the EAA, 50 U.S.C. 4610(h) (Supp. III 2015); Sections 1760(e) and 1768 of ECRA, Title XVII, Subtitle B of Public Law 115-232, 132 Stat. 2208, 2225 and 2233 (Aug. 13, 2018); and note 1, *supra*.

person had an interest at the time of his/her conviction.³

BIS has received notice of Nirala's conviction for violating the Espionage Act, and has provided notice and an opportunity for Nirala to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has received a submission from Nirala.

Based upon my review of the record, including Nirala's submission and the facts available to BIS, and my consultations with BIS's Office of Export Enforcement, including its Director, I have decided to deny Nirala's export privileges under the Regulations for a period of 10 years from the date of Nirala's conviction. I have also decided to revoke all BIS-issued licenses in which Nirala had an interest at the time of his conviction.

Accordingly, it is hereby *ordered*:

First, from the date of this Order until March 13, 2027, Mohan L. Nirala, with a last known address of 8005 Moss Bank Drive, Laurel, MD 20724, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives ("the Denied Person"), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item

subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Nirala by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Nirala may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Nirala and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until March 13, 2027.

Issued this 25th day of March, 2019.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019-06185 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-092]

Mattresses From the People's Republic of China: Postponement of Preliminary Determination in the Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Lilit Astvatsatrian at (202) 482-6412 or Stephen Bailey at (202) 482-0193, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On October 17, 2018, the Department of Commerce (Commerce) initiated a less-than-fair-value (LTFV) investigation of imports of mattresses from the People's Republic of China.¹ Currently, the preliminary determination is due no later than April 8, 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 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, the revised deadline for the preliminary determination of this investigation became April 8, 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 an 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 than 190 days after the date on which

¹ See *Mattresses from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 83 FR 52386 (October 17, 2018) (*Initiation Notice*).

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 See notes 1 and 2, *supra*.

Commerce initiated the investigation if: (A) The petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, and determines 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 March 7, 2019, the petitioners³ in the mattresses LTFV investigation submitted a timely request that Commerce postpone the preliminary determination in the investigation to the maximum extent permitted under the statute.⁴ The petitioners requested the postponement to provide Commerce, and the petitioners, time to review questionnaire responses and identify deficiencies within those responses, and to provide time for Commerce to issue, and receive responses to, supplemental questionnaires prior to the preliminary determination.⁵

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 in the mattresses LTFV investigation by 50 days (*i.e.*, until 190 days after the date on which this investigation was initiated, plus 40 days for tolling). As a result, Commerce will issue its preliminary determination in the mattress LTFV investigation no later than May 28, 2019. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination in 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: March 27, 2019.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019-06214 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) and the International Trade Commission automatically initiate and conduct reviews to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for May 2019

Pursuant to section 751(c) of the Act, the following Sunset Reviews are scheduled for initiation in May 2019 and will appear in that month's *Notice of Initiation of Five-Year Sunset Reviews* (Sunset Review).

	Department contact
Antidumping Duty Proceedings	
Light-Walled Rectangular Pipe and Tube from China (A-570-914) (2nd Review)	Jacqueline Arrowsmith (202) 482-5255.
Prestressed Concrete Steel Rail Tie Wire from China (A-570-990) (1st Review)	Joshua Poole (202) 482-1293.
Small Diameter Graphic Electrodes from China (A-570-929) (2nd Review)	Joshua Poole (202) 482-1293.
Light-Walled Rectangular Pipe and Tube from Mexico (A-201-836) (2nd Review)	Jacqueline Arrowsmith (202) 482-5255.
Prestressed Concrete Steel Rail Tie Wire from Mexico (A-201-843) (1st Review)	Joshua Poole (202) 482-1293.
Light-Walled Rectangular Pipe and Tube from South Korea (A-580-859) (2nd Review)	Jacqueline Arrowsmith (202) 482-5255.
Light-Walled Rectangular Pipe and Tube from Turkey (A-489-815) (2nd Review)	Jacqueline Arrowsmith (202) 482-5255.
Countervailing Duty Proceedings	
Light-Walled Rectangular Pipe and Tube from China (C-570-915) (2nd Review)	Joshua Poole (202) 482-1293.
Suspended Investigations	
No Sunset Reviews of suspended investigations are scheduled for initiation in May 2019.	

Commerce's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. The *Notice of Initiation of Five-Year (Sunset) Review* provides further information regarding what is required of all parties to participate in Sunset Review.

Pursuant to 19 CFR 351.103(c), Commerce will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact Commerce in writing within 10

days of the publication of the Notice of Initiation.

Please note that if Commerce receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue.

³ The petitioner is the Corsicana Mattress Company, Elite Comfort Solutions, Future Foam Inc., FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, Serta Simmons

Bedding, LLC, and Tempur Sealy International, Inc. (collectively, the petitioners).

⁴ See Letter from the petitioners, "Mattresses from the People's Republic of China: Petitioners' Request

to Postpone the Antidumping Investigation Preliminary Determination," dated March 7, 2019.

⁵ *Id.*

Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: March 27, 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. 2019-06218 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

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 January anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

DATES: Applicable April 1, 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 January anniversary dates. With respect to the antidumping duty and countervailing duty orders on certain softwood lumber from Canada, the initiation of the antidumping duty and countervailing duty administrative reviews for these orders will be published in a separate initiation notice.

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, except for the administrative review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China (China), 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.

Respondent Selection—Wooden Bedroom Furniture From China

In the event that Commerce limits the number of respondents for individual examination in the antidumping duty administrative review of wooden bedroom furniture from China, for the purposes of this segment of the proceeding, i.e., the 2018 review period, Commerce intends to select respondents based on volume data contained in responses to a Q&V questionnaire. All parties are hereby notified that they must timely respond to the Q&V questionnaire. Commerce's Q&V questionnaire along with certain additional questions will be available in a document package on Commerce's website at <https://enforcement.trade.gov/download/prc-wbf/index.html> on the date this notice is published. The responses to the Q&V questionnaire should be filed with the respondents' Separate Rate Application or Separate Rate Certification (see the Separate Rates section below) and their response to the additional questions and must be received by Commerce by no later than 30 days after publication of this notice. Please be advised that due

¹ See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

to the time constraints imposed by the statutory and regulatory deadlines for antidumping duty administrative reviews, Commerce does not intend to grant any extensions for the submission of responses to the Q&V questionnaire.

Welded Line Pipe From Korea— Correction to December Initiation Notice

In the March 14, 2019, notice of initiation of the administrative review of the antidumping duty order on welded line pipe from Korea covering the period 12/01/2017–11/30/2018,² we inadvertently initiated on the following companies: BDP International, Inc. and Kelly Pipe Co., LLC. We note that the addresses provided for these companies are in the United States. Therefore, absent evidence that these companies produced and/or exported subject merchandise, they are not included in this review.

Welded Line Pipe From Turkey— Correction to December Initiation Notice

In the March 14, 2019, notice of initiation of the administrative review of the antidumping duty order on welded line pipe from Turkey covering the period 12/01/2017–11/30/2018,³ Cayirova Boru Sanayi ve Ticaret A.S. was misspelled.

Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates— Correction to December Initiation Notice

In the March 14, 2019, notice of initiation of the administrative review of the antidumping duty order on circular welded carbon-quality steel pipe from the United Arab Emirates covering the period 12/01/2017–11/30/2018,⁴ we inadvertently initiated on the following companies: Al Jazeera Steel Products Co. SAOG (Al Jazeera), Prime Metal Corp. USA, and UTP Pipe Corp. USA. Although domestic interested parties requested a review of these companies, Al Jazeera notified Commerce that it is located in the Sultanate of Oman and is an Omani producer and exporter of certain welded carbon steel pipe, and the addresses provided for Prime Metal Corp. USA, and UTP Pipe Corp. USA are in the United States. Therefore, absent evidence that these companies produced and/or exported subject merchandise, we are not including them in this review. Further, Conares Metal Supply Ltd. was misspelled. Finally, we

inadvertently did not list K.D. Industries Inc.

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.⁵ 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 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. In addition, all firms that wish to qualify for separate-rate status in the antidumping duty administrative review of wooden bedroom furniture from China must complete, as appropriate, either a separate-rate certification or application, as described below, and respond to the additional questions and the Q&V questionnaire on Commerce’s website at <https://enforcement.trade.gov/download/prc-wbfi/index.html>. 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/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. For the antidumping duty administrative review of wooden bedroom furniture from China, Separate Rate Certifications, as well as a response to the Q&V questionnaire and the additional questions in the document package, are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The

² See 84 FR 9297.

³ See *id.*

⁴ See *id.*

⁵ See Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

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 proceeding⁶ 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,⁷ 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 of publication of this **Federal Register** notice. For the antidumping duty administrative review of wooden bedroom furniture from China, Separate Rate Status Applications, as well as a response to the Q&V questionnaire and the additional questions in the document package, are due to Commerce no later than 30 calendar days after 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.

Furthermore, this notice constitutes public notification to all firms for which an antidumping duty administrative review of wooden bedroom furniture from China has been requested, and that are seeking separate rate status in the review, that they must submit a timely

separate rate application or certification (as appropriate) as described above, and a timely response to the Q&V questionnaire and the additional questions in the document package on Commerce’s website in order to receive consideration for separate-rate status. In other words, Commerce will not give consideration to any timely separate rate certification or application made by parties who failed to respond in a timely manner to the Q&V questionnaire and the additional questions. All information submitted by respondents in the antidumping duty administrative review of wooden bedroom furniture from China is subject to verification. As noted above, the separate rate certification, the separate rate application, the Q&V questionnaire, and the additional questions will be available on Commerce’s website on the date of publication of this notice in the **Federal Register**.

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. We intend to issue the final results of these reviews not later than January 31, 2020.

	Period to be reviewed
Antidumping Duty Proceedings	
THAILAND: Prestressed Concrete Steel Wire Strand A–549–820 The Siam Industrial Wire Co., Ltd.	1/1/18–12/31/18
THE PEOPLE’S REPUBLIC OF CHINA: Hardwood Plywood Products A–570–051 Anhui Hoda Wood Co., Ltd. Celtic Co., Ltd. Cosco Star International Co., Ltd. Feixian Longteng Wood Co., Ltd. Golder International Trade Co., Ltd. Happy Wood Industrial Group Co., Ltd. Highland Industries—Hanlin. Huainan Mengping Import and Export Co., Ltd. Jiangsu High Hope Arser Co., Ltd. Jiangsu Sunwell Cabinetry Co., Ltd. Jiangsu Top Point International Co., Ltd. Jiaxing Gsun Imp. & Exp. Co., Ltd. Jiaxing Hengtong Wood Co., Ltd. Lianyungang Yuantai International Trade Co., Ltd. Linyi Bomei Furniture Co., Ltd. Linyi Chengen Import and Export Co., Ltd. Linyi City Dongfang Jinxin Economic and Trade Co., Ltd. (a/k/a Linyi City Dongfang Jinxin Economic and Trade Co., Ltd.) Linyi Dahua Wood Co., Ltd. Linyi Evergreen Wood Co., Ltd. Linyi Glary Plywood Co., Ltd. Linyi Hengsheng Wood Industry Co., Ltd. Linyi Huasheng Yongbin Wood Co., Ltd. Linyi Jiahe Wood Industry Co., Ltd. Linyi Linhai Wood Co., Ltd. Linyi Mingzhu Wood Co., Ltd.	6/23/17–12/31/18

⁶ 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.

⁷ 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.

	Period to be reviewed
Linyi Sanfortune Wood Co., Ltd. Pingyi Jinniu Wood Co., Ltd. Qingdao Top P&Q International Corp. Qingdao Good Faith Import and Export Co., Ltd. Qingdao Top P&Q International Corp. SAICG International Trading Co., Ltd. Shandong Dongfang Bayley Wood Co., Ltd. Shandong Jinhua International Trading Co., Ltd. Shandong Jinluda International Trade Co., Ltd. Shandong Qishan International Trading Co., Ltd. Shandong Senmanqi Import & Export Co., Ltd. Shandong Shengdi International Trading Co., Ltd. Shanghai Brightwood Trading Co., Ltd. Shanghai Futuwood Trading Co., Ltd. Shanghai Luli Trading Co., Ltd. Suining Pengxiang Wood Co., Ltd. Sumec International Technology Co., Ltd. Suqian Hopeway International Trade Co., Ltd. Suzhou Fengshuwan Import and Export Trade Co., Ltd. a/k/a Suzhou Fengshuwan I&E Trade Co., Ltd. Suzhou Oriental Dragon Import and Export Co., Ltd. Vietnam Finewood Company Limited. Win Faith Trading Limited. Xuzhou Amish Import & Export Co., Ltd. Xuzhou Andefu Wood Co., Ltd. Xuzhou DNT Commercial Co., Ltd. Xuzhou Jiangheng Wood Products Co., Ltd. Xuzhou Jiangyang Wood Industries Co., Ltd. Xuzhou Longyuan Wood Industry Co., Ltd. XuZhou PinLin International Trade Co., Ltd. Xuzhou Shengping Imp and Exp Co., Ltd. Xuzhou Timber International Trade Co., Ltd. Yishui Zelin Wood Made Co., Ltd. Zhejiang Dehua TB Import & Export Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Multilayered Wood Flooring ⁸ A-570-970	12/1/17-11/30/18
Dalian Penghong Floor Products Co., Ltd. Dunhua City Dexin Wood Industry Co., Ltd. Huilong Wooden Products Co., Ltd. Karly Wood Product Limited. Yingyi-Nature (Kunshan) Wood Industry Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Cased Pencils ⁹ A-570-827	12/1/17-11/30/18
THE PEOPLE'S REPUBLIC OF CHINA: Potassium Permanganate A-570-001	1/1/18-12/31/18
Chongqing Changyan Group Limited. Pacific Accelerator Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Wooden Bedroom Furniture A-570-890	1/1/18-12/31/18
Billionworth Enterprises Ltd. Carven Industries Ltd. (BVI). Carven Industries Ltd. (HK). Dongguan Chengcheng Group Co., Ltd. Dongguan Fortune Furniture Ltd. Dongguan Mu Si Furniture Co., Ltd. Dongguan Nova Furniture Co., Ltd. Dongguan Singways Furniture Co., Ltd. Dongguan Sunrise Furniture Co. Dongguan Sunrise Furniture Co., Ltd. Dongguan Sunshine Furniture Co., Ltd. Dongguan Yongpeng Furniture Co., Ltd. Dongguan Yujia Furniture Co., Ltd. Dongguan Zhenxin Furniture Co., Ltd. Dongguan Zhisheng Furniture Co., Ltd. Dorbest Ltd. Dream Rooms Furniture (Shanghai) Co. Ltd. Eurosa (Kunshan) Co., Ltd. Eurosa Furniture Co., (PTE) Ltd. Fairmont Designs. Fine Furniture (Shanghai) Ltd. Fleetwood Fine Furniture LP. Fortune Glory Industrial, Ltd. (HK Ltd.). Fortune Glory Industrial Ltd. (H.K. Ltd.). Fortune Furniture Ltd. Fujian Lianfu Forestry Co., Ltd. (Aka Fujian Wonder Pacific, Inc.). Fuzhou Huan Mei Furniture Co., Ltd. Golden Lion International Trading Ltd. Golden Well International (HK), Ltd./Producer: Zhangzhou XYM Furniture Product Co., Ltd. Guangdong New Four Seas Furniture Manufacturing Ltd.	

Period to be reviewed

Guangdong Yihua Timber Industry Co., Ltd.
 Guangzhou Lucky Furniture Co., Ltd.
 Guangzhou Maria Yee Furnishings Ltd.
 Hang Hai Woodcraft's Art Factory.
 Hang Hai Woodcrafts Art Factory.
 Jasonwood Industrial Co., Ltd. S.A.
 Jiangmen Kinwai International Furniture Co., Ltd.
 Jiangmen Kinwai Furniture Decoration Co., Ltd.
 Jiangmen Kinwai Furniture Decoration Co., Ltd.
 Jiangsu Dare Furniture Co., Ltd.
 Jiangsu Xiangsheng Bedtime Furniture Co., Ltd.
 Jiangsu Yuexing Furniture Group Co., Ltd.
 Jiashan Zhenxuan Furniture Co., Ltd.
 Jiedong Lehouse Furniture Co., Ltd.
 Lianjiang Zongyu Art Products Co., Ltd.
 King's Way Furniture Industries Co., Ltd.
 Kingsyear, Ltd.
 Lianjiang Zongyu Art Products Co., Ltd.
 Meizhou Sunrise Furniture Co., Ltd.
 Meizhou Sunrise Furniture Co., Ltd.
 Maria Yee, Inc.
 Nanhai Jiantai Woodwork Co. Ltd.
 Nantong Yangzi Furniture Co. Ltd.
 Nantong Wangzhuang Furniture Co. Ltd.
 Nathan International Ltd.
 Nathan Rattan Factory.
 Perfect Line Furniture Co., Ltd.
 PuTian JingGong Furniture Co., Ltd.
 Pyla HK Ltd.
 Qingdao Beiyuan Industry Trading Co., Ltd.
 Qingdao Beiyuan Shengli Furniture Co., Ltd.
 Rui Feng Woodwork Co., Ltd.
 Rui Feng Woodwork Co., Ltd. AKA Rui Feng Woodwork (Dongguan) Co., Ltd.
 Rui Feng Lumber Development Co., Ltd.
 Rui Feng Lumber Development Co., Ltd. AKA Rui Feng Lumber Development (Shenzhen) Co., Ltd.
 Shanghai Jian Pu Export & Import Co., Ltd.
 Shanghai Maoji Imp & Exp Co., Ltd.
 Shanghai Sunrise Furniture Co., Ltd.
 Shenyang Shining Dongxing Furniture Co., Ltd.
 Shenzhen Diamond Furniture Co., Ltd.
 Shenzhen Forest Furniture Co., Ltd.
 Shenzhen Jiafa High Grade Furniture Co., Ltd.
 Shenzhen Jichang Woodproducts Co. Ltd.
 Shenzhen New Fudu Furniture Co., Ltd.
 Shenzhen Wonderful Furniture Co., Ltd.
 Shenzhen Xingli Furniture Co., Ltd.
 Shin Feng Furniture Co., Ltd.
 Shing Mark Enterprise Co., Ltd.
 Songgang Jasonwood Furniture Factory.
 Sunforce Furniture (Hui-Yang) Co., Ltd.
 Sun Fung Wooden Factory.
 Sun Fung Co..
 Stupendous International Co., Ltd.
 Superwood Co. Ltd.
 Taicang Sunrise Wood Industry, Co., Ltd.
 Taicang Sunrise Wood Industry Co., Ltd.
 Taicang Fairmont Designs Furniture Co., Ltd.
 Tradewinds Furniture Ltd.
 Tradewinds Furniture Ltd. (successor-in-interest to Nanhai Jiantai Woodwork Co.).
 Tube-Smith Enterprise (Haimen) Co., Ltd.
 Tube-Smith Enterprise (Zhangzhou) Co., Ltd.
 Wanvog Furniture (Kunshan) Co., Ltd.
 Weimei Furniture Co., Ltd.
 Wuxi Yushea Furniture Co., Ltd.
 Xiamen Yongquan Sci-Tech Development Co., Ltd.
 Xilinmen Group Co. Ltd.
 Yeh Brothers World Trade Inc.
 Yihua Lifestyle Technology Co., Ltd.
 Yihua Timber Industry Co., Ltd.
 Yihua Timber Industry Co., Ltd. (a.k.a. Guangdong Yihua Timber Industry Co., Ltd.).
 Zhangjiagang Daye Hotel Furniture Co. Ltd.
 Zhangzhou Guohui Industrial & Trade Co. Ltd.
 Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd.
 Zhong Shan Fullwin Furniture Co., Ltd.

	Period to be reviewed
Zhongshan Fookyik Furniture Co., Ltd. Zhongshan Golden King Furniture Industrial Co., Ltd. Zhoushan For-Strong Wood Co., Ltd.	
Countervailing Duty Proceedings	
ARGENTINA: Biodiesel C-357-821	8/28/17-12/31/18
Aceitera General Deheza S.A. Bio Nogoya S.A. Bunge Argentina S.A. Cargill S.A.C.I. COFCO Argentina S.A. Cámara Argentina de Biocombustibles. Explora. GEFCO Argentina. LDC Argentina S.A. Molinos Agro S.A. Noble Argentina. Oleaginosa Moreno Hermanos S.A. Patagonia Bioenergia. Renova S.A.. T6 Industrial SA (EcoFuel). Unitec Bio S.A. Vicentin S.A.I.C. Viluco S.A.	
INDONESIA: Biodiesel C-560-831	8/28/17-12/31/18
PT. Cermerlang Energi Perkasa (CEP). PT. Ciliandra Perkasa. PT. Musim Mas, Medan. PT. Pelita Agung Agrindustri. Wilmar International Ltd. (aka Wilmar Trading PTE Ltd.).	
THE PEOPLE'S REPUBLIC OF CHINA: Hardwood Plywood Products C-570-052	4/25/18-12/31/18
Anhui Hoda Wood Co., Ltd. Celtic Co., Ltd. Feixian Longteng Wood Co., Ltd. Golder International Trade Co., Ltd. Huainan Mengping Import and Export Co., Ltd. Jiangsu Top Point International Co., Ltd. Jiaxing GsunImp. & Exp. Co., Ltd. Jiaxing Hengtong WoodCo.,Ltd. Linyi Celtic Wood Co., Ltd. Linyi City Dongfang Jinxin Economic and Trade Co., Ltd. (a/k/a Linyi City Dongfang Jinxin Economicand Trade Co., Ltd.). Linyi Chengen Import and Export Co., Ltd. Linyi Evergreen Wood Co., Ltd. Linyi Glary Plywood Co., Ltd. Linyi Hengsheng Wood Industry Co., Ltd. Linyi Huasheng Yongbin Wood Co., Ltd. Linyi Jiahe Wood Industry Co., Ltd. Linyi Linhai Wood Co., Ltd. Linyi Mingzhu Wood Co., Ltd. Linyi Sanfortune Wood Co., Ltd. Qingdao Good Faith Import and Export Co., Ltd. Shandong Dongfang Bayley Wood Co., Ltd. Shandong Jinluda International Trade Co., Ltd. Shandong Qishan International Trading Co., Ltd. Shandong Senmanqi Import & Export Co., Ltd. Shandong Shengdi International Trading Co., Ltd. Shanghai Brightwood Trading Co., Ltd. Shanghai Futuwood Trading Co., Ltd. Suining Pengxiang Wood Co., Ltd. Sumec International Technology Co., Ltd. Suqian Hopeway International Trade Co., Ltd. Suzhou Oriental Dragon Import and Export Co., Ltd. Vietnam Pinewood Company Limited. Win Faith Trading Limited. Xuzhou Andefu Wood Co., Ltd. Xuzhou DNT Commercial Co., Ltd. Xuzhou Jiangheng Wood Products Co., Ltd. Xuzhou Longyuan Wood Industry Co., Ltd. XuZhou PinLin International Trade Co., Ltd. Xuzhou Shengping Imp and Exp Co., Ltd. Xuzhou Timber International Trade Co., Ltd. Yishui Zelin Wood Made Co., Ltd. Zhejiang Dehua TB Import & Export Co., Ltd.	

	Period to be reviewed
THE PEOPLE'S REPUBLIC OF CHINA: Tool Chests and Cabinets C-570-057 Geelong Sales Co. International (HK). Geelong Sales (Macao Commercial Offshore) Limited (also known as Geelong Sales (MCO) Limited). Zhongshan Geelong Manufacturing Co. Ltd.	9/15/18-12/31/18
Suspension Agreements	
None.	

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

⁸ The companies listed above were inadvertently omitted from the initiation notice that published on March 14, 2019 (84 FR 9297).

⁹ In the March 14, 2019, notice of initiation of the administrative review of the antidumping duty order on certain cased pencils (pencils) from China covering the period 12/01/2017-11/30/2018, we inadvertently initiated an administrative review of Beijing Fila Dixon Stationery Co., Ltd. (aka Beijing Dixon Ticonderoga Stationery Co., Ltd. and Beijing Dixon Stationery Co., Ltd.) (collectively Beijing Dixon). Commerce revoked the antidumping duty order on pencils exported by Beijing Dixon on July 18, 2013. See *Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Determination To Revoke Order In Part; 2010-2011*, 78 FR 42932 (July 18, 2013), and accompanying Issues and Decision Memorandum.

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.¹⁰ Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives. All segments of any

¹⁰ See section 782(b) of the Act.

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*.¹¹ 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

¹¹ 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/tei/notices/factual_info_final_rule_FAQ_07172013.pdf.

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: March 27, 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. 2019-06220 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

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.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting date.

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 release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 21 days of publication of the initiation notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. Commerce invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

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 finds that determinations concerning whether particular companies should be “collapsed” (*i.e.*, 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 a 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 (*i.e.*, investigation, administrative review, new shipper review or changed circumstances review). For any company subject to a 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 a Quantity and Value 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 a proceeding where Commerce considered collapsing that entity, complete quantity and value 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 requests 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.¹ 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 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

¹ See Trade Preferences Extension Act of 2015, Public Law 114-27, 129 Stat. 362 (2015).

773(e) of the Act, it must do so no later than 20 days after submission of initial Section D responses.

Opportunity To Request a Review: Not later than the last day of April 2019,² interested parties may request administrative review of the following

orders, findings, or suspended investigations, with anniversary dates in April for the following periods:

	Period of review
Antidumping Duty Proceedings	
ARGENTINA: Biodiesel A-357-820	10/31/17-3/31/19
INDONESIA: Biodiesel A-560-830	10/31/17-3/31/19
REPUBLIC OF KOREA: Phosphor Copper A-580-885	4/1/18-3/31/19
THE PEOPLE'S REPUBLIC OF CHINA:	
1,1,1,2-Tetrafluoroethane A-570-044	4/1/18-3/31/19
Activated Carbon A-570-904	4/1/18-3/31/19
Aluminum Foil A-570-053	11/2/17-3/31/19
Drawn Stainless Steel Sinks A-570-983	4/1/18-3/31/19
Magnesium Metal A-570-896	4/1/18-3/31/19
Non-Malleable Cast Iron Pipe Fittings A-570-875	4/1/18-3/31/19
Stainless Steel Sheet and Strip A-570-042	4/1/18-3/31/19
Steel Threaded Rod A-570-932	4/1/18-3/31/19
Countervailing Duty Proceedings	
THE PEOPLE'S REPUBLIC OF CHINA:	
Aluminum Foil C-570-054	8/14/17-12/31/18
Drawn Stainless Steel Sinks C-570-984	1/1/18-12/31/18
Stainless Steel Sheet and Strip C-570-043	1/1/18-12/31/18
Suspension Agreements	
None.	

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party Commerce was unable to locate in prior segments, Commerce will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested

party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.³

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.⁴ Accordingly, the NME entity will not be under review unless Commerce specifically receives a

request for, or self-initiates, a review of the NME entity.⁵ In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS

² Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when Commerce is closed.

³ See also the Enforcement and Compliance website at <http://trade.gov/enforcement/>.

⁴ See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).

⁵ In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

website at <http://access.trade.gov>.⁶ Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

Commerce will publish in the **Federal Register** a notice of “Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation” for requests received by the last day of April 2019. If Commerce does not receive, by the last day of April 2019, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, Commerce will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

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 period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: March 27, 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. 2019-06213 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Certain Softwood Lumber Products From Canada: 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 the

antidumping and countervailing duty orders on certain softwood lumber products (softwood lumber) from Canada with January anniversary dates. In accordance with Commerce’s regulations, we are initiating those administrative reviews.

DATES: Applicable April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Robert Galantucci (AD) and Kristen Johnson (CVD), AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482-2923 and (202) 482-4793, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of the antidumping and countervailing duty orders on softwood lumber from Canada with January 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 <https://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 the reviews. 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 the 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 the antidumping proceeding (e.g., investigation, administrative review, new shipper review or changed circumstances review). For any company subject to the 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.

⁶ See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

¹ See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

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 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.

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. We intend to issue the final results of these reviews not later than January 31, 2020.

We request that the companies listed below review the spelling of their company name. If a company name is not accurate (*i.e.*, misspelled or incomplete) or appears more than once with different spelling variations, then please notify Commerce of the company’s correct legal name *in writing* within 30 days after the date of publication of this initiation notice. All submissions must be filed electronically at <https://access.trade.gov>.

	Period to be reviewed
CANADA: Certain Softwood Lumber Products	
A-122-857	6/30/17-12/31/18
C-122-858	4/28/17-12/31/18
0744822 BC Ltd.	
1074712 BC Ltd.	
1074712 BC Ltd./Quadra Cedar.	
1867 Confederation Log Homes.	
5214875 Manitoba Ltd.	
752615 B.C Ltd, Fraserview Remanufacturing Inc, DBA Fraserview Cedar Products.	
9224-5737 Québec inc. (aka, A.G. Bois).	
A & A Trading Ltd.	
A & D Woodturning.	
A & H Lumber Services Ltd.	
A & K Millwork Ltd.	
A M Cedar Ltd./A.M. Cedar Ltd.	
A.B. Cedar Shingle Inc.	
A.B. Cushing Mills Ltd.	
A.J. Forest Products Ltd.	
A-1 Trusses Ltd.	
AAC Woodworking & Manufacturing.	
Aallcann Wood Suppliers Inc.	
ABC Lumber.	
Abfam Enterprises Ltd.	
Absolute Lumber Products, Ltd.	
Accurate Cedar Ltd.	
Acoustic Wood Ltd.	
Acutruss Industries Ltd.	
Adam Lumber Inc.	
Adco Forest Products.	
Adirondack Wood Supply.	
Advance Lumber Remanufacturing.	
Advance Reload Ltd.	
ADWOOD Manufacturing Ltd./ADWOOD Mfg. Ltd.	
AFA Forest Products Inc.	
AG Bois/A.G. Bois/9224-5737 Quebec Inc.	
AJ Forest Products Ltd.	
AJIA Canadian Building Systems Inc.	
AJM International Development Corp./AJM Intl. Development Corp.	
Alba Pallet Co.	
Albert Larocque Lumber Ltd.	
Alberta Pallet Co. Ltd.	
Alberta Spruce Industries Ltd.	

² See Trade Preferences Extension Act of 2015, Public Law 114-27, 129 Stat. 362 (2015).

	Period to be reviewed
<p> Aler Forest Products, Ltd. Alexandria Moulding Inc. All American Forest Products Corp. All Span Building Systems Ltd. All-Fab Building Components Inc./ALLFAB Building Components Inc./Nu-Fab Building Products. Allmac Lumber Sales Ltd. Allmar International. Almand Lumber Mfg. Inc. Almonte Lumber & Truss. Alpa Forest Products Inc. Alpa Lumber Mills Inc. Alpine Forest Products (2001) Ltd. American Bayridge Corp./Bayridge Lumber. American Pacific Wood Products. Amexfor Inc. Anbrook Industries Ltd. Andersen Pacific Forest Products Ltd. Anderson Pacific Forest Products Ltd. Anglo American Cedar Products Ltd. Anglo-American Cedar Products, LTD. Anthony-Domtar Inc. Antrim Cedar Corp. Antrim Cedar Corporation. APacific Lumber Remanufacturing Ltd. Apollo Forest Products Ltd. Apollo Industries Ltd. Aquila Cedar Products, Ltd. Ara Sales Co. Arbec Inc./Arbec Lumber Inc. Arbec Lumber Inc. Arbutus Manufacturing Ltd./Arbutus Mfg. Ltd. Arco Lumber Ltd. Argo Lumber Inc. Ashley Woodworks. Aspen Planers Ltd. Aspen Planers Ltd./Mill & Timber Products Ltd. Atco Structures Ltd. ATCO Wood Products Ltd. Atelier Du Bois St-Laurent/92244904 Quebec Inc. Atlas Group. Atmosphere & Bois NA Inc. Aurora Timberland Wholesale/Hardwood Lumber Inc. AWyatt Marketing Inc. B & B Inc. B & H Woodturning Ltd. B & L Forest Products Ltd. B B Pallets Inc./B.B. Pallets Inc. B&L Forest Products Ltd. B.B. Pallets Inc. B.E. Grein Lumber Ltd. B.S.L. Lumber. B.W. Creative Wood Ind. Ltd. Babine Forest Products Limited. Bakerview Forest Products Inc. Bakerview Forest Products/Pat Power Forest Products Corp./Pemco Power Export & Manufacturing Corp. Balleys Wood Sales LLC. Balmoral Ltée., Cedres. Balmoral Lumber & Millwork Ltd. Barco Materials Handling Ltd./Cherry Forest Products. Bardeaux Acadieville Shingle. Bardobec Inc. Barkley Sound Oar & Paddle. Barrette-Chapais Ltd./Barrette Chapais Ltee. Barrette-Chapais Ltee. BarretteWood Inc. Bartram H.S. Ltd./H.S. Bartram Ltd. Barvi Inc. Bath Mill Inc. Bayridge Lumber & Forest Products Inc. Bayside Framing & Timberfield Roof Truss. BC Custom Timber Products Ltd. BC Lumber Sales. BCF Shake Mill Ltd./B.C.F. Shake Mill. Bear Lumber Ltd. </p>	

	Period to be reviewed
<p> Beaubois Coaticook Inc. Beaufort Forest Products Ltd. Beaver Forest Products. Beere Holdings Ltd./Beere Timber Co. Bel Air Lumber Mills Inc. Beland Produits Forestiers Ltee. Bell & Sons Lumber/Raymond Bell & Sons Lumber. Benoit & Dionne Forest Products Ltd. Benoit & Dionne Forest Products Ltd./Benoit and Dionne Produits Forestiers Ltee. Benoît & Dionne Produits Forestiers Ltée. Bernie McGlynn Lumber. Bernier (Ad) Inc. Best Quality Cedar Products Ltd. Best Quality Cedar Products Ltd./Copper River Shake & Shingle Ltd. Best Quality Cedar Products, Inc. Big Foot Manufacturing Inc. Bill Smith Forest Products. Bishop Lumber Co. Ltd. Black Loon Millworks International Inc. Black Tusk Forest Products Ltd. Blanchet Multi Concept Inc. Blanchette & Blanchette Inc. Blanchette Inc./Bois Carolle. Blue Trail Construction Ltd. Boa-Franc Inc. Boards by George Lumber Co. Boardwalk Enterprises. Bob Inc., Les Produits Forestiers. Bois Aisé de Montréal inc. Bois B S L Inc. Bois Bonsai inc. Bois Bonsai Inc./Bois Aise de Montreal Inc. Bois Daaquam Inc. Bois Daaquam Inc./Daaquam Lumber Inc. Bois de l'Est FB Inc. Bois D'oeuvre Cedrico Inc. Bois D'oeuvre Cedrico Inc. (aka, Cedrico Lumber Inc.). Bois D'oeuvres Beaudoin Gauthier Inc./B & G Lumber/Beaudoin Gauthier Inc./Les Bois d'oeuvre Beaudoin Gauthier Inc. Bois et Solutions Marketing SPEC, Inc. Bois Francs Benoit Inc./Les Bois de Parquets Vaucluse Inc./Vaucluse Inc./Les Bois de Parquets. Bois Hunting Inc. Bois Lac Frontiere Inc. Bois Lemay Inc. Bois Mirabel Ltee./Mirabel Ltee., Bois. Bois Poulin Inc., Les/Les Bois Poulin Inc./Bois Poulin Inc. (Les). Bois Traité S.C./Les Bois Traites/Bois Traites M.G. Inc./Bois Traites (Les). Bois Weedon. Boisaco. Boisaco Inc./Boisaco. Bois-Aise de Montreal Inc. Boiscarvin Inc. Boiseries Lussier. Boiseries Rousseau Inc./Rousseau Woodworks Inc. Bomat Inc., Materiaux. Borderline Lumber Service. Boscus Canada Inc. Bouchard Projects Ltd. Boucher Bros. Lumber Ltd. Boundary Lumber and Reman Ltd. Box Lake Lumber Products Ltd. BP Wood Ltd. BP Wood/BPWood Ltd. BPWood. BPWood Ltd. Bramwood Forest Inc. Bramwood Forest Inc./Bramwood Lumber Industries. Bridgeside Forest Industries Ltd. Brink Forest Products Ltd. Britannia Woodmoulding Co. Ltd. Britco Structures. Brite Manufacturing Inc. British Columbia Door Co. Ltd. Brown & Rutherford Co. Ltd. </p>	

	Period to be reviewed
<p> Brunswick Valley Lumber Inc. BSL Wood Products. Buchanan Lumber Sales Inc. Burrows Lumber Inc. Burton Cabinets & Custom Doors. Busque & Laflamme Inc. Byrne Road Wholesale Lumber. Byrnexco Inc. C & C Lath Mill Ltd. C & C Wood Products Ltd. C&C Wood Products Ltd. C.A. Spencer Inc. C.J. Cedar Ltd. C.P. Loewen Enterprises Ltd. Cajun Moulding Shoppe Ltd. Caledonia Forest Products. Caledonia Forest Products Inc. Calgary Pallet Ltd. Cambie Cedar Products Ltd. Campbell River Shake & Shingle. Campbell River Shake & Shingle Co., Ltd. Canada Pallet Corp. Canada Wood Specialties Inc. Canadian American Forest Products Ltd. Canadian Antique Lumber Co. Ltd. Canadian Bavarian Millwork & Lumber Ltd. Canadian Engineered Wood Products. Canadian Lumber Co. Ltd. Canadian TimberFrames Ltd. Canadian Walden Log Homes Ltd. Canadian Wood Products. Canadian Wood Products Inc. Canadian Woodenware Mfg., The. Canalog Wood Industries Ltd. Canasia Forest Industries Ltd. Canbar Inc. Can-Cell Industries Inc. Cancom International Trading Ltd. Candor Interior Specialties. Canfor Corporation/Canadian Forest Products, Ltd./Canfor Wood Products Marketing, Ltd. Canusa cedar inc. Canusa Cedar Inc. CanWel Building Materials. Canwel Building Materials Ltd. Canwest Trading Ltd. Canyon Lumber Co. Ltd. Canyon Lumber Company, Ltd. Careau Bois inc. Carlwood Lumber Ltd. Carrier & Begin Inc. Carrier Forest Products Ltd. Carrier Forest Products Ltd./Carrier Lumber Company Ltd. Carrier Lumber Ltd. Carson Lake Lumber Ltd. Carter Forest Products Inc. Cascade Cedar Ltd. Cattermole Timber. Caux et Freres Inc. Cayouette Cabinets. CDS Lumber Product. Cedar City Shake Ltd. Cedar Island Forest Products Ltd. Cedar Solutions & Millworks. Cedar Valley Holdings Ltd. Cedar Valley Milling. CedarCoast Lumber Products. Cedarland Forest Products Ltd. Cedarline Industries, Ltd. Cedarroof Canada Ltd. Cedartone Specialties Ltd. Cedres Balmoral Ltée. Cedres Basques Enr. Cedrico Lumber Inc. Central Alberta Pallet Supply. </p>	

	Period to be reviewed
<p> Central Cedar Ltd. Centurion Lumber Manufacturing Ltd. Centurion Lumber, Ltd. Century Mill Lumber. Chaleur Sawmills Associates. Chaleur Sawmills LP. Chanin (W.G.) Hardwoods Ltd. Channel Original Co. Ltd. Channel-Ex Trading Corp. Channel-ex Trading Corporation. Chasse Inc. Chemainus Forest Products Ltd./Centurion Lumber Manufacturing (1983) Ltd. Cheminis Lumber Inc. Chisholm's (Roslin) Ltd. Choicewood Products Inc. City Lumber & Millwork. City Lumber Sales & Services Ltd. Clair Industrial Development Corp. Ltd. Clareco Industries Ltd. Clarke Group. Claude Forget Inc. Clearbrook Shakes & Shingles. Clermond Hamel Ltée. Clermond Hamel Ltee./Busque & Laflamme Inc. Clyvanor Ltee. Coast Clear Wood—Sundher Timber Products. Coast Clear Wood Ltd. Coast Mountain Cedar Products Ltd. Cobodex Lumber (1995) Inc. Coldstream Lumber Remanufacturing Ltd. Coleman Road Shingle Ltd. Colonial Fence Manufacturing Ltd. Colonial Log Mills Ltd. Colonial Wood Packaging Inc. Columbia Mills Ltd. Commonwealth Plywood Co. Ltd. Comox Valley Shakes Ltd. Compos-A-Tron Manufacturing Inc. Confederate Shake & Shingle Ltd. Conifex Fibre Marketing Inc. Conifex Inc./Conifex Fibre Marketing Inc. Cooper Lumber Ltd. Coopérative des Travailleurs de la Scierie. Copper Mountain Cedar Products Ltd. Coté Ltée., Alexandre/Cote (Alexandre) Ltée. Coulson Manufacturing Ltd. Coulter Lumber Sales & Services Ltd. Country Lumber Ltd. Country Wood. Cowichan Lumber Ltd. Craftsman Panel Cutters Ltd. Crawford Creek Lumber Co. Ltd. Creations Vie Bois Inc. Crestview Mills. Crestwood International Industries Ltd. CS Manufacturing Inc., dba Cedarshed. CS Manufacturing Inc./Cedarshed Industrial (1992) Inc. Curtis Lumber Co., Ltd. Custom Log Homes Ltd. Cut Rite Lumber Ltd. Cutler Forest Products. CWP—Industriel inc. CWP—Industriel Inc./CWP—Montreal Inc. CWP—Montréal inc. D & D Pallets, Ltd. D & D Wood Products Ltd. D & S Calver Lumber Ltd. D V Hardwoods. D&G Forest Products Ltd. D&G Produits Forestiers Ltée./Les Produits Forestiers D&G Ltee./Produits Forestiers D & G Ltee. Daaquam Lumber Ltd. Daizen Joinery Ltd. Dakeryn Industries Ltd. Dament & Charles Lumber Manufacturing Ltd. </p>	

	Period to be reviewed
<p> Danfor Export Ltd. Davey Lumber. Davron Forest Products Ltd. Deacoff Bros. Enterprises Ltd. Decawood Industries Inc. Decker Lake Forest Products. Decker Lake Forest Products Ltd. Decor Cabinets Ltd. Deep Cove Forest Products Inc. Delco Forest Products. Delco Forest Products Ltd. Delta Cedar. Delta Cedar Products Ltd. Delta Cedar Specialties Ltd. Demens Brothers Lumber Co. Ltd. Demxx Deconstruction Inc. Devon Lumber Co. Ltd. Devon Mills Ltd. DH Manufacturing Inc. Dhaliwal Cedar Ltd. Dick's Lumber & Building Supplies Ltd. Direct Cedar Supplies Ltd. Distribution Rioux. Dollar Saver Lumber Ltd. Domexport Inc. Domtar Inc. Doralie-Maroy Inc. Dorval Timber Inc. Double R Building Products Ltd. Doubletree Forest Products. Doubletree Forest Products Ltd. Downie Timber Ltd. Downie Timber Ltd./Selkirk Specialty Wood Ltd. Driftwood Cedar. Drummond Lumber. DS Timber Mills Ltd. Dubreuil Forest Products Ltd. Duhamel Mill/Armand Duhamel & Fils Inc. Duke Point Reman Ltd. Dungey R J & Sons Ltd. Dunkley Lumber Ltd. Duplessis Ltée. Leopold/Leopold Duplessis Ltee. Dynamic Forest Products Inc. Dynamic Forest Products Ltd. DZD Hardwood Export Inc. E and A Sales. EACOM Timber Corp./Anthony EACOM Inc. EACOM Timber Corporation. Eagle River Industries Inc. East Coast Building Materials Ltd. East Fraser Fiber Co. Ltd. East Fraser Fiber Co. Ltd./East Fraser Fibre Co. Ltd. Ébénisterie Beaubois Ltée. Eberhard's Manufacturing Inc. Econobois Enr. Ed Bobocel Lumber (1993) Ltd. Edge Grain Cedar. Edgewood Forest Products Inc. Edgewood Lumber Ltd. Edson Forest Products/Sundance Forest Products. Edwards W.C. Elite Trimworks Corp. Elk Trading Co. Ltd. Ellen Lumber Ltd. Elmira Wood Products. Elykwood Forest Products Ltd. Epic Truss Systems Ltd. ER Probyn Export Ltd. ER Probyn Export Ltd./ER Probyn Ltd. Eric Goguen & Sons Ltd. Erie Flooring & Wood Products. Errington Cedar Products. Evan's Enterprises. Evans-Tedham Lumber Ltd. </p>	

	Period to be reviewed
<p> Evergreen Empire Mills Inc. Evergreen Lumber Inc. Evergreen Specialties Ltd. Everwood Trading Ltd. Exulon Forest Products. Exxium Group. Fairway Lumber Ltd. Falcon Lumber Ltd. Faulkener Wood Specialties Ltd. Fawcett Lumber Co. Federated Co-operatives Ltd. Felix Huard Inc. FinishWell Group/F.W. Mouldings. Finmac Lumber Ltd. Finnforest Canada. Flavelle Mill Co. Fontaine Inc./J.A. Fontaine & Fils. Foothills Forest Products Inc. Foresbec Inc. Forex Log & Lumber Ltd. Forexam LtTe (Les Produits Forestiers). Fornebu Lumber Co. Ltd. Forwest Wood Specialties/FWV Industries Inc. Forwood Forest Products Inc. Fraser Bay Industries Inc. Fraser Cedar Products Ltd. Fraser Papers Inc. Fraser Specialty Products. Fraser Specialty Products Ltd. Fraserview Cedar Products. Fraserview Cedar Products/Fraserview Remanufacturing Inc. Fraserwood Industries Ltd. Freymond Lumber Ltd. Furtado Forest Products Ltd. Futura Forest Products Ltd. G & R Cedar Ltd. G L Sawmill Ltd./G.L. Mill Ltd. G&R Cedar Ltd. G.A. Grier (1991) Inc. Gagnon Bois Industriel. Galaxy Pallet Ltd. Gallant Enterprises Ltd. Galloway Lumber Co. Ltd. Galloway Lumber Company Ltd. Gang-Nail Trusses & Building Components. Gaston Cellard Inc. Gaylord Forest Products Ltd. Georgian Bay Forest Products Ltd. Gerard Crete & Fils Inc. Gestofor Inc. Gibeault & Fils Ltée. Gienow Building Products Ltd. Gilbert Smith Forest Products Ltd. Gillies Lumber Inc. Gillwood Remanufacturing Inc./Uneeda Wood Products. Glandell Enterprises Inc. Glenmore Millwork. Globe Lumber Supply & Logistics Ltd. Goat Lake Forest Products. Goat Lake Forest Products Ltd. Goguen Lumber. Gold Band Shake & Shingle Ltd. Goldband Shake & Shingle Ltd. Golden Ears Shingle. Golden Ears Shingle Ltd. Golden Wood Import & Export Inc. Goldwood Industries Ltd. Goldwood Industries Ltd./Universal Lumber Sales Ltd. Goodfellow Inc. GoodWOOD Forest Products Corp. Gorman Bros. Lumber Ltd. Granules L.G. Great Lakes MSR Lumber Ltd. Great Northern Remanufacturing. </p>	

	Period to be reviewed
<p>Green Tree Fencing Supplies Ltd. Greendale Industries Inc. Greenwood Forest Products Ltd. Griff Building Supplies Ltd. Groleau Inc. Groupe Bocenor/Bonneville Windows & Doors. Groupe Crête Chertsey. Groupe Crête division St-Faustin. Groupe Crete/Groupe Crete division St. Faustin/Groupe Crete Chertsey. Groupe Forestra. Groupe Lebel inc. Groupe Lebel Inc./Groupe Lebel (2004) Inc./Traitel Ltée., Bois. Groupe Lebel/Rideau Forest Products. Groupe Lignarex inc. Groupe Savoie Inc. Grove Cedar Ltd. Grove Lumber & Manufacturing Ltd. Gulick Forest Products Ltd. H.J. Crabbe & Sons Ltd. Haida Forest Products. Haida Forest Products Ltd. Hainsville Mill Ltd. Halland Farms Inc. Halo Sawmill Ltd. Hamill Creek Timber/Hamill Creek Timberwrights Inc. Hampton Lumber Mills—Canada, Ltd./Babine Forest Products/Decker Lake Forest Products Ltd. Hanford Lumber Ltd. Hanson's Sawmill Inc. Hanwa Canada Corp. Harkerson BC Wholesale Lumber Ltd. Harrison Cedar Products. Harry Freeman & Son Ltd. Hauer Brothers Lumber Ltd. Henri Radermaker & Fils Inc. Henry Vasseur Custom Planing Ltd. Henzel Lumber Ltd. Herb Shaw & Sons Ltd. Hermitage Forest Products. Highland Block Sort. Hodgson Brothers Lumber. Home Lumber Inc. Hornepayne Lumber LP. Howe Sound Timber Products Inc. Hudson Mitchell & Sons Lumber Inc./HMS Lumber Inc. Hughes Lumber Specialties Inc. Huron Timber Co. Hy Mark Wood Products Inc. Hyak Specialty Wood Products. I J Windows & Doors Ltd. Imperial Cedar Products, Ltd. Imperial Shake Co. Imperial Shake Co. Ltd. Independent Building Materials Dist. Independent Building Materials Distribution Inc. Independent Lumber Dealers Cooperative. Industrial Hardwood Products Ltd. Industries Norpen Inc./Norpen Industries Inc. Industries Parent Inc./Groupe Rémabec. Interbois, Inc. Interfor Corp. Interfor Corporation. Interforest Lumber Inc. Interior Wood Ltd. International Lumber Inc. Interpro Forest Products. IRLY Distributors Ltd. Iroquois Enterprises. Island Cedar Products Ltd. Island Precision Manufacturing Ltd. Ivis Wood Products Ltd. Ivor Forest Products Ltd. J & D Shake & Cedar Mill Ltd. J & G Log Works Ltd. J&G Log Works Ltd.</p>	

	Period to be reviewed
<p> J&G Logworks, Ltd. J.D. Irving, Limited. J.H. Huscroft Ltd. J.M. Champeau Inc., Les Entreprises. J.W. Jamer Ltd. Jager Building Systems. James Sparkes & Sons Ltd. Jan Woodland (2001) inc. Jan Woodland (2001) Inc./Jan Woodland 2001 Inc. Jasco Forest Products Ltd. Jasper Millwork Ltd. Jazz Forest Products Ltd. Jean Riopel Inc. Jhajj Lumber Corp. Jhajj Lumber Corporation. Joe Kozek Mill Ltd. Jointfor. Jones Percy & Sons Ltd. Jones Ties & Piles. Jude & Lyne, Les Produits Forestier. Julius Becker Forest Ltd. Junction Lumber Products Inc. Juste Du Pin. K C Doors Ltd. K P Wood Ltd. Kalesnikoff Lumber Co. Ltd. Kan Wood, Ltd. Kanaka Creek Pole Co. Ltd./Stella-Jones Inc. Karlite Manufacturing. Kebois Ltd. Kebois Ltee/Ltd. Kelfor Industries Ltd. Kenomee Log Homes Ltd. Kenora Forest Products Ltd./Prendville Industries Ltd. Kent Trusses Ltd. Kenwood Lumber Ltd. Kermode Forest Products Ltd./Richelieu Hardware Canada Ltd./Teamwood Distribution. Keystone Forest Products Ltd. Keystone Timber Ltd. Keywood Timber Products Ltd. Kingsey Inc., Scierie. Kitwanga Lumber Co. Ltd. KLP Shake & Shingle. Kodiak Forest Products Ltd. Kootenay Innovative Wood Ltd. Kootur Lumber Mill. Kott Lumber Co.. Kotyk Lumber Ltd. Kruger Inc.—Scierie Parent. Kurian Forest Products Ltd. L & M Lumber Co. Ltd. L & M Wood Products. L.P.M. Inc., Moulins (Les). La Crete Sawmills Ltd. Lafontaine Lumber Inc. Lahaie Lumber Ltd. Lake Country Log Homes. Lakeland Mills Ltd. Lakeside Timber. Lamontagne, Industries Bois. Lanark Cedar. Landmark Truss & Lumber Inc. Landrienne Inc./Scierie Landrienne. Landry (Robert) & Fils, Industries. Langelier Ltee., Bois. Langevin Forest Ltee.. Langevin Forest Products Inc. Lasertrim Custom Millwork & Mouldings. Lattes Waska Laths Inc. Lauzon Distinctive Hardwood Flooring. Lauzon Forest Resources. Lavern Heideman & Sons Ltd. Lebel Cambium Inc. Lecours Lumber Co. Limited. </p>	

	Period to be reviewed
<p> Lecours Lumber Co., Ltd. Ledwidge Lumber Co. Ltd. Legare Industries Ltd. Leger & Fils Inc., Bois. Leggett & Platt/LeggettWood. Leisure Lumber Ltd. Leisure Lumber Ltd./0995192 BC Ltd. Lemire Lumber Co. Inc. Lennox Snow Fence Co.. Leonard Ellen Canada (1991) Inc./G.A. Grier (1991) Inc. Leptick Mill Ltd. Les Bois d'oeuvre Beaudoin Gauthier inc. Les Bois Martek Inc./Bois Martek Inc./Les Bois Martek Lumber Inc. Les Bois Martek Lumber Inc. Les Bois Traités M.G. Inc. Les Boiseries du Saint-Laurent Inc./Boiseries du Saint-Laurent Inc. (Les). Les Boiseries du St-Laurent. Les Chantiers de Chibougamau Ltd. Les Chantiers de Chibougamau Ltee./Chantiers de Chibougamau Ltee. (Les)/Nordic Engineered Wood. Les Chantiers de Chibougamau Ltee./Les Chantiers de Chibougamau Ltd. Les Industries de Bois St-Raymond Ltee./Industries de Bois St-Raymond Ltee. (Les). Les Industries Picard et Poulin Inc./Picard Et Poulin. Les Manufacturiers Warwick Ltd./Warwick Ltd., Les Manufacturiers. Les Manufacturiers Warwick Ltee. Les Produits Forestiers Bellerive-Ka'N'Enda Inc./Produits Forestiers Bellerive-Ka'N'Enda Inc., Les. Les Produits Forestiers D&G Ltee. Les Produits Forestiers Dube Inc./Produits Forestiers Dube Inc., Les. Leslie Forest Products. Leslie Forest Products Ltd. Lignarex Inc./Group Lignarex Inc./Careau Bois Inc. Lignum Forest Products LLP. Lindal Cedar Homes Ltd. Linde Brothers Lumber Ltd. Linwood Homes. Linwood Homes Ltd. Liskeard Lumber Ltd. Little John Enterprises Ltd. Little's Lumber Ltd. Liverance Lumber. Logic Lumber. Lois Lumber Ltd./Goat Lake Forest Products. Lone Star Lumber. Long Hoh Enterprises Canada Ltd. Longhouse Trading Co. Ltd. Longlac Lumber Inc. Low Grade Lumber. Lulumco Inc. Lulumco inc. Lumber King Building Material Ltd. LumberLine Inc. Lumpulse Inc. Luxor Industrial Products Co Ltd. Lyle Forest Products Ltd. M&K Mills Ltd. M.F. Bernard Inc. M.W. Hunter Lumber Ltd. MacKenzie Sawmill Ltd. Madawaska Doors. Magnum Forest Products. Magnum Forest Products, Ltd. Magwood Lumber/PM Lumber Co. Maibec inc. Maibec Inc./Maibec Industries Inc. Mailhot Inc. Mainland Sawmill Ltd. Manitou Forest Products Ltd. Manu-Fab Building Components Ltd. Maple Ridge Truss. Marathon Forest Products Ltd. Marcel Lauzon Inc. MarDan Enterprises. Marine Way Industries Inc. Maritime Lumber Ltd. Marshall Lumber. </p>	

	Period to be reviewed
<p> Martek (1992) Inc., Les Bois. Marumi Canada Lumber Ltd. Marwin Industries Inc. Marwood Ltd. Masse et D'Amours Inc., Industries. Master Grade Instrument Materials Inc. Materiaux Blanchet Inc. Matsqui Management and Consulting Services Ltd., dba Canadian Cedar Roofing Depot. Maurer Construction Ltd. Max Meilleur et Fils Ltée. Maxi-Foret. Maxwood Lumber Ltd. Mayfair Lumber Sales Ltd. McDonald Ranch & Lumber Ltd. McFadden Hardwood & Hardware Ltd. McIlveen Lumber Industries (Alta) Ltd. McKenzie Lumber Inc. McKillican Canadian Inc. McLean Lumber Sales Alberta Ltd. McLeod Lake Indian Band. McRae Lumber Ltd. Meadow Creek Cedar Ltd. Medicine Lodge Timber Products Ltd. Meeker Lumber Ltd. Megaforex Industries. Meristem Enterprises Ltd. Merit Kitchens. Metrie Canada Ltd. Meunier Lumber Co. Ltd. Mid America Lumber Inc. Mid Canada Millwork Ltd. Mid Valley Lumber Specialties, Ltd. Midway Lumber Mills Ltd. Mike Gogo Cedar Products. Mill & Timber Products Ltd. Mill and Timber Products Ltd. Millar Western Forest Products Ltd. Millenium Lumber. Millinear Lumber. Miradas Inc., Produits Forestiers. Miramichi Timber Frames. Mirax Lumber. Mitek Canada Inc. Mitsui & Co. (Canada) Ltd. Mitsui Homes Canada Inc. Mobilier Rustique (Beauce) Inc. Moen Lumber. Moggie Valley Timber Inc. Moisan & Morasse Inc. Moisan (Eloi) Inc. Mondor Lumber Inc. Montauban Inc. Monterra Lumber Mills. Moore Log and Timber Homes. Moreland, Adam. Moricetown Band Development LP. Morwood Forest Products. Moseley Lumber Ltd., A.L. Moulores Hudon & Fils Inc. Mountain View Specialty Products & Reload Ltd. Mountain Voice Woodsounds. MP Atlantic Wood Ltd. Multicedre Itee. Murray Bros. Lumber Co. Ltd. Muskoka Timber Mills. N.M.V. Lumber Ltd./NMV Lumber Ltd. Nagaard Mills Ltd. Nakina Lumber Inc. Natal Forest Products Ltd. National Forest Products Ltd. Natural Trade Ltd. Nechako Lumber Co. Ltd. Nederman Logistics North America. New Future Lumber Ltd. </p>	

	Period to be reviewed
<p> New West Lumber. Newcastle Lumber Co. Inc. Newcastle Lumber Co./Miramichi Lumber Products. Nice International Canada Corp. Nicholson and Cates Ltd. Nicholson and Cates Ltd./Nicholson Manufacturing Ltd. Nicholson and Cates Ltd./Wesont Lumber. Nickel Lake Lumber. Nickel Lake Lumber/531322 Ontario Ltd. Nikolai Manufacturing Inc. Nobel Custom Cut Ltd. Nor-Can Post and Pole. Nordex Inc., Bois. Nordic Structures. Norsask Forest Products Limited Partnership. NorSask Forest Products Ltd. Partner/Norsask Forest Products Inc. North American Crating. North American Forest Products, Ltd. North American Hardwoods Ltd. North American Wood Treating Corp. North Enderby Timber Ltd. North Enderby Timber Ltd./Richwood Fencing. North Mitchell Lumber Co. Ltd. North of 50. North River Log Homes. North Star Planing Co. Ltd. Northcoast Building Products Ltd. Northern Wood. Northland Corp. Northland Forest Products Ltd. Nose Creek Forest Products Corp. Nostalgic Wood. Notch Hill Wood Door & Millwork. Nu-Forest Products (Canada) Inc. Odorizzi Lumber Co. Ltd. Okanagan Door & Window Sales Inc. Olav Haavaldsrud Timber Co./Hornepayne Lumber. Old Country Wood Turning Ltd. Old Yale Log Homes. Olympic Industries Inc-Reman Code. Olympic Industries ULC. Olympic Industries ULC-Reman. Olympic Industries ULC-Reman Code. Olympic Industries, Inc. Ontario Hardwood Products Ltd. Optibois/Precibois Inc. Oregon Canadian Forest Products. Ornamental Moulding Co.. Ospika Lath & Precut. Outdoor Living Mfg. Ltd. Oyama Forest Products Inc. P&E Enterprises. P.F. Inc., Industries/Industries P.F. Inc. P.G. Hardwood Flooring Inc. P.J. White Hardwoods Ltd. Pac-Deck Wood Specialties Ltd. Pacific Cedar (Coleman Road Shingle Ltd.). Pacific Chalet Ltd. Pacific Coast Cedar Products Ltd. Pacific Pallet, Ltd. Pacific Western Wood Works Ltd. Pacifica Forest Products Inc. Pal Lumber Co. Pallan Timber Products (2000) Ltd. Pallet Source Inc. Palliser Lumber Sales Ltd. Panabode Remanufacturing Ltd. Panwood Global Inc. Paragon Laminated Wood Products. Paragon Wood Products. Parallel Wood Products Ltd. Park County Lumber Manufacturing Ltd. Pastway Planing Ltd. Pat Power Forest Products Corp. </p>	

	Period to be reviewed
<p>Pat Power Forest Products Corporation. Patrick Lumber Co. Pattar Cedar Products Ltd. Paul Vallee, Inc. Paulcan Enterprises Ltd. Paul's Mill & Planer. PBF/Produits de Bois. Peacock Lumber Ltd. Peavine Lumber. Peel Lumber and Trusses Inc. Peerless Forest Products. Pepe Millworks Ltd. Perfect-Bois Inc. Perron Inc., Industries. Peter Angus Forest Products Ltd. Peter Rebus Lumber Sales Ltd. Peter Thomson & Sons Inc. Petryk Forest Products Ltd. Pexim Enterprises Inc. Phoenix Forest Products Inc. Pianos Bolduc Inc./Les Pianos Andre Bolduc Inc. Pine Ideas Ltd. Pine Profiles Ltd. Pineseed Forest Products Ltd. Pioneer Log Homes of BC. Pioneer Pallet & Lumber Ltd. Pioneer Pallet and Lumber Ltd. Pioneer Palley and Lumber. Plateau Forest Prod Co. Yarrow. PLCL Holdings Inc./Coastal Cedar Direct. Pleasant Valley Remanufacturing Ltd. Poirier (Rosario) Inc. Pollard Windows Inc. Porcupine Wood Products Ltd. Port McNeill Shake & Shingle. PortBec Forest Products Ltd. Portelance Lumber Capreol Ltd. Portelance Lumber Inc., Jean L. Porter Lumber Ltd. Potvin & Bouchard Inc. Power Wood Corp. Powerwood. Prairie Barnwood. Prairie Cedar Products. Prairie Forest Products Ltd. Precision Cedar Products Corp. Precision Lumber Products Inc. Precut International C L Inc. Premier Wood Products Inc. Premium Cedar Products Ltd./Watkins Mills Ltd./Watkins Sawmills Ltd. Prendiville Industries Ltd. (aka, Kenora Forest Products). Prestige Homes. Preverco Inc. Princeton Lumber Inc. Pristine Log And Timber Ltd. Pro Folia Mill Ltd./Commonwealth Plywood Co. Ltd. Pro-bois Andre Rousseau. Probyn Group. Produits Forestiers D.G. Ltée. Produits Forestiers KGB Enr. Produits Forestiers La Tuque Inc. Produits Forestiers Mauricie. Produits Forestiers Petit Paris. Produits Forestiers Temrex, s.e.c. Produits forestiers Temrex, s.e.c. Produits Matra Inc. Prolam. Promobois G.D.S. Inc. Promobois G.D.S. inc. Quadra Island Forest Products Ltd. Quadra Wood Products Ltd. Quality Hardwoods Ltd. R.L. Palmer Manufacturing Ltd. Rabotage Lemay Inc.</p>	

	Period to be reviewed
<p>Raintree Lumber Specialties Ltd. Ratcliff Forest Products Inc. Rayonier A.M. Canada GP. Redtree Cedar Products Ltd. Rembos Inc. Rene Bernard Inc. Resolute FP Canada Inc./Resolute Forest Products Inc. Richard Lutes Cedar Inc. Richard Ward Lumber Co. Ridge Cedar Ltd. Ridgeline Forest Products. Ridgetimber Trading Inc. Ridgewood Industries Ltd. Rielly Industrial Lumber Inc. Rielly Lumber Inc. Riemer Contracting Ltd. River City Remanufacturing. Riverside Shingle Products. Riverwood Industries Ltd. Robert Windows. Rockett Lumber & Building Supplies. Rocky Mountain Log Homes. Rocky Wood Preservers Ltd. Rojac Enterprises. Roland Boulanger & Cie Ltee. Roland Lefebvre & Fils Inc. Rosko Forestry Operations. Rouck Bros. Mill Ltd. Roxing Enterprise Inc. S & K Cedar Products Ltd. S & R Mills Ltd. S & W Forest Products Ltd. S&R Sawmills Ltd. S&W Forest Products. S&W Forest Products Ltd. San Group Inc. San Industries Ltd. Saran Cedar Ltd. Saskatchewan Abilities Council. Saskatoon Building Supplies. Saskatoon Pallet Ltd. Sask-Can Wood Specialties Inc. Satin Finish Hardwood Flooring. Sault Forest Products Ltd. Sawarne Lumber Co. Ltd. Sawarne Lumber Co., Ltd./Sawarne Lumber Co. Ltd. Sawarne Lumber Company Ltd. SBC Inc./Specialiste Du Bardeau de Cedre Inc. Schmid Industries Ltd. Scierie Adrien Arseneault Ltd. Scierie Alexandre Lemay & Fils Inc. Scierie Arbotek Inc. Scierie Gaston Morin Inc. Scierie Gauthier Ltée. Scierie Girard Inc. Scierie Lac St-Jean Inc. Scierie Leduc/Papiers Stadacona. Scierie Martel Ltée. Scierie Norbois Inc. Scierie Rivest Inc. Scierie Ste-Irene Ltee. Scierie St-Elzear. Scierie St-Michel inc. Scierie St-Michel Inc. Scierie Tech Inc. Scierie West Brome Inc. Scotsburn Lumber Co. Ltd. Scott Lumber. Scottywood Corp. Scouten White Cedar Inc. Sechoir des Bois du Lac Vert Inc. Sechoirs de Beauce Inc. Seel Forest Products Ltd. Sefina Industries Ltd.</p>	

	Period to be reviewed
<p>Selkirk Remanufacturing Ltd. Serpentine Cedar Ltd. Serpentine Cedar Roofing Ltd. Services Boismax Inc. Sexton Lumber Co. Ltd. Shannon Lumber. Shawood Lumber Inc. Shy's Forest Prod Inc. Sigurdson Brothers Logging Co. Ltd./Sigurdson Forest Products Ltd. Sigurdson Forest Products Ltd. Silvaris Corp. Silvaris Corporation. Silver Creek Premium Products Ltd. Silver Creek Premium Products Ltd./Matsqui Management and Consulting Services Ltd., dba Canadian Cedar Roofing Depot. Silvermere Forest Products. Simon Lussier Ltd. Sinclar Enterprises Ltd. Sinclar Group Forest Products Ltd. Sitka Forest Products, Inc. Skagit Industries Ltd. Skaha Forest Products Ltd. Skana Forest Products Ltd. Skeena Sawmills Ltd. Snowcap Lumber Ltd. Soanbert Corp. Solid Wood Products. Sound Spars Enterprise Ltd. Source Forest Products Ltd. South Beach Trading Inc. South River Planing Mills Inc. Southcoast Millworks. South-East Forest Products Ltd. Southwest Forest Products Ltd. Specialiste du Bardeau de Cedre Inc. SPF Precut Lumber. Spray Lake Sawmills (1980) Ltd. Springer Creek Forest Products. Springhill Lumber Wholesale Ltd. Spruce Products Ltd. Spruce Top Lumber Sales Ltd. Spruceland Millworks Inc. Spruceland Millworks, Ltd. St. Boniface Pallet Co. Ltd. St. Jean Lumber (1984) Ltd. Standard Building Supplies Ltd. Stanley Knight Ltd. Stave River Industries Ltd. Stave River Trading. Stella-Jones Inc. Stilewood International Manufacturing Ltd. Still Creek Forest Products Ltd. Stork Craft Manufacturing Inc./Canwood Furniture Inc. Strachan Forest Products. Structurecraft Builders Inc. Structurlam Products Ltd. Sumitomo Canada Ltd. Sunbury Cedar. Suncoast Lumber & Milling. Sundher Timber Products. Supply-All Mfg Inc. Surelog Homes Ltd. Surewood Forest Products/Surewood Forest Industries. Surrey Cedar Ltd. Surrey Millwork (1990) Ltd. Swan Industries. Swift Sure Milling and Moulding. Swiftwood Forest Products Ltd. SWP Industries Inc. T & H Forest Industries Ltd. T.G. Wood Products, Ltd. T.P. Downey & Sons Ltd. Taan Forest Products. Taiga Building Products Ltd.</p>	

	Period to be reviewed
<p> Talan Lumber Products Ltd. Tall Pine Timber Co. Ltd. Tall Tree Lumber Co. Tall Tree Lumber Company. Tamarack Lumber Inc. Tan-Wood Forest Products. Taylor Mill. Teal Cedar Products Ltd. Teal Cedar Products Ltd./J.S. Jones Timber/Stag Timber Ltd. Teal-Jones Group. Tembec Inc. Tembec Inc./Rayonier A.M. Canada GP. Temlam Inc./Jager Building Systems Inc. Temrex Produits Forestiers s.e.c. Terminal Forest Products. Terminal Forest Products Ltd. TF Mill Inc. TFL Forest Ltd. The Teal Jones Group. The Teal-Jones Group. The Wood Source Inc. Thermal Wood. Thomas J. Neuman Ltd. Thompson Hardwoods of Thedford Ltd. Thomson Bros. Lumber Co. Ltd. Timber Specialties. Timber Systems Ltd. TimberWest Forest Corp. Timberworld Forest Products. Timbre Tonewood. Timeu Forest Products Ltd. Titan Ridge Forest Products. TLB Forest Products Inc. Ti'oh Forest Products Inc. Tobin Lake Farms Ltd. Tolko Industries Ltd./Tolko Marketing and Sales Ltd./Gilbert Smith Forest Products Ltd. Top Quality Lumber. Topco Pallet Recycling. Townsend Lumber Inc. Toyoshima Trading. Trans North Timber. Transco Mills Ltd. Transformation de Bois CBV Inc. Trans-Pac Resources Ltd. Trans-Pacific Trading Ltd. Tree-City Lumber & Plywood Inc. Treeline Wood Products Ltd. Trendwood Ltd. Trent Timber Treating Ltd. Triad Forest Products Ltd. Tri-Cept Industries Inc. Trimlite ULC. Trout Creek Enterprises. Trout Creek Planing Mill Ltd. TRS Components Ltd. Tsain Ko Forest Products. Twin River Lumber. Twin Rivers Paper Co. Twin Rivers Paper Co. Inc. Two by Four Lumber Sales Ltd. Tyee Timber Products Ltd. UBM Forest Products Ltd. UCS Forest Group. Unibest Wood Products. Universal Inc./Produits Forestiers/Universal Forest Products of Canada, Inc. Universal Lumber Sales Ltd. UPM Kymmene Miramichi Inc. Upper Canada Forest Products Ltd. Usihome Inc. Usine Sartigan Inc. V & R Sawing. Vaagen Bros. Lumber Inc./Vaagen Fibre Canada, ULC/Vaagen Brothers Lumber Inc. Vaagen Fibre Canada, ULC. Valley Cedar 2 ULC. </p>	

	Period to be reviewed
<p>Valley Kiln & Pattern/Vancouver Specialty Cedar Products. Valley Truss Ltd. Vancouver Island Shingle, Ltd. Vancouver Specialty Cedar Products. Vancouver Specialty Cedar Products Ltd. Vancouver Specialty Products Ltd. Vanderhoof Specialty Wood. Vanderwall Contractors (1971) Ltd. Velcan Forest Products Inc. Vernon Forest Products Ltd. Vexco Veneer Inc. Vimaw Lumber Inc. Vintage Woodworks. Visscher Lumber Inc. W.I. Woodtone Industries Inc. W.K. Lumber Ltd. Wadlegger Logging & Construction Ltd. Wainfleet Box & Pallet. Waldun Forest Product Sales Ltd. Waldun Forest Products Ltd. Waldun Forest Products Sales Ltd./The Waldun Group. Waltham Inc. Watford Roof Truss Ltd. Watkins Sawmills Ltd. Waugh's Woods Ltd. Welco Lumber Corp. West Bay Forest Products Ltd. West Bay Forest Products Ltd./West Bay Forest Products & Manufacturing Ltd. West Bros. Frame & Chair (1976) Inc. West Built Homes. West Creek Panel Products. West Fraser Mills Ltd./West Fraser Timber Co. Ltd./100 Mile Lumber. West Hill Lumber Ltd. West Wind Hardwood Inc. Western Archrib. Western Forest Products. Western Forest Products Inc. Western Lumber Sales Limited. Western Lumber Sales Ltd. Western Pallet & Bin. Western Wood Preservers Ltd. Westex Timber Mills Ltd. Westlam Industries Ltd. Westmark Products Ltd. Westminster Industries Ltd. Weston Forest Corp./Neos Forest Inc. Weston Forest Group/Weston Forest Products Inc. Weston Forest Products Inc. Westree Custom Cedar Products Inc. Westrend Exteriors Inc. West-Wood Industries. Westwood Wholesale Lumber Ltd. Weyerhaeuser Co. White River Forest Products Ltd. White-Wood Forest Products. Wilfrid Paquet & Fils Ltee. Willard G. Hallman Lumber Ltd. Williamsburg Wood & Garden. Winfield Wood & Lath Ltd. Winnipeg Forest Products Inc. Winton Global/Spruce Capital Homes Ltd. Winton Homes Ltd. Woodex International Inc. Woodland Supply & Manufacturing Co. Woodline Forest Products Ltd. Woodstock Forest Products. Woodstock Forest Products Inc. Woodtone Building Products/Woodtone Industries. Woodtone Specialities Inc./Synergy Pacific Wood Solutions ULC. Woodtone Specialties Inc. World Wood Corp./Woodcorp. Wynndel Box & Lumber Co. Ltd. Yarrow Wood Ltd. Yellowhead Wood Products Inc.</p>	

	Period to be reviewed
Zavisha Mills Ltd. Zelensky Brothers La Ronge Mill. Zytech Building. CANADA: Certain Softwood Lumber Products C-122-858 L'Atelier de Réadaptation au travail de Beauce Inc ³ .	4/28/17-12/31/18

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.⁴ 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*.⁵ 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 CBP 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: March 27, 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. 2019-06221 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (Sunset) Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with the Tariff Act of 1930, as amended (the Act), the

³ The other companies, for which a review of the countervailing duty order is requested, are listed separately above, because those companies are subject to both the antidumping and countervailing duty administrative reviews. This company is subject only to the countervailing duty administrative review.

⁴ See section 782(b) of the Act.

⁵ 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.

Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) listed below. The International Trade Commission (the Commission) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews* which covers the same order(s).

DATES: Applicable (April 1, 2019).

FOR FURTHER INFORMATION CONTACT: Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade

Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205-3193.

SUPPLEMENTARY INFORMATION:

Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders*, 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on

methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following antidumping and countervailing duty order(s):

DOC case No.	ITC case No.	Country	Product	Commerce contact
A-570-935	731-TA-1149	China	Circular Welded Carbon Quality Steel Line (2nd Review).	Matthew Renkey, (202) 482-2312
C-570-936	701-TA-455	China	Circular Welded Carbon Quality Steel Line (2nd Review).	Joshua Poole, (202) 482-1293
A-570-848	731-TA-752	China	Freshwater Crawfish Tailmeat (4th Review).	Joshua Poole, (202) 482-1293
A-588-869	731-TA-1206	Japan	Diffusion-Annealed Nickel-Plated Flat-Rolled Steel Products (1st Review).	Jacqueline Arrowsmith, (202) 482-5255

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Commerce's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on Commerce's website at the following address: <http://enforcement.trade.gov/sunset/>. All submissions in these Sunset Reviews must be filed in accordance with Commerce's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.¹

Any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information.² Parties must use the certification formats provided in 19 CFR 351.303(g).³

Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

On April 10, 2013, Commerce modified two regulations related to AD/CVD proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301).⁴ Parties are advised to review the final rule, available at <http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt>, prior to submitting factual information in these segments. To the extent that other regulations govern the submission of factual information in a segment (such as 19 CFR 351.218), these time limits will continue to be applied. Parties are also advised to review the final rule concerning the extension of time limits for submissions in AD/CVD proceedings, available at <http://enforcement.trade.gov/frn/2013/1309frn/2013-22853.txt>, prior to submitting factual information in these segments.⁵

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304-306.

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice

¹ See also *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

² See section 782(b) of the Act.

³ See also *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at

http://enforcement.trade.gov/lei/notices/factual_info_final_rule_FAQ_07172013.pdf.

⁴ See *Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule*, 78 FR 21246 (April 10, 2013).

⁵ See *Extension of Time Limits*, 78 FR 57790 (September 20, 2013).

of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.⁶

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that Commerce's information requirements are distinct from the Commission's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: March 27, 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. 2019-06217 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG893

Western Pacific Fishery Management Council; Public Meetings; Correction

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

ACTION: Notice of correction of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold its 177th Council meeting by teleconference and webinar to take actions on fishery management issues in the Western Pacific Region. The Council will also hold a Biological Opinion Review Advisory Panel meeting by teleconference and webinar. This notice corrects the dates and times for these two meetings and the deadline for written public comments for the 177th Council meeting.

DATES: The Biological Opinion Review Advisory Panel meeting and the 177th Council meeting will be held on April 12, 2019. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meetings will be held by teleconference and webinar. The teleconference numbers are U.S. toll-free (888) 482-3560 or International Access: +1 (647) 723-3959, and Access Code: 5228220. The webinar can be accessed at: <https://wprfmc.webex.com/join/info.wpcouncilnoaa.gov>.

The host site for the Biological Opinion Review Advisory Panel meeting teleconference will be the Council Conference Room, 1164 Bishop St., Suite 1400, Honolulu, HI. The following venues will also be host sites for the 177th Council Meeting teleconference: Council Conference Room, 1164 Bishop St., Suite 1400, Honolulu, HI; Native American Samoa Advisory Council Office Conference Room, Pava'ia'i Village, Pago Pago, AS; Guam Hilton Resort and Spa, 202 Hilton Rd., Tumon Bay, GU; Department of Land and Natural Resources Conference Room, Lower Base Drive, Saipan, MP.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council, (808) 522-8220 (voice) or (808) 522-8226 (fax).

SUPPLEMENTARY INFORMATION: The original notice published in the **Federal Register** on March 19, 2019 (84 FR 10046).

The Biological Opinion Review Advisory Panel meeting will be held on April 12, 2019, from 9 a.m. to 11 a.m. (Hawaii Standard Time (HST)). The 177th Council Meeting will be held on April 12, 2019, from 1 p.m. to 4 p.m. (HST) and from noon to 3 p.m. (Samoa Standard Time (SST)), and on April 13, 2019, from 9 a.m. to noon (Chamorro Standard Time (ChST)). Agenda items noted as "Final Action Items" refer to actions that may result in Council transmittal of a proposed fishery management plan, proposed plan amendment, or proposed regulations to the U.S. Secretary of Commerce, under

Sections 304 or 305 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Opportunities to present oral public comment will be provided throughout the agendas. The order of the agenda may change, and will be announced in advance at the meetings. The meetings may run past the scheduled times noted above to complete scheduled business.

Background documents for the 177th Council meeting will be available at <http://www.wpcouncil.org>. Written public comments for the 177th Council meeting should be received at the Council office by 5 p.m. (HST), April 10, 2019, and should be sent to Kitty M. Simonds, Executive Director; Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813; fax: (808) 522-8226; or email: info.wpcouncil@noaa.gov.

Agenda for the Biological Opinion Review Advisory Panel Meeting

Friday, April 12, 2019, 9 a.m. to 11 a.m. (HST)

1. Introductions
2. Overview of the Advisory Panel Task
3. Overview of the Draft Biological Opinion for the Hawaii-based Shallow-set Longline Fishery
4. Advisory Panel Review of the Draft Biological Opinion
5. Public Comment
6. Advisory Panel Discussion and Recommendations
7. Other Business

Agenda for 177th Council Meeting

Friday, April 12, 2019, 1 p.m.–4 p.m. (HST); Friday, April 12, 2019, 12 p.m.–3 p.m. (ASST); Saturday, April 13, 2019, 9 a.m.–12 p.m. (MST)

1. Welcome and Introductions
2. Approval of the 177th Agenda
3. Draft Biological Opinion for the Hawaii-based Shallow-set Longline Fishery
4. Biological Opinion Review Advisory Panel Report and Recommendations
5. Managing Loggerhead and Leatherback Sea Turtle Interactions in the Hawaii-based Shallow-set Longline Fishery (Final Action Item)
6. Public Hearing
7. Council Discussion and Recommendations
8. Other Business

Non-emergency issues not contained in this agenda may come before the Council for discussion and formal Council action during the 177th meeting. However, Council action on regulatory issues will be restricted to

⁶ See 19 CFR 351.218(d)(1)(iii).

those issues specifically listed in this document and any regulatory issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

These meetings are accessible to people with disabilities. Please direct requests for sign language interpretation or other auxiliary aids to Kitty M. Simonds (see **FOR FURTHER INFORMATION CONTACT**) at least 5 days prior to the meeting date.

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

Dated: March 27, 2019.

Key Israel Marquez,

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

[FR Doc. 2019-06227 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meetings.

SUMMARY: This notice sets forth the schedule and proposed agenda of two meetings of the Science Advisory Board (SAB). The members will discuss issues outlined in the section on Matters to be considered.

DATES: There are two meetings: The first meeting is scheduled for April 23, 2019 from 8:30 a.m. to 5:45 p.m. Eastern Daylight Time (EDT) and April 24, 2019 from 8:30 a.m. to 12:00 p.m. EDT. The second meeting is scheduled for July 10, 2019, from 8:00 a.m. to 5:00 p.m. Pacific Daylight Time (PDT) and July 11, 2019 from 8:00 a.m. to 12:00 p.m. PDT. These times and the agenda topics described below are subject to change. For the latest agenda please refer to the SAB website: <http://sab.noaa.gov/SABMeetings.aspx>.

ADDRESSES: The April 23–24, 2019 meeting will be at the Hilton Garden Inn, 2201 M St NW, Washington, DC 20037. The July 10–11, 2019 meeting will be at the Hyatt Regency Seattle, 8008 Howell Street, Seattle, WA 98101. The link for the webinar registration for the April 23–24, 2019 meeting may be found here: <https://>

attendee.gotowebinar.com/register/7212839555782655746.

The link for the July 10–11, 2019 meeting will be posted on the SAB website when available.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Executive Director, SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910; Phone Number: 301-734-1156; email: Cynthia.Decker@noaa.gov; or visit the SAB website at <http://sab.noaa.gov/SABMeetings.aspx>.

SUPPLEMENTARY INFORMATION: The NOAA Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and provide optimal support to resource management.

Status: The April 23–24, 2019 meeting will be open to public participation with a 15-minute public comment period at 5:30 p.m. EDT. The July 10–11, 2019 meeting will have a 15-minute public comment period at 4:45 p.m. PDT. The SAB expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three minutes. Written comments for the April 23–24, 2019 meeting should be received by April 14, 2019 and written comments for the July 10–11, 2019 meeting should be received in the SAB Executive Director's Office by July 3, 2019 to provide sufficient time for SAB review. Written comments received by the SAB Executive Director after these dates will be distributed to the SAB, but may not be reviewed prior to the meeting date.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed to the Executive Director no later than 12 p.m. on April 9 for the April 23–24, 2019 meeting and by no later than 12 p.m. on May 26 for the July 10–11, 2019 meeting.

Matters to be Considered: The meeting on April 23–24, 2019 will include the NOAA Update, NOAA Science Update, Presentation of the Sustainable Marine Aquaculture report,

Presentation of the Environmental Information Services Working Group (EISWG) Report on the Use of Observing System Simulation Experiments (OSSEs), and Presentation of the Environmental Information Services Working Group (EISWG) Annual Report to Congress, The July 10–11, 2019 meeting will consider updates and reports on topics contained in the SAB Work Plan. Meeting materials, including work products, will be made available on the SAB website: <http://sab.noaa.gov/SABMeetings.aspx>.

Dated: March 12, 2019.

David Holst,

Chief Financial Officer/Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2019-06300 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-KD-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG921

New England 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 New England Fishery Management Council (Council, NEFMC) will hold a three-day meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Tuesday, April 16 through Thursday, April 18, 2019, beginning at 9 a.m. on April 16 and 8:30 a.m. on April 17 and 18.

ADDRESSES: The meeting will be held at the Hilton Hotel, 20 Coogan Boulevard, Mystic, CT 06355; telephone: (860) 572-0328; online at <https://www3.hilton.com/en/hotels/connecticut/hilton-mystic-MYSMHHF/index.html>.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465-0492; www.nefmc.org.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, April 16, 2019

After introductions and brief announcements, the meeting will begin with reports from the Council Chairman and Executive Director, NMFS's Regional Administrator for the Greater Atlantic Regional Fisheries Office (GARFO), liaisons from the Northeast Fisheries Science Center (NEFSC) and Mid-Atlantic Fishery Management Council (MAFMC), representatives from NOAA General Counsel and NOAA's Office of Law Enforcement, and staff from the Atlantic States Marine Fisheries Commission (ASMFC) and the U.S. Coast Guard. The Council also will receive a short report on the South Atlantic Council's Dolphin Wahoo Amendment 10. The Council next will receive a presentation from NOAA Fisheries on the joint NOAA Fisheries/ U.S. Fish and Wildlife Service recovery plan for the Gulf of Maine District Population Segment of Atlantic Salmon. This will be followed by a GARFO presentation on options that will be considered by the Atlantic Large Whale Take Reduction Team (ALWTRT) during its April 23–26, 2019 meeting. The Council's discussion will focus on potential ALWTRT impacts on New England-managed fisheries. GARFO also will provide information about the Biological Opinion for all species listed under the Endangered Species Act that may be affected by the 10 fishery management plans that NOAA Fisheries is consulting on. The Council then will receive a progress report on the Mid-Atlantic Fishery Management Council's Commercial eVTR Omnibus Framework Action, which the MAFMC is developing to consider implementing electronic Vessel Trip Reports for all vessels with commercial permits for species managed by the Mid-Atlantic Council.

After the lunch break, members of the public will have the opportunity to speak during an open comment period on issues that relate to Council business but are not included on the published agenda for this meeting. The Council asks the public to limit remarks to 3–5 minutes. The Groundfish Committee will report next. The Council is scheduled to approve the range of alternatives for Groundfish Monitoring Amendment 23. It also will receive an update on the status of ongoing listening sessions, which are being held to gauge public interest in whether or not the Council should develop an amendment to the groundfish plan to limit access to the party/charter fishery. In addition, the Council will receive an update on its Five-Year Catch Share Review, which is

underway, and then approve a modified Gear Standards Policy to facilitate use of gear in accountability measures. At the conclusion of the discussion, the Council will adjourn for the day.

Wednesday, April 17, 2019

The Council will begin the day with a progress report from its Ecosystem-Based Fishery Management (EBFM) Committee on setting catch limits for stock complexes, managing overfished stocks, and other issues related to the development of an example Fishery Ecosystem Plan (eFEP) for Georges Bank. The Council then will receive the Northeast Fisheries Science Center's annual Ecosystem Status Report, which provides an update on the condition of the Northeast Continental Shelf ecosystem. The Atlantic Herring Committee will report next. First, the Council will receive a progress report on the development of 2019–21 specifications for Atlantic herring and approve the Scientific and Statistical Committee's (SSC) acceptable biological catch and overfishing limit recommendations. The Council then will identify the range of additional management measures for the 2019–21 Atlantic herring fishing years if any measures are needed.

Following the lunch break, the Council will receive and discuss the final report from the Research Set-Aside (RSA) Program Review Panel. The Council may make recommendations based on the panel's findings. Next, the SSC will provide comments and recommendations on the Council's revised research priorities, which were developed in 2018 and updated based on suggestions from the Council's committees and Plan Development Teams. The full Council then will review, discuss, and approve the updated list. Before adjourning for the day, the Council will review, discuss, and approve updates to the Council Operations Handbook regarding the Research Steering Committee, research priority setting, and research review policy.

Thursday, April 18, 2019

The third day of the meeting will begin with a report from the Council's executive director on the staff's participation in a facilitated offsite workshop, which was held March 13–14, 2019 and was prompted by a recommendation from the Council Program Review Panel. The remainder of the meeting largely will be devoted to a special session titled "Offshore Wind in the Northeast Region." This session will cover four wide-ranging subject areas: (1) A broad overview of the scope

and time horizon of likely offshore wind energy development in the region; (2) a summary of the wind energy development process and major players; (3) an update on research planning and coordination, including wind energy impacts on fishery surveys; and (4) an update on regional projects under development. Finally, the Council will close out the meeting with "other business."

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council 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 Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: March 27, 2019.

Rey Israel Marquez,

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

[FR Doc. 2019–06228 Filed 3–29–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Multistakeholder Process on Promoting Software Component Transparency

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Telecommunications and Information Administration (NTIA) will convene a meeting of a multistakeholder process on promoting software component transparency on April 11, 2019.

DATES: The meeting will be held on April 11, 2019, from 10:00 a.m. to 4:00 p.m., Eastern Time.

ADDRESSES: The meeting will be held at the American Institute of Architects, 1735 New York Ave. NW, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Allan Friedman, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4725, Washington, DC 20230; telephone: (202) 482-4281; email: afriedman@ntia.gov. Please direct media inquiries to NTIA's Office of Public Affairs: (202) 482-7002; email: press@ntia.gov.

SUPPLEMENTARY INFORMATION:

Background

This National Telecommunications and Information Administration cybersecurity multistakeholder process focuses on promoting software component transparency. Most modern software is not written completely from scratch, but includes existing components, modules, and libraries from the open source and commercial software world. Modern development practices such as code reuse, and a dynamic IT marketplace with acquisitions and mergers, make it challenging to track the use of software components. The Internet of Things compounds this phenomenon, as new organizations, enterprises, and innovators take on the role of software developer to add "smart" features or connectivity to their products. While the majority of libraries and components do not have known vulnerabilities, many do, and the sheer quantity of software means that some software products ship with vulnerable or out-of-date components.

The first meeting of this multistakeholder process was held on July 19, 2018, in Washington, DC.¹ Stakeholders presented multiple perspectives, and identified several inter-related work streams: Understanding the Problem, Use Cases and State of Practice, Standards and Formats, and Healthcare Proof of Concept. Since then, stakeholders have scoped their work streams and have begun developing products such as guidance documents. NTIA acts as the convener, but stakeholders drive the outcomes. Success of the process will be evaluated by the extent to which broader findings on software component transparency are implemented across the ecosystem.

The main objectives of the April 11, 2019, meeting are to share progress from

the working groups and hear feedback from the broader stakeholder community. Stakeholders will also discuss how the outputs of the different work streams can complement each other, and identify further issues to pursue. More information about stakeholders' work is available at: <https://www.ntia.gov/SoftwareTransparency>.

Time and Date: NTIA will convene the next meeting of the multistakeholder process on Software Component Transparency on April 11, 2019, from 10:00 a.m. to 4:00 p.m., Eastern Time. Please refer to NTIA's website, <https://www.ntia.gov/SoftwareTransparency>, for the most current information.

Place: The meeting will be held at the American Institute of Architects, 1735 New York Ave. NW, Washington, DC 20006. The location of the meeting is subject to change. Please refer to NTIA's website, <https://www.ntia.gov/SoftwareTransparency>, for the most current information.

Other Information: The meeting is open to the public and the press on a first-come, first-served basis. Space is limited.

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Allan Friedman at (202) 482-4281 or afriedman@ntia.gov at least seven (7) business days prior to each meeting. The meetings will also be webcast. Requests for real-time captioning of the webcast or other auxiliary aids should be directed to Allan Friedman at (202) 482-4281 or afriedman@ntia.gov at least seven (7) business days prior to each meeting. There will be an opportunity for stakeholders viewing the webcast to participate remotely in the meetings through a moderated conference bridge, including polling functionality. Access details for the meetings are subject to change. Please refer to NTIA's website, <https://www.ntia.gov/SoftwareTransparency>, for the most current information.

Dated: March 27, 2019.

Kathy Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2019-06211 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-60-P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Notice of Intent to Renew Collection 3038-0061: Daily Trade and Supporting Data Reports

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. Under the Paperwork Reduction Act ("PRA"), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on the daily trade and supporting data reports that are submitted to CFTC pursuant to Commission Rule 16.02. This part imposes reporting requirements on Reporting Markets, including Designated Contract Markets.

DATES: Comments must be submitted on or before May 31, 2019.

ADDRESSES: You may submit comments, identified by "OMB Control No. 3038-0061", by any of the following methods:

- The Agency's website, at <http://comments.cftc.gov/>. Follow the instructions for submitting comments through the website.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>.

FOR FURTHER INFORMATION CONTACT:

Thomas Guerin, Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, (202) 734-4194; email: tguerin@cftc.gov.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.*, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of Information" is defined

¹Notes, presentations, and a video recording of the July 19, 2018, kickoff meeting are available at: <https://www.ntia.gov/SoftwareTransparency>.

in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

Title: Regulation 16.02 Daily Trade and Supporting Data Reports (OMB Control No. 3038–0061). This is a request for extension of a currently approved information collection.

Abstract: Commission Rule 16.02 requires Reporting Markets to report transaction-level trade data and related order information for each executed transaction. The Commission uses the transaction-level trade data and related order information to discharge its regulatory responsibilities, including the responsibilities to prevent market manipulations and commodity price distortions and ensure the financial integrity of its jurisdictional markets.

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of 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.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according

to the procedures established in § 145.9 of the Commission's regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The Commission is revising its burden estimate for this collection. The Commission estimates that up to 15 Reporting Markets could provide daily trade and supporting data reports to the Commission in the future. The CFTC believes that Reporting Markets incur an average burden of two hours to compile and submit each report made pursuant to Commission Rule 16.02. Reporting Markets submit an average of 250 reports annually. The estimated total annual time-burden for all Reporting Markets is 7,500 hours. The respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 15.

Estimated Average Burden Hours Per Respondent: 500 hours.

Estimated Total Annual Burden Hours: 7,500 hours.

Frequency of Collection: Daily.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: March 26, 2019.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2019–06153 Filed 3–29–19; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (“ICR”) abstracted below has been forwarded to the Office of Management and Budget

(“OMB”) for review and comment. The ICR describes the nature of the information collection and its expected costs and burdens.

DATES: Comments must be submitted on or before May 1, 2019.

ADDRESSES: Comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, may be submitted directly to the Office of Information and Regulatory Affairs (“OIRA”) in OMB within 30 days of publication of this notice by either of the methods specified below. Please identify the comments by “OMB Control Numbers 3038–0088.”

• *By email addressed to:* OIRASubmissions@omb.eop.gov; or

• *By mail addressed to:* Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Commodity Futures Trading Commission, 725 17th Street NW, Washington, DC 20503.

A copy of all comments submitted to OIRA should be sent to the Commodity Futures Trading Commission (“Commission”) by any of the following methods. The copies should refer to “OMB Control Numbers 3038–0088.”

• *By mail addressed to:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581;

• *By Hand Delivery/Courier to the same address; or*

• *Through the Commission's website at <http://comments.cftc.gov>. Please follow the instructions for submitting comments through the website.*

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.¹ The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as

¹ 17 CFR 145.9.

¹ 17 CFR 145.9.

obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

A copy of the supporting statements for the collections of information discussed herein may be obtained by visiting <http://RegInfo.gov>.

FOR FURTHER INFORMATION CONTACT:

Jacob Chachkin, Special Counsel, (202) 418-5496, jchachkin@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581, and refer to OMB Control Numbers 3038-0088.

SUPPLEMENTARY INFORMATION:

Titles: Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants (OMB control number 3038-0088). This is a request for revision of this currently approved information collection.

Abstract: Pursuant to the authority granted to it by Section 731 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act, Pub L. No. 111-203, 124 Stat. 1376 (2010)), the Commission promulgated regulation 23.504, among others. This regulation obligates swap dealers (“SDs”) and major swap participants (“MSPs”) to develop and retain written swap trading relationship documentation, which is essential to ensuring that SDs and MSPs document their swaps. The ICRs for this regulation are included under OMB control number 3038-0088.

The United Kingdom (“UK”) has provided formal notice of its intention to withdraw from the European Union (“EU”). This withdrawal may happen as soon as April 12, 2019 and may transpire without a negotiated agreement between the UK and EU (No-deal Brexit). To the extent this event occurs, affected SDs and MSPs may be involved in transfers of certain uncleared swaps, including uncleared swaps that were entered into before the relevant compliance dates under the CFTC Margin Rule² or the Prudential

Margin Rule and that, therefore, may not be subject to such rules, in whole or in part.

The Commission is adopting an interim final rule (“Final Rule”) amending the CFTC Margin Rule such that the date used for purposes of determining whether an uncleared swap was entered into prior to an applicable compliance date will not change under the CFTC Margin Rule if the swap is transferred, and thereby amended, in accordance with the terms of the Final Rule in respect of any such transfer. In doing so, the Final Rule, subject to its requirements, allows an uncleared swap to retain its legacy status when transferred in connection with a No-deal Brexit. As a condition to the relief in the Final Rule, in certain cases, the Commission requires that the transferor of a legacy swap make certain representations to the SD or MSP that is a party to the swap in the swap trading relationship documentation relating to such transfer. The Commission proposes to revise the burden of OMB control number 3038-0088 to reflect this requirement.

Burden Statement: As a condition to the relief in the Final Rule, in certain cases, the Commission requires that the transferor of a legacy swap make certain representations to the SD or MSP that is a party to the swap in the swap trading relationship documentation relating to such transfer. The Commission is revising the burden of this OMB number to reflect the inclusion of this requirement in the Final Rule. Specifically, the Commission estimates that this requirement will increase the burden under OMB control number 3038-0088 as follows:

Respondents/Affected Entities: SDs and MSPs and their counterparties.

Estimated Number of Respondents: 52.

Estimated Total Annual Burden on Respondents: 1,404 hours.

Frequency of Collection: Periodically.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: March 26, 2019.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2019-06168 Filed 3-29-19; 8:45 am]

BILLING CODE 6351-01-P

Credit Administration, and the Federal Housing Finance Agency published final margin requirements in November 2015. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (“Prudential Margin Rule”).

BUREAU OF CONSUMER FINANCIAL PROTECTION

Agency Information Collection Activities: Notice of Office of Management and Budget Approval of Information Collection Requirements

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of approval of information collection requirements.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is announcing Office of Management and Budget (OMB) approval of new and revised information collection requirements contained in a final rule published in the **Federal Register** on November 22, 2016, as amended on April 25, 2017 and February 13, 2018, regarding prepaid accounts under Regulations E and Z. See the **SUPPLEMENTARY INFORMATION** section below for additional information about each OMB approval.

FOR FURTHER INFORMATION CONTACT:

Documentation prepared in support of these information collection requests is available at www.reginfo.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: Under the PRA (44 U.S.C. 3501 *et seq.*) the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. On October 5, 2016, the Bureau issued a final rule titled “Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)” (2016 Final Rule).¹ The Bureau subsequently amended the 2016 Final Rule twice, in 2017 and 2018.² The 2016 Final Rule, as subsequently amended, is referred to herein as the Prepaid Accounts Rule. Pursuant to 5 CFR 1320.11(h), the Bureau submitted the 2016 Final Rule with information collection requests (ICRs) to OMB on the date the 2016 Final Rule was published

¹ 81 FR 83934 (Nov. 22, 2016).

² See 82 FR 18975 (Apr. 25, 2017) and 83 FR 6364 (Feb. 13, 2018). These amendments, among other things, extended the effective date of the Prepaid Accounts Rule to April 1, 2019.

² Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016) (“CFTC Margin Rule”). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission’s regulations. 17 CFR 23.150–23.159, 23.161. The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Farm

in the **Federal Register**.³ The Bureau hereby announces OMB approval of the information collection requirements

contained in the Prepaid Accounts Rule and the respective OMB control

numbers currently assigned to each of the information collection requirements.

Title of collection	OMB control number	Date approved by OMB
Electronic Fund Transfer Act (Regulation E) 12 CFR 1005	3170-0014	3/22/2019
Truth in Lending Act (Regulation Z) 12 CFR 1026 Pre-Paid Card Regulation ⁴	3170-0050	3/22/2019

Dated: March 26, 2019.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2019-06172 Filed 3-29-19; 8:45 am]

BILLING CODE 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2019-0015]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, “Consumer Response Government and Congressional Portal Boarding Forms.”

DATES: Written comments are encouraged and must be received on or before May 1, 2019 to be assured of consideration.

ADDRESSES: Comments in response to this notice are to be directed towards OMB and to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection. You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- **Electronic:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Email:** OIRA_submission@omb.eop.gov.

- **Fax:** (202) 395-5806.
- **Mail:** Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT:

Documentation prepared in support of this information collection request is available at www.reginfo.gov (*this link becomes active on the day following publication of this notice*). Select “Information Collection Review,” under “Currently under review, use the dropdown menu “Select Agency” and select “Consumer Financial Protection Bureau” (recent submissions to OMB will be at the top of the list). The same documentation is also available at <http://www.regulations.gov>. Requests for additional information should be directed to Darrin King at (202) 435-9575, or email: CFPB_PRA@cfpb.gov. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov. Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Consumer Response Government and Congressional Portal Boarding Forms.

OMB Control Number: 3170-0057.

Type of Review: Revision of a currently approved collection.

Affected Public: State, Local, and Tribal Governments; Federal Government.

Estimated Number of Respondents: 60.

Estimated Total Annual Burden Hours: 14.

Abstract: Section 1013(b)(3)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act) requires the Bureau to “facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services.”¹ The Act also requires the Bureau to “share consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies.”²

In furtherance of its statutory mandates related to consumer complaints, the Bureau utilizes Government and Congressional Portal Boarding Forms (Boarding Forms) to register users for access to secure, web-based portals. The Bureau has developed separate portals for congressional users and other government users as part of its secure web portal offerings (the “Government Portal” and the “Congressional Portal,” respectively).³

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on December 17, 2018, 83 FR 64567, Docket Number: CFPB-2018-0040. Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau’s estimate of the burden of the collection of information, including the

continue to use the 3170-0015 control number for Regulation Z.

¹ Codified at 12 U.S.C. 5493(b)(3)(A).

² Dodd-Frank Act section 1013(b)(3)(D), codified at 12 U.S.C. 5493(b)(3)(D).

³ In addition to the boarding forms for congressional and government users, the Bureau utilizes a separate OMB-approved form to board companies onto their own distinct portal to access complaints submitted against them, through OMB Control No. 3170-0054 (Consumer Complaint Intake System Company Portal Boarding Form Information Collection System; expires July 31, 2018).

³ On March 6, 2019, the Bureau published a notification in the **Federal Register** titled “Technical Specifications for Submissions to the Prepaid Account Agreements Database.” 84 FR 7979 (Mar. 6, 2019) (Technical Specifications). The Technical Specifications relate to a provision in 12 CFR 1005.19, added to Regulation E by the Prepaid Accounts Rule, which requires a prepaid account issuer to make submissions of its currently-offered prepaid account agreements on a rolling basis, in the form and manner specified by the Bureau. While the Technical Specifications do not introduce any new or revised collections of information beyond what is already contemplated

by the Prepaid Accounts Rule, for purposes of the PRA, OMB considers them as instructions for an information collection and, as such, have been included in OMB’s docket for OMB number 3170-0014.

⁴ The Bureau divided certain proposals to amend the Bureau’s Regulation Z into separate ICRs in the OMB system (accessible at www.reginfo.gov) to ease the public’s ability to view and understand the individual proposals. The Bureau anticipates that it will combine OMB Number 3170-0050 into the existing control number for Regulation Z (OMB Number 3170-0015). Bureau respondents should

validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All comments will become a matter of public record.

Dated: March 26, 2019.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2019-06171 Filed 3-29-19; 8:45 am]

BILLING CODE 4810-AM-P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Scientific Advisory Board; Notice of Federal Advisory Committee Meeting

AGENCY: U.S. Air Force Scientific Advisory Board, Department of the Air Force, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the U.S. Air Force Scientific Advisory Board will take place.

DATES: Closed to the public Thursday April 11, 2019 from 1:15 p.m. to 3:30 p.m. Mountain Standard Time. Due to circumstances beyond the control of the Department of Defense (DoD) and the Designated Federal Officer, the U.S. Air Force Scientific Advisory Board was unable to provide public notification required by 41 CFR 102-3.150(a) concerning its April 11, 2019 meeting of the U.S. Air Force Scientific Advisory Board. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102.3-150(b), waives the 15-calendar day notification requirement.

ADDRESSES: The address of the closed meeting is the Auditorium of Bldg 1575, located at 6006 Wardleigh Rd, Hill AFB, UT 80456.

FOR FURTHER INFORMATION CONTACT: Evan Buschmann, (240) 612-5503 (Voice), 703-693-5643 (Facsimile), evan.g.buschmann.civ@us.af.mil (Email). Mailing address is 1500 West Perimeter Road, Ste. #3300, Joint Base

Andrews, MD 20762. Website: <http://www.sab.af.mil/>. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102-3.140 and 102-3.150.

Purpose of the Meeting: The purpose of this Air Force Scientific Advisory Board quarterly meeting is to conduct mid-term reviews of the Scientific Advisory Board's FY19 studies, offering board members the opportunity to hear directly from the Study Chairs on the progress they have made thus far and provide dedicated time to continue collaboration on research.

Agenda: 1315-1330 FY19 Study Remarks, Dr. James Chow, Chair, U.S. Air Force Scientific Advisory Board 1330-1400 Multi-Source Data Fusion for Target Location and Identification (DFT)—Midterm Outbrief, Dr. Patrick Stadter, Study Chair 1400-1430 Fidelity of Modeling, Simulation, and Analysis to Support Air Force Decision Making (MSA)—Midterm Outbrief, Mr. Darcy McGinn, Study Chair 1430-1445 Coffee Break 1445-1515 21st Century Training and Education Technologies (TET)—Midterm Outbrief, Dr. Mica Endsley-Jones, Study Chair 1515-1530 Closing Remarks, Dr. James Chow, Chair, U.S. Air Force Scientific Advisory Board.

Meeting Accessibility:

Written Statements: Any member of the public that wishes to provide input on the Air Force Scientific Advisory Board Spring Meeting must contact the meeting organizer at the phone number or email address listed in this announcement at least five working days prior to the meeting date. Please ensure that you submit your written statement in accordance with 41 CFR 102-3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act. Statements being submitted in response to the agenda mentioned in this notice must be received by the Scientific Advisory Board meeting organizer at least five calendar days prior to the meeting commencement date. The Scientific Advisory Board meeting organizer will review all timely submissions and respond to them prior to the start of the meeting identified in this notice. Written statements received after this date may not be considered by

the Scientific Advisory Board until the next scheduled meeting.

Carlinda N. Lotson,

Acting Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019-06167 Filed 3-29-19; 8:45 am]

BILLING CODE 5001-10-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Innovation Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Research and Engineering, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Innovation Board will take place.

DATES: Open to the public Wednesday, April 3, 2019, from 3:00 p.m.-4:00 p.m. Eastern Time.

ADDRESSES: The public meeting will be held virtually via live phone conference. Please refer to the Defense Innovation Board's website for the audio conference phone number: <http://innovation.defense.gov>. (See guidance in the **SUPPLEMENTARY INFORMATION** section.)

FOR FURTHER INFORMATION CONTACT: Captain Christopher Brunett, (703) 697-4337 (Voice), christopher.w.brunett@mail.mil (Email); OR Janet Boehnlein, (571) 527-9209 (Voice), janet.a.boehnlein.civ@mail.mil (Email). Mailing address is Defense Innovation Board, 3030 Defense Pentagon, Room 5E572, Washington, DC 20301-3030. Website: <http://innovation.defense.gov>. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense (DoD) and the Designated Federal Officer, the Defense Innovation Board was unable to provide public notification required by 41 CFR 102-3.150(a) concerning its April 3, 2019 meeting of the Defense Innovation Board. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102-3.150(b) waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5

U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The mission of the DIB is to examine and provide the Secretary of Defense and the Deputy Secretary of Defense independent advice and recommendations on innovative means to address future challenges in terms of integrated change to organizational structure and processes, business and functional concepts, and technology applications. The DIB focuses on (a) technology and capabilities, (b) practices and operations, and (c) people and culture.

Agenda: During the meeting, the DIB will deliberate and vote on the unclassified portion of the 5G Study. See below for additional information on how to sign up to provide public comments. Oral comments will be accepted at the public meeting if time permits.

Meeting Accessibility: Pursuant to Federal statutes and regulations (the FACA, the Sunshine Act, and 41 CFR 102–3.140 through 102–3.165), the meeting is open to the public via webcast and conference call from 3:00 p.m. to 4:00 p.m. EDT. Members who plan to attend via webcast or phone should register on the DIB website, <http://innovation.defense.gov>, no later than April 1, 2019.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact the Designated Federal Officer (DFO), see **FOR FURTHER INFORMATION CONTACT** section for contact information, no later than March 25, 2019, so that appropriate arrangements can be made.

Written Statements: Pursuant to section 10(a)(3) of the FACA and 41 CFR 102–3.140, the public or interested organizations may submit written comments to the DIB about its approved agenda pertaining to this meeting or at any time regarding the DIB's mission. Individuals submitting a written statement must submit their statement to the DFO (see **FOR FURTHER INFORMATION CONTACT** section for contact information). Written comments that do not pertain to a scheduled meeting may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at the planned meeting, then such comments must be received in writing not later than April 1, 2019. The DFO will compile all written submissions and provide them to DIB members for consideration.

Oral Presentations: Individuals wishing to make an oral statement to the DIB at the public meeting may be

permitted to speak for up to two minutes, time permitting, and will need microphone access enabled on the device from which they are participating in the meeting. Anyone wishing to speak to the DIB should submit a request by email at osd.innovation@mail.mil not later than April 1, 2019 for planning. Requests for oral comments should include a copy or summary of planned remarks for archival purposes. Individuals may also be permitted to submit a comment request at the public meeting; however, depending on the number of individuals requesting to speak, the schedule may limit participation. Webcast attendees will be provided instructions with the live stream link if they wish to submit comments during the open meeting. Dial-in attendees must submit written statements prior to the meeting (see "Written Statements" section for instructions).

Dated: March 27, 2019.

Shelly E. Finke,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–06273 Filed 3–29–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Army Corps of Engineers

Notice of Intent To Prepare an Environmental Impact Statement for the Willamette Valley System Operations and Maintenance

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The Portland District, U.S. Army Corps of Engineers (Corps) intends to prepare an Environmental Impact Statement (EIS) to address the continued operations and maintenance of the Willamette Valley System (WVS) in accordance with authorized project purposes; while meeting Endangered Species Act (ESA) obligations to avoid jeopardizing the continued existence of listed species.

The Corps will serve as the lead federal agency for purposes of the National Environmental Policy Act (NEPA).

DATES: Written comments for consideration in the development of the scope of the NEPA EIS are due to the addresses below no later than June 28, 2019.

ADDRESSES: Mailed comments may be sent to: U.S. Army Corps of Engineers, Portland District, P.O. Box 2946, Attn:

CENWP–PME–E, Portland, OR 97208–2946. Email comments to: willamette.eis@usace.army.mil. All comments and materials received, including names and addresses, will become part of the administrative record and may be released to the public.

FOR FURTHER INFORMATION CONTACT: For questions regarding the EIS, or special accommodations for scoping process participation, please contact Suzanne Hill, Environmental Resources Specialist, (503) 808–4767.

SUPPLEMENTARY INFORMATION:

Background. The WVS consists of 13 multipurpose dams and reservoirs, riverbank protection projects in the Willamette River Basin in Oregon, and hatchery programs to mitigate for effects of the project on fish habitat. The most recent NEPA evaluation for the overall WVS operations and maintenance was an EIS completed in 1980. Since 1980, operations have been modified and structural improvements for fish passage and temperature control have been implemented to address effects of the WVS on ESA-listed fish. NEPA evaluations since the 1980 EIS have been project-specific. There is also new information relevant to the environmental impacts of operating the WVS. This EIS will evaluate the impacts of continued operations and maintenance of the WVS. The EIS will be prepared in accordance with NEPA, the Council on Environmental Quality's (CEQ) NEPA regulations (40 CFR parts 1500–1508), and the Corps' NEPA regulations (33 CFR part 230). The Corps has reinitiated formal consultation under Section 7 of the ESA on the National Marine Fisheries Service's 2008 Biological Opinion for the Willamette River Basin Flood Control Project. This NEPA process will inform the ESA Section 7 consultation process. Additionally, the Corps intends to initiate consultation under Section 106 of the National Historic Preservation Act. The Corps anticipates that the draft EIS will be made available for public comment in Fall/Winter 2020.

The Corps has invited the following Tribes and federal and state agencies to participate as cooperating agencies for the EIS: Confederated Tribes of Warm Springs, Confederated Tribes of Grand Ronde, Confederated Tribes of Siletz Indians, Cow Creek Band of Umpqua Tribe of Indians, Bonneville Power Administration, U.S. Bureau of Land Management, National Marine Fisheries Service, U.S. Bureau of Reclamation, U.S. Forest Service, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, Oregon Water Resources Department, Oregon Parks

and Recreation Department, Oregon Department of Environmental Quality, Oregon Department of Land Conservation and Development, Oregon Department of State Lands, and Oregon Department of Agriculture.

Alternatives. The EIS will evaluate a no action alternative and action alternatives. The no action alternative is the current management direction for the WVS. Action alternatives will be composed of various measures for continued operations and maintenance of the WVS, as well as measures that will be developed to meet ESA obligations to avoid jeopardizing the continued existence of listed species. Comments received during the scoping comment period will inform the development of action alternatives.

Scoping Process/Public Involvement. The Corps invites all affected federal, state, and local agencies, affected Native American Tribes, other interested parties, and the general public to participate in the NEPA process during development of the EIS. The purpose of the public scoping process is to provide information to the public, narrow the scope of analysis to significant environmental issues, serve as a mechanism to solicit agency and public input on alternatives and issues of concern, and ensure full and open participation in scoping for the Draft EIS. Numerous public scoping meetings will be held during the scoping period. The specific dates, times, and locations of the meetings will be published on the Corps' project website: <https://www.mwp.usace.army.mil/Locations/Willamette-Valley/Evaluation/>.

This is not a notice for the public comment periods for the Cougar Downstream Passage and Detroit Downstream Passage projects; public comment periods for those projects will be noticed separately.

Documents and other important information related to the EIS will be available for review on the Corps' project website.

Aaron L. Dorf,

Colonel, Corps of Engineers, District Commander.

[FR Doc. 2019-06258 Filed 3-29-19; 8:45 am]

BILLING CODE 3720-58-P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy (DoN) announces the availability of the inventions listed below, assigned to the United States Government, as represented by the Secretary of the Navy, for domestic and foreign licensing by the Department of the Navy.

ADDRESSES: Requests for copies of the patents cited should be directed to 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, Email Christopher.Monsey@navy.mil, 812-854-2777.

SUPPLEMENTARY INFORMATION: The following patents are available for licensing: Patent No. 10,200,081 (Navy Case No. 200348): SYSTEMS AND METHODS FOR SIGNAL DETECTION AND DIGITAL BANDWIDTH REDUCTION IN DIGITAL PHASED ARRAYS// Patent No. 10,204,875 (Navy Case No. 200421): SYSTEMS AND METHODS FOR INHIBITING BACKEND ACCESS TO INTEGRATED CIRCUITS BY INTEGRATING PHOTON AND ELECTRON SENSING LATCH-UP CIRCUITS// Patent No. 10,209,342 (Navy Case No. 200479): ELECTROMAGNETIC RADIATION SOURCE LOCATING SYSTEM// and Patent No. 10,215,531 (Navy Case No. 200357): TESTING SYSTEM FOR OPTICAL AIMING SYSTEMS WITH LIGHT EMITTER SYSTEMS INCLUDING TESTING SYSTEM FOR THERMAL DRIFT AND RELATED METHODS.

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: March 26, 2019.

M.S. Werner,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2019-06163 Filed 3-29-19; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Extension of Public Comment Period for the Draft Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement for Mariana Islands Training and Testing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: A notice of public meetings was published in the **Federal Register** by the U.S. Environmental Protection Agency on January 31, 2019 and March 8, 2019 for the Department of the Navy's (DoN) Draft Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement (EIS/OEIS) for the Mariana Islands Training and Testing (MITT) Study Area.

DATES: This notice announces a 15-day extension of the public comment period from April 2, 2019, to April 17, 2019.

ADDRESSES: Comments may be mailed to Naval Facilities Engineering Command Pacific, Attention: MITT Supplemental EIS/OEIS Project Manager, 258 Makalapa Drive, Suite 100, Pearl Harbor, HI 96860-3134, or electronically via the project website at www.MITT-EIS.com. All comments submitted during the public comment period will become part of the public record and substantive comments will be addressed in the Final Supplemental EIS/OEIS. All comments must be postmarked or received online by April 17, 2019, Chamorro Standard Time, for consideration in the Final Supplemental EIS/OEIS.

Naval Facilities Engineering Command Pacific, Attention: MITT Supplemental EIS/OEIS Project Manager, 258 Makalapa Drive, Suite 100, Pearl Harbor, HI 96860-3134.

SUPPLEMENTARY INFORMATION: The Draft Supplemental EIS/OEIS is available electronically for public viewing at www.MITT-EIS.com and at the following public libraries:

1. Robert F. Kennedy Memorial Library, University of Guam, UOG Station, Mangilao, GU 96923-1871.
2. Nieves M. Flores Memorial Library, 254 Martyr St., Hagåtña, GU 96910-5141.
3. Tinian Public Library, San Jose Village, Tinian, MP 96952-9997.
4. Antonio C. Atalig Memorial Library (Rota Public Library), Rota, MP 96951-9997.
5. Joeten-Kiyu Public Library, Beach Road and Insatto St., Saipan, MP 96950-9996.

Dated: March 25, 2019.

M.S. Werner,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2019-06028 Filed 3-29-19; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0041]

Agency Information Collection Activities; Comment Request; 2016/20 Baccalaureate and Beyond (B&B:16/20) Full-Scale Study Panel Maintenance**AGENCY:** National Center for Education Statistics (NCES), Department of Education (ED).**ACTION:** Notice.**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.**DATES:** Interested persons are invited to submit comments on or before May 31, 2019.**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2019–ICCD–0041. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9089, Washington, DC 20202–0023.**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Kashka Kubzdela, 202–245–7377 or email NCES.Information.Collections@ed.gov.**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also

helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: 2016/20 Baccalaureate and Beyond (B&B:16/20) Full-Scale Study Panel Maintenance.*OMB Control Number:* 1850–0926.*Type of Review:* A revision of an existing information collection.*Respondents/Affected Public:* Individuals or Households.*Total Estimated Number of Annual Responses:* 3,790.*Total Estimated Number of Annual Burden Hours:* 190.*Abstract:* This request is for the National Center for Education Statistics (NCES) to conduct the 2016/20 Baccalaureate and Beyond (B&B:16/20) full-scale study panel maintenance activities. The B&B studies of the education, work, financial, and personal experiences of individuals who have completed a bachelor's degree at a given point in time are a series of longitudinal studies. Every 8 years, students are identified as bachelor's degree recipients through the National Postsecondary Student Aid Study (NPSAS). B&B:16/20 is the second follow-up of a panel of baccalaureate degree recipients identified in the 2015–16 NPSAS, and part of the fourth cohort (B&B:16) of the B&B series. NPSA:16 is the base year for B&B:16 follow-up interviews in 2017, 2020, and 2026 (anticipated). B&B cohorts prior to B&B:16 were approved under OMB# 1850–0729. The B&B:16 cohort is submitted and reviewed under OMB# 1850–0926. The primary purposes of the B&B studies are to describe the post-baccalaureate paths of new college graduates, with a focus on their experiences in the labor market and post-baccalaureate education, and their education-related debt. B&B also focuses on the continuing education paths of

science, technology, engineering, and mathematics (STEM) graduates, as well as the experiences of those who have begun careers in education of students through the 12th grade. Since graduating from college in 2014–15 for the field test, and 2015–16 for the full-scale study, members of this B&B:16 cohort will begin moving into and out of the workforce, enrolling in additional undergraduate and graduate education, forming families, and repaying undergraduate education-related debt. Documenting these choices and pathways, along with individual, institutional, and employment characteristics that may be related to those choices, provides critical information on the costs and benefits of a bachelor's degree in today's workforce. B&B studies include both traditional-age and non-traditional-age college graduates, whose education options and choices often diverge considerably, and allow study of the paths taken by these different graduates. B&B:16/20 full-scale study student interview data collection is scheduled to take place from July 2020 through March 2021, and the panel maintenance activity requested in this submission is scheduled to take place from October 2019 through February 2020.

Dated: March 27, 2019.

Stephanie Valentine,*PRA Clearance Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.*

[FR Doc. 2019–06224 Filed 3–29–19; 8:45 am]

BILLING CODE 4000–01–P**DEPARTMENT OF EDUCATION**

[Docket No. ED–2019–ICCD–0042]

Agency Information Collection Activities; Comment Request; Annual Performance Report for the Gaining Early Awareness for Undergraduate Programs**AGENCY:** Office of Postsecondary Education (OPE), Department of Education (ED).**ACTION:** Notice.**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.**DATES:** Interested persons are invited to submit comments on or before May 31, 2019.**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by

searching the Docket ID number ED–2019–ICCD–0042. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the [regulations.gov](http://www.regulations.gov) site is not available to the public for any reason, ED will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Monique Bolton, 202–453–7653.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual Performance Report for the Gaining

Early Awareness for Undergraduate Programs.

OMB Control Number: 1840–0777.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 127.

Total Estimated Number of Annual Burden Hours: 1,270.

Abstract: The Annual Performance Report for Partnership and State Projects for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) is a required report that grant recipients must submit annually. The purpose of this information collection is for accountability. The data is used to report on progress in meeting the performance objectives of GEAR UP, program implementation, and student outcomes. The data collected includes budget data on Federal funds and match contributions, demographic data, and data regarding services provided to students.

Dated: March 27, 2019.

Kate Mullan,

PRA Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–06269 Filed 3–29–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Case Number 2018–012; EERE–2016–BT–WAV–0034]

Energy Conservation Program: Extension of Waiver to Dyson, Inc. From the Department of Energy Battery Chargers Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of extension of waiver.

SUMMARY: The U.S. Department of Energy (“DOE”) is granting a waiver extension (Case No. 2018–012) to Dyson, Inc. (“Dyson”) to waive certain requirements of the DOE battery charger test procedure for determining the energy consumption of the specified Dyson battery charger basic model. Dyson is required to test and rate this basic model in accordance with the alternate test procedure specified.

DATES: The Extension of Waiver is effective on April 1, 2019. The Extension of Waiver will terminate upon the compliance date of any future amendment to the test procedure for

battery chargers located in 10 CFR part 430, subpart B, appendix Y that addresses the issues presented in this waiver. At such time, Dyson must use the relevant test procedure for the specified basic model of battery chargers for any testing to demonstrate compliance with standards, and any other representations of energy use.

FOR FURTHER INFORMATION CONTACT:

Ms. Lucy deButts, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: AS_Waiver_Requests@ee.doe.gov.

Mr. Peter Cochran, 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) 586–9496. Email: Peter.Cochran@hq.doe.gov.

SUPPLEMENTARY INFORMATION: In

accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(g)), DOE gives notice of the issuance of an Extension of Waiver as set forth below. The Extension of Waiver extends the scope of the Decision and Order granted to Dyson on April 5, 2017 (82 FR 16580, “April 2017 Decision and Order”) to include Dyson basic model RB02, as requested by Dyson on December 21, 2018.¹ Dyson must test and rate the basic model in accordance with the alternate test procedure specified in the April 2017 Decision and Order. Dyson's representations concerning the energy consumption of the basic model must be based on testing in accordance with the alternate test procedure set forth in the April 2017 Decision and Order, and the representations must fairly disclose the test results. Distributors, retailers, and private labelers are held to the same requirements when making representations regarding the energy consumption of these products. (42 U.S.C. 6293(c)).

DOE makes decisions on waiver extensions for only those basic models specifically set out in the request, not future models that may be manufactured by the petitioner. Dyson may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional basic models of battery chargers. Alternatively, if appropriate, Dyson may request that DOE extend the scope of a waiver to include additional basic models employing the same technology as the basic model set forth in the original

¹Dyson's request is available at <https://www.regulations.gov/document?D=EERE-2016-BT-WAV-0034-0005>.

petition consistent with 10 CFR 430.27(g).

Signed in Washington, DC, on March 25, 2019.

Steven Chalk,

Acting Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Case Number 2018–012

Extension of Waiver

I. Background and Authority

Title III, Part B¹ of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program that includes battery chargers.² Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, or estimated operating costs during a representative average-use cycle, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for battery chargers is contained in Title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendix Y, *Uniform Test Method for Measuring the Energy Consumption of Battery Chargers* (“Appendix Y”).

The regulations set forth in 10 CFR 430.27 contain provisions that allow a person to seek a waiver from the test procedure requirements for a particular basic model of a type of covered product when the petitioner’s basic model for which the petition for waiver was submitted contains one or more design characteristics that: (1) Prevent testing according to the prescribed test procedure, or (2) cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). Additionally, a petitioner may request that DOE extend the scope of a waiver or an interim

waiver to include additional basic models employing the same technology as the basic model set forth in the original petition. 10 CFR 430.27(g). DOE will publish any such extension in the **Federal Register**. *Id.*

II. Request for an Extension of Waiver: Assertions and Determinations

On April 5, 2017, DOE issued a Decision and Order (“April 2017 Decision and Order”) in Case Number BC–001 granting Dyson a waiver to test its Dyson basic model RB01 (marketed as the Dyson 360-Eye, or “Robot”) using an alternate test procedure. 82 FR 16580. As described by Dyson, the Robot is a robotic vacuum cleaner that includes a battery charger with a number of settings and management features associated with the vacuum cleaner. 82 FR 16581.

The DOE test procedure for battery chargers requires that any function controlled by the user and not associated with the battery charging process must be switched off, or, for functions not possible to switch off, be set to the lowest power-consuming mode. Section 3.2.4.b of Appendix Y. Dyson stated that in order to provide the user with the setting and management features of the Robot, the relevant functionalities and circuitry have to be powered at all times. 82 FR 16581. Accordingly, Dyson stated that it is not appropriate to make these functions, which are not associated with the battery charging process, user controllable because they are an integral part of the Robot itself. *Id.* Dyson asserted that using the prescribed test procedure would cause the machine to be evaluated in a manner not representative of the true energy consumption characteristics of the battery charger. *Id.*

Based on its review of the information provided by Dyson, DOE determined that the current test procedure at Appendix Y would evaluate the battery charger basic model specified in the April 2017 Decision and Order in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. *Id.* The April 2017 Decision and Order specifies that Dyson test and rate the subject basic model such that power to functions not associated with the battery charging process is disabled by isolating a terminal of the battery pack using isolating tape. *Id.*

On December 21, 2018, Dyson submitted a request to extend the scope of the waiver, Case Number 2018–012, to the Dyson basic model RB02. Dyson stated that this basic model has the

same characteristics and employs the same technology for the battery charger as the model covered by the existing waiver.

Based on the information provided by Dyson in its waiver extension request, DOE has determined that the battery charger basic model identified in Dyson’s request incorporates the same design characteristics as the basic model covered under the waiver in Case Number BC–001. DOE also determined that the alternate procedure specified in Case Number BC–001 will provide results that are representative of the actual energy use of the battery charger basic model identified by Dyson in its waiver extension request.

III. Order

After careful consideration of Dyson’s request that DOE extend the scope of the waiver granted under Case Number BC–001 to include an additional basic model, it is *ordered* that:

(1) Dyson must, as of the date of publication of this Extension of Waiver in the **Federal Register**, test and rate the following basic model as set forth in paragraph (2):

Brand name	Basic model No.
Dyson	RB02

(2) The alternate test procedure for the Dyson basic model referenced in paragraph (1) of this Order is the test procedure for battery chargers prescribed by DOE at 10 CFR part 430, subpart B, appendix Y, with the following modifications:

Notwithstanding the instructions in sections 3.2.4 and 3.3.6 of 10 CFR part 430, subpart B, appendix Y, Dyson will disable power to functions not associated with the battery charging process by isolating a terminal of the battery pack using isolating tape, as shown in the Appendices to the petition for waiver in Case Number BC–001.³

(3) *Representations.* Dyson may not make representations about the energy use of the basic model referenced in paragraph (1) of this Order for compliance, marketing, or other purposes unless that basic model has been tested in accordance with the provisions set forth above and such representations fairly disclose the results of such testing.

(4) This Extension of Waiver shall remain in effect according to the provisions of 10 CFR 430.27.

(5) This Extension of Waiver is issued on the condition that the statements,

¹ For editorial reasons, upon codification in the U.S. Code, Part B was redesignated as Part A.

² All references to EPCA in this document refer to the statute as amended through America’s Water Infrastructure Act of 2018, Public Law 115–270 (October 23, 2018).

³ Dyson’s petition for waiver in Case Number BC–001 is available at <https://www.regulations.gov/docket?D=EERE-2016-BT-WAV-0034>.

representations, and documents provided by Dyson are valid. If Dyson makes any modifications to the controls or configurations of these basic models, the waiver will no longer be valid and Dyson will either be required to use the current Federal test method or submit a new application for a test procedure waiver. DOE may rescind or modify this Extension of Waiver at any time if it determines the factual basis underlying the petition for extension of waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic model's true energy consumption characteristics. 10 CFR 430.27(k)(1). Likewise, Dyson may request that DOE rescind or modify the Extension of Waiver if Dyson discovers an error in the information provided to DOE as part of its petition, determines that the waiver is no longer needed, or for other appropriate reasons. 10 CFR 430.27(k)(2).

(6) Granting of this Extension of Waiver does not release Dyson from the certification requirements set forth at 10 CFR part 429.

Signed in Washington, DC, on March 25, 2019.

Steven Chalk,

Acting Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2019-06279 Filed 3-29-19; 8:45 am]

BILLING CODE 6450-01-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: RP13-459-000.
Applicants: Trailblazer Pipeline Company LLC.
Description: Report Filing: 2018 Penalty Revenues Refund Report.
Filed Date: 3/25/19.
Accession Number: 20190325-5152.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-873-000.
Applicants: Bobcat Gas Storage.
Description: Compliance filing Bobcat Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.
Filed Date: 3/25/19.
Accession Number: 20190325-5020.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-874-000.
Applicants: Egan Hub Storage, LLC.

Description: Compliance filing Egan Hub Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5021.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-875-000.
Applicants: East Tennessee Natural Gas, LLC.

Description: Compliance filing East Tennessee Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5022.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-876-000.
Applicants: Saltville Gas Storage Company L.L.C.

Description: Compliance filing Saltville Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5023.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-877-000.
Applicants: Ozark Gas Transmission, L.L.C.

Description: Compliance filing Ozark Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5024.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-878-000.
Applicants: Steckman Ridge, LP.

Description: Compliance filing Steckman Ridge Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5025.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-879-000.
Applicants: Southern Natural Gas Company, L.L.C.

Description: Compliance filing Order No. 587-Y Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5026.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-880-000.
Applicants: Southern LNG Company, L.L.C.

Description: Compliance filing Order No. 587-Y Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5027.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-881-000.
Applicants: Elba Express Company, L.L.C.

Description: Compliance filing Order No. 587-Y Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5037.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-882-000.
Applicants: Texas Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Amendments to Neg Rate Agmts (IPL 34015, 34016) to be effective 3/25/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5042.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-883-000.
Applicants: Midcontinent Express Pipeline LLC.

Description: Compliance filing Compliance Filing Pursuant to Order No. 587-Y to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5046.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-884-000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.

Description: Compliance filing MNUS Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5068.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-885-000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Compliance filing Order No. 587-Y Compliance (NAESB 3.1) to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5070.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-886-000.
Applicants: Northern Border Pipeline Company.

Description: § 4(d) Rate Filing: Compressor Usage Surcharge 2019 to be effective 5/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5088.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-887-000.
Applicants: Texas Eastern Transmission, LP.

Description: Compliance filing TETLP Order 587-Y (Docket RM96-1-041) Compliance Filing to be effective 8/1/2019.

Filed Date: 3/25/19.
Accession Number: 20190325-5092.
Comments Due: 5 p.m. ET 4/8/19.
Docket Numbers: RP19-888-000.
Applicants: Trailblazer Pipeline Company LLC.

Description: § 4(d) Rate Filing: Fuel Tracker 2019 to be effective 5/1/2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5114.

Comments Due: 5 p.m. ET 4/8/19.

Docket Numbers: RP19–889–000.

Applicants: Texas Eastern Transmission, LP.

Description: Compliance filing TETLP OFO March 2019 Penalty Disbursement Report.

Filed Date: 3/25/19.

Accession Number: 20190325–5132.

Comments Due: 5 p.m. ET 4/8/19.

Docket Numbers: RP19–890–000.

Applicants: Bison Pipeline LLC.

Description: Compliance filing Company Use Gas Annual Report 2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5133.

Comments Due: 5 p.m. ET 4/8/19.

Docket Numbers: RP19–891–000.

Applicants: Pine Needle LNG Company, LLC.

Description: Compliance filing Pine Needle Order No. 587–Y Compliance (NAESB 3.1) to be effective 8/1/2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5151.

Comments Due: 5 p.m. ET 4/8/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 26, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–06226 Filed 3–29–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2897–048, 2392–047, 2941–043, 2931–042, 2942–051]

Sappi North America, Inc.; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed an application for surrender of license for the Saccarappa Project (P–2897–048) and for amendments to the licenses for the Mallison Falls (P–2932–047), Little Falls (P–2941–043), Gambo (P–2931–042), and Dundee (P–2942–051) projects and have prepared a final Environmental Assessment (EA) for the proposed actions. The projects are located on the Presumpscot River in Cumberland County, Maine. The projects do not occupy federal lands.

The final EA contains Commission staff's analysis of the potential environmental effects of the proposed surrender of license and amendments to licenses, and concludes that the proposed actions, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the final EA 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 at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

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. For further information, contact Jennifer Ambler at (202) 502–8586.

Dated: March 26, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–06236 Filed 3–29–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–113–000]

National Fuel Gas Supply Corporation; Notice of Request Under Blanket Authorization

Take notice that on March 19, 2019, National Fuel Gas Supply Corporation (National Fuel), 6363 Main Street, Williamsville, New York 14221, filed in Docket No. CP19–113–000 a prior notice request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), requesting authorization to: abandon 3 injection/withdrawal wells and approximately 1,909 feet of associated field pipeline at its East Branch Storage Field all located in McKean County, Pennsylvania. (East Branch Abandonment Project). National states that the East Branch Abandonment Project will not result in a material decrease in service to its existing customers, or impact its storage operations, 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 Margaret D. Sroka, Attorney for National Fuel, 6363 Main Street, Williamsville, New York 14221; by telephone at (716) 857–7066, by fax at (716) 857–7206, or by email at srokam@natfuel.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 commenter's 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 commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentors, will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Dated: March 26, 2019.

Kimberly D. Bose,
Secretary.

[FR Doc. 2019-06234 Filed 3-29-19; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2466-034]

Appalachian Power Company; Notice of Intent To File License Application, Filing of Pre-Application Document (Pad), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 2466-034.

c. *Dated Filed:* January 28, 2019.

d. *Submitted By:* Appalachian Power Company (Appalachian).

e. *Name of Project:* Niagara Hydroelectric Project.

f. *Location:* On the Roanoke River near the City of Roanoke, Roanoke County, Virginia. The project does not occupy federal lands.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Jon Magalski, Environmental Specialist Consultant, Appalachian Power Company, 1 Riverside Plaza, Columbus, OH (614) 716-2240, jmmagalski@aep.com.

i. *FERC Contact:* Allyson Conner at (202) 502-6082 or email at allyson.conner@ferc.gov.

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402, and (b) the State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Appalachian as the Commission's non-federal representative for carrying out

informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. On January 28, 2019, Appalachian filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website (<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 at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). A copy is also available for inspection and reproduction at the address in paragraph h.

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. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission.

The Commission strongly encourages electronic filing. Please file all documents 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. 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-2466-034.

All filings with the Commission must bear the appropriate heading: "Comments on Pre-Application

Document,” “Study Requests,” “Comments on Scoping Document 1,” “Request for Cooperating Agency Status,” or “Communications to and from Commission Staff.” Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by May 25, 2019.

p. Although our current intent is to prepare an environmental assessment (EA), there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and location of these meetings are as follows:

Evening Scoping Meeting

Date and Time: Wednesday, April 24, 2019 at 6:30 p.m.

Location: Vinton Library, 300 S Pollard Street, Vinton, VA 24179, (540) 857-5043.

Daytime Scoping Meeting

Date and Time: Thursday, April 25, 2019 at 9:00 a.m.

Location: Vinton Library, 300 S Pollard Street, Vinton, VA 24179, (540) 857-5043.

SD1, which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission’s mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at <http://www.ferc.gov>, using the “eLibrary” link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Environmental Site Review

The applicant and Commission staff will conduct an environmental site review of the project on Wednesday, April 24, 2019 at 10:00 a.m. All participants should meet at Niagara Dam located at 1495 Niagara Road, Vinton, VA 24179; thereafter, participants should be prepared to drive or carpool to other locations within the project boundary. To attend the environmental site review, please RSVP via email to Jon Magalski at jmmagalski@aep.com. Persons not providing an RSVP by April 19, 2019, will not be allowed on the environmental site review.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission’s regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public record of the project.

Dated: March 26, 2019.

Kimberly D. Bose,
Secretary.

[FR Doc. 2019-06235 Filed 3-29-19; 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: EC19-70-000.

Applicants: High Lonesome Mesa, LLC, High Lonesome Mesa Wind, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of High Lonesome Mesa, LLC, et al.

Filed Date: 3/25/19.

Accession Number: 20190325-5200.

Comments Due: 5 p.m. ET 4/15/19.

Docket Numbers: EC19-71-000.

Applicants: PPL Electric Utilities Corporation.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of PPL Electric Utilities Corporation.

Filed Date: 3/25/19.

Accession Number: 20190325-5203.

Comments Due: 5 p.m. ET 4/15/19.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19-83-000.

Applicants: FirstLight CT Housatonic LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of FirstLight CT Housatonic LLC.

Filed Date: 3/26/19.

Accession Number: 20190326-5161.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: EG19-84-000.

Applicants: FirstLight CT Hydro LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of FirstLight CT Hydro LLC.

Filed Date: 3/26/19.

Accession Number: 20190326-5165.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: EG19-85-000.

Applicants: FirstLight MA Hydro LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of FirstLight MA Hydro LLC.

Filed Date: 3/26/19.

Accession Number: 20190326-5166.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: EG19-86-000.

Applicants: Northfield Mountain LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Northfield Mountain LLC.

Filed Date: 3/26/19.

Accession Number: 20190326-5226.

Comments Due: 5 p.m. ET 4/16/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17-1568-003.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Updated Request for Deferral of

Effective Date-Order No. 831
Compliance Filing to be effective N/A.

Filed Date: 3/26/19.

Accession Number: 20190326–5067.

Comments Due: 5 p.m. ET 4/2/19.

Docket Numbers: ER19–709–002.

Applicants: Entergy Louisiana, LLC.

Description: Tariff Amendment:

Entergy OpCos Reactive Power Update to be effective 1/1/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5089.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1417–000.

Applicants: GenOn Power Midwest, LP.

Description: § 205(d) Rate Filing:

Notice of Succession and Revisions to MBR Tariff and Request for Waivers to be effective 3/11/2019.

Filed Date: 3/22/19.

Accession Number: 20190322–5112.

Comments Due: 5 p.m. ET 4/12/19.

Docket Numbers: ER19–1417–001.

Applicants: GenOn Power Midwest, LP.

Description: Tariff Amendment:

Notice of Succession and Revisions to MBR Tariff and Request for Waivers to be effective 3/11/2019.

Filed Date: 3/22/19.

Accession Number: 20190322–5131.

Comments Due: 5 p.m. ET 4/12/19.

Docket Numbers: ER19–1434–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: First Revised WMPA No. 4869; Queue No. AD2–044/AC2–138 to be effective 2/22/2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5166.

Comments Due: 5 p.m. ET 4/15/19.

Docket Numbers: ER19–1435–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ICSA, SA No. 5310; Queue No. AB2–174 to be effective 2/22/2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5170.

Comments Due: 5 p.m. ET 4/15/19.

Docket Numbers: ER19–1436–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: First Revised WMPA No. 4880; Queue No. AD2–021/AC2–137 to be effective 2/22/2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5171.

Comments Due: 5 p.m. ET 4/15/19.

Docket Numbers: ER19–1437–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of ISA SA No.

3904; Queue No. AA1–108 to be effective 4/8/2019.

Filed Date: 3/25/19.

Accession Number: 20190325–5172.

Comments Due: 5 p.m. ET 4/15/19.

Docket Numbers: ER19–1438–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: 2nd Amendment to CDWR WPA for the Thermalito Restoration Project (SA 275) to be effective 3/27/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5010.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1439–000.

Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–03–26_SA 3288 Sugar Creek Wind One—Ameren Illinois GIA (J756) to be effective 3/12/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5090.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1440–000.

Applicants: DTE Electric Company.
Description: § 205(d) Rate Filing: Update to Reactive Revenue to be effective 3/27/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5095.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1441–000.

Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–03–26_SA 3289 Sugar River Wind—ATC GIA (J584) to be effective 3/12/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5108.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1442–000.

Applicants: Sage Solar I LLC.
Description: § 205(d) Rate Filing: Sage Solar I LLC Shared Facilities Agreement to be effective 5/1/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5199.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1443–000.

Applicants: Sage Solar II LLC.
Description: § 205(d) Rate Filing: Sage Solar II LLC Shared Facilities Agreement to be effective 5/1/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5212.

Comments Due: 5 p.m. ET 4/16/19.

Docket Numbers: ER19–1444–000.

Applicants: Sage Solar III LLC.
Description: § 205(d) Rate Filing: Sage Solar III LLC Shared Facilities Agreement to be effective 5/1/2019.

Filed Date: 3/26/19.

Accession Number: 20190326–5224.

Comments Due: 5 p.m. ET 4/16/19.

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: March 26, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–06225 Filed 3–29–19; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9991–24–ORD]

Human Studies Review Board; Notification of Public Meetings

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA), Office of the Science Advisor announces two separate public meetings of the Human Studies Review Board (HSRB) to advise the Agency on the ethical and scientific review of research involving human subjects.

DATES: A virtual public meeting will be held on Wednesday, April 24, 2019, from 1:00 p.m. to approximately 5:30 p.m. Eastern Time. A separate, subsequent teleconference meeting is planned for Tuesday, June 11th, 2019, from 2:00 p.m. to approximately 3:30 p.m. Eastern Time for the HSRB to finalize its Report of the April 24, 2019 meeting and review other possible topics.

ADDRESSES: All of these meetings will be conducted entirely by telephone and on the internet using Adobe Connect. For detailed access information visit the HSRB website: <http://www2.epa.gov/osa/human-studies-review-board>.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to receive further information should

contact the HSRB Designated Federal Official (DFO), Thomas O'Farrell on telephone number (202) 564-8451; fax number: (202) 564-2070; email address: ofarrell.thomas@epa.gov; or mailing address: Environmental Protection Agency, Office of the Science Advisor, Mail code 8105R, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Meeting access: These meetings will be open to the public. The full Agenda and meeting materials will be available at the HSRB website: <http://www2.epa.gov/osa/human-studies-review-board>. For questions on document availability, or if you do not have access to the internet, consult with the DFO, Thomas O'Farrell, listed under **FOR FURTHER INFORMATION CONTACT**.

Special accommodations. For information on access or services for individuals with disabilities, or to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

How may I participate in this meeting?

The HSRB encourages the public's input. You may participate in these meetings by following the instructions in this section.

1. **Oral comments.** To pre-register to make oral comments, please contact the DFO, Thomas O'Farrell, listed under **FOR FURTHER INFORMATION CONTACT**. Requests to present oral comments during the meeting will be accepted up to Noon Eastern Time on Wednesday, April 17, 2019, for the April 24, 2019 meeting and up to Noon Eastern Time on Tuesday, June 4, 2019 for the June 11, 2019 meeting. To the extent that time permits, interested persons who have not pre-registered may be permitted by the HSRB Chair to present oral comments during either meeting at the designated time on the agenda. Oral comments before the HSRB are generally limited to five minutes per individual or organization. If additional time is available, further public comments may be possible.

2. **Written comments.** Submit your written comments prior to the meetings. For the Board to have the best opportunity to review and consider your comments as it deliberates, you should submit your comments via email or Fax by Noon Eastern Time on Wednesday, April 17, 2019, for the April 24, 2019 meeting and by Noon Eastern Time on Tuesday, June 4, 2019 for the June 11, 2019 meeting. If you submit comments after these dates, those comments will be provided to the HSRB members, but

you should recognize that the HSRB members may not have adequate time to consider your comments prior to their discussion. You should submit your comments to the DFO, Thomas O'Farrell listed under **FOR FURTHER INFORMATION CONTACT**. There is no limit on the length of written comments for consideration by the HSRB.

Background

The HSRB is a Federal advisory committee operating in accordance with the Federal Advisory Committee Act 5 U.S.C. App. 2 section 9. The HSRB provides advice, information, and recommendations on issues related to scientific and ethical aspects of third-party human subjects research that are submitted to the Office of Pesticide Programs (OPP) to be used for regulatory purposes.

Topic for discussion. On April 24, 2019, the Human Studies Review Board will consider a study submitted by the Agricultural Handlers Exposure Task Force (AHETF) titled "Determination of Dermal and Inhalation Exposure to Workers during Mixing, Loading and Application of Pesticides in Managed Horticultural Facilities using Powered Handgun Equipment".

The Agenda and meeting materials for this topic will be available in advance of the meeting at <http://www2.epa.gov/osa/human-studies-review-board>.

On June 11, 2019, the HSRB will review and finalize their draft Final Report from the April 24, 2019 meeting, in addition to other topics that may come before the Board. The HSRB may also discuss planning for future HSRB meetings. The agenda and the draft report will be available prior to the meeting at <http://www2.epa.gov/osa/human-studies-review-board>.

Meeting minutes and final reports. Minutes of these meetings, summarizing the matters discussed and recommendations made by the HSRB, will be released within 90 calendar days of the meeting. These minutes will be available at <http://www2.epa.gov/osa/human-studies-review-board>. In addition, information regarding the HSRB's Final Report, will be found at <http://www2.epa.gov/osa/human-studies-review-board> or from Thomas O'Farrell listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: March 13, 2019.

Jennifer Orme-Zavaleta,
EPA Science Advisor.

[FR Doc. 2019-06283 Filed 3-29-19; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9991-26-ORD]

Human Studies Review Board Advisory Committee; Request for Nominations to the Human Studies Review Board (HSRB) Advisory Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) invites nominations from a diverse range of qualified candidates with expertise in the areas of toxicology, bioethics, and statistics to be considered for appointment to its Human Studies Review Board (HSRB) federal advisory committee. HSRB vacancies will be filled in the fall of 2019. In addition to this **Federal Register** Notice, additional sources of nominations may be used to obtain a balanced committee.

DATES: Submit nominations by May 16, 2019.

SUPPLEMENTARY INFORMATION:

Background

On February 6, 2006, the Agency published a final rule for the protection of human subjects in research (71 FR 24 6138) that called for creating a new, independent human studies review board (*i.e.*, HSRB). The HSRB is a federal advisory committee operating in accordance with the Federal Advisory Committee Act (FACA) 5 U.S.C. App. 2 § 9 (Pub. L. 92-463). The HSRB provides advice, information, and recommendations to EPA on issues related to scientific and ethical aspects of human subjects research. The major objectives of the HSRB are to provide advice and recommendations on: (1) Research proposals and protocols that include human subjects; (2) reports of completed research with human subjects; and (3) how to strengthen EPA's programs for protection of human subjects of research. Typically, the HSRB reviews protocols and completed studies involving pesticide studies, such as worker exposure studies with agricultural handlers applying pesticides in field conditions; janitorial maintenance personnel applying antimicrobial pesticides in commercial settings; and field efficacy studies for skin applied insect repellent products. The HSRB reports to the EPA Administrator through EPA's Science Advisor. General information concerning the HSRB, including its charter, current membership, and

activities can be found on the EPA website at <https://www.epa.gov/osa/human-studies-review-board>.

HSRB members serve as special government employees or regular government employees. Members are appointed by the EPA Administrator for either two or three year terms with the possibility of reappointment for additional terms, with a maximum of six years of service. The HSRB convenes on average four times a year, with most of the meetings being virtual. The average workload for HSRB members is approximately 20 hours per meeting, including the time spent at the meeting. Responsibilities of HSRB members include reviewing extensive background materials prior to meetings of the Board, preparing draft responses to Agency charge questions, attending Board meetings, participating in the discussion and deliberations at these meetings, drafting assigned sections of meeting reports, and assisting with the finalization of HSRB reports. EPA compensates special government employees for their time and provides reimbursement for travel and other incidental expenses associated with official government business related to the HSRB meetings. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups, as well as from a variety of backgrounds (e.g., industry, non-profit organizations, academia, and government).

Candidates not selected for HSRB membership at this time may be considered for HSRB membership as vacancies arise in the future or for service as consultants to the HSRB.

Members of the HSRB are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, each nominee will be asked to submit confidential financial information that fully discloses, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The information provided is strictly confidential and will not be disclosed to the public. Before a candidate is considered further for service on the HSRB, EPA will evaluate each candidate to assess whether there is any conflict of financial interest, appearance of a lack of impartiality, or prior involvement with matters likely to be reviewed by the Board.

Nominations will be evaluated on the basis of several criteria, including: The professional background, expertise, and

experience that would contribute to the diversity of perspectives of the committee; interpersonal, oral, and written communication skills and other attributes that would contribute to the HSRB's collaborative process; consensus building skills; absence of any financial conflicts of interest or the appearance of a lack of impartiality, or lack of independence, or bias; and the availability to participate in meetings and administrative sessions, participate in teleconferences, develop policy recommendations to the Administrator, and prepare recommendations and advice in reports.

Nominations should include a resume or curriculum vitae providing the nominee's educational background, qualifications, leadership positions in national associations or professional societies, relevant research experience and publications along with a short (one page) biography describing how the nominee meets the above criteria and other information that may be helpful in evaluating the nomination, as well as the nominee's current business address, email address, and daytime telephone number. Interested candidates may self-nominate.

To help the Agency in evaluating the effectiveness of its outreach efforts, nominees are requested to inform the Agency of how you learned of this opportunity.

Final selection of HSRB members is a discretionary function of the Agency and will be announced on the HSRB website at <https://www.epa.gov/osa/human-studies-review-board> as soon as selections are made.

ADDRESSES: Submit your nominations by May 16, 2019, using any of the following methods:

Email: Submit nominations electronically using the subject line: "HSRB Membership 2019" to ofarrell.thomas@epa.gov.

USPS Mail: Human Studies Review Board, DFO, Environmental Protection Agency, Mail code: 8105R, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

Hand or Courier Delivery: Human Studies Review Board, DFO, Room 41249, EPA, Ronald Reagan Building, 1300 Pennsylvania Avenue NW, MC8105R, Washington, DC 20004. Deliveries are accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information.

FOR FURTHER INFORMATION CONTACT: Thomas O'Farrell, Office of the Science Advisor, Mail Code 8105R, U.S. Environmental Protection Agency, 1200

Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-8451, fax number: (202) 564-2070, email: ofarrell.thomas@epa.gov.

Dated: March 13, 2019.

Jennifer Orme-Zavaleta,
EPA Science Advisor.

[FR Doc. 2019-06285 Filed 3-29-19; 8:45 am]

BILLING CODE 6560-50-P

FARM CREDIT ADMINISTRATION

Sunshine Act Meeting; Farm Credit Administration Board

AGENCY: Farm Credit Administration.

ACTION: Notice, regular meeting.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act, of the regular meeting of the Farm Credit Administration Board (Board).

DATES: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on April 9, 2019, from 9:00 a.m. until such time as the Board concludes its business.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090. Submit attendance requests via email to VisitorRequest@FCA.gov. See

SUPPLEMENTARY INFORMATION for further information about attendance requests.

FOR FURTHER INFORMATION CONTACT: Dale Aultman, Secretary to the Farm Credit Administration Board, (703) 883-4009, TTY (703) 883-4056.

SUPPLEMENTARY INFORMATION: This meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. Please send an email to VisitorRequest@FCA.gov at least 24 hours before the meeting. In your email include: Name, postal address, entity you are representing (if applicable), and telephone number. You will receive an email confirmation from us. Please be prepared to show a photo identification when you arrive. If you need assistance for accessibility reasons, or if you have any questions, contact Dale Aultman, Secretary to the Farm Credit Administration Board, at (703) 883-4009. The matters to be considered at the meeting are:

Open Session

A. *Approval of Minutes*

- March 14, 2019

B. *Reports*

- Quarterly Report on Economic Conditions and FCS Condition and Performance

- Farm Credit System Building Association Auditor's Report on 2018 Financial Audit
- C. Closed Sessions
- Office of Examination Quarterly Report¹
 - Executive Session—FCS Building Association Auditor's Report²

Dated: March 28, 2019.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2019-06397 Filed 3-28-19; 4:15 pm]

BILLING CODE 6705-01-P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Privacy Act of 1974; System of Records

AGENCY: Federal Retirement Thrift Investment Board (FRTIB).

ACTION: Notice of modified system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, the Federal Retirement Thrift Investment Board (FRTIB) is proposing to modify its system of records for fraud and forgery records. Records contained in this system are used to investigate potential or actual fraud against TSP participant or beneficiary accounts. FRTIB is modifying this system of records to account for its process for addressing new alerts the Financial Services Information Sharing and Analysis Center (FS-ISAC) sends to FRTIB to better help protect and secure participant account information.

DATES: This system will become effective upon its publication in today's **Federal Register**. FRTIB is not proposing any changes to the routine uses.

ADDRESSES: You may submit written comments to FRTIB by any one of the following methods:

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

- *Fax:* (202) 942-1676.

- *Mail or Hand Delivery:* Office of General Counsel, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT:

Marla Greenberg, Chief Privacy Officer, Federal Retirement Thrift Investment Board, Office of General Counsel, 77 K Street NE, Suite 1000, Washington, DC

¹ Session Closed-Exempt pursuant to 5 U.S.C. Section 552b(c)(8) and (9).

² Session Closed-Exempt pursuant to 5 U.S.C. Section 552b(c)(2).

20002, (202) 942-1600. For access to any of the FRTIB's system of records, contact Amanda Haas, FOIA Officer, Office of General Counsel, at the above address and phone number.

SUPPLEMENTARY INFORMATION: FRTIB is proposing to modify its system of records for fraud and forgery records, entitled, "FRTIB-13, Fraud and Forgery Records." The proposed changes are necessary because they enable the FRTIB to protect participant accounts based on additional information FRTIB receives from the FS-ISAC, concerning account credentials that may have been compromised. FRTIB is proposing to amend the purpose of the system of records to provide additional context around how the Agency protects participant accounts from fraudulent activity. FRTIB is proposing to change the categories of individuals covered by the system, to include information about participants and beneficiaries who may be actual or potential victims of fraud.

Additionally, FRTIB is proposing to modify the category of records in the system to include telephone numbers, IP addresses, and notifications from FS-ISAC, which includes potentially or actually compromised credentials participants use to log into their TSP account online. FRTIB is also proposing a change to record source categories to include FS-ISAC. Finally, FRTIB is proposing technical and clarifying language to conform to the standards established in OMB Circular A-108, but these changes are not substantive in nature. FRTIB is not proposing modifications to its routine uses or exemptions claimed.

Megan Grumbine,

General Counsel and Senior Agency Official for Privacy.

System Name

Fraud and Forgery Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are located at the Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002. Records may also be kept at an additional location for Business Continuity purposes.

SYSTEM MANAGER:

Supervisory Fraud Specialist, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 8474; and 44 U.S.C. 3101.

PURPOSE(S):

These records are used to inquire into and investigate allegations that a TSP participant, beneficiary, alternate payee, or third party has committed or attempted to commit an act of fraud or forgery relating to a participant or beneficiary account or the Thrift Savings Fund; *to prevent fraud and to protect participant accounts from potential fraud*; and to collect information to verify allegations that a third party has misappropriated the FRTIB's (or TSP's) name, brand, or logos.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system of records contains information on Thrift Savings Plan (TSP) participants, beneficiaries, alternate payees, and third party individuals alleged to have committed an act of fraud or forgery relating to participant and beneficiary accounts; and third parties alleged to have misappropriated, or attempted to misappropriate the FRTIB's (including the TSP's) name, brand, or logos. *This system of records also contains information about TSP participants and beneficiaries who may be actual or potential victims of fraud.*

CATEGORIES OF RECORDS IN THE SYSTEM:

These records contain the following kinds of information: name, date of birth, *telephone number, IP address,* and Social Security number of TSP participants, beneficiaries, alternate payees, and third parties alleged to have committed an act of fraud or forgery relating to participant accounts or the Thrift Savings Fund; TSP account information related to the fraud or forgery allegation; information obtained from other agencies as it relates to allegations of fraud or forgery; documentation of complaints and allegations of fraud and forgery; exhibits, statements, affidavits, or records obtained during investigations of fraud, or forgery, court and administrative orders, transcripts, and documents; internal staff memoranda; staff working papers; *notifications from the Financial Services Information Sharing and Analysis Center (FS-ISAC), including credentials used to log into MyAccount that have been potentially or actually compromised*; and other documents and records related to the investigation of fraud or forgery, including the disposition of the allegations; and reports on the investigation.

RECORD SOURCE CATEGORIES:

Records in this system may be provided by or obtained from the following: persons to whom the information relates when practicable, including TSP participants, beneficiaries, alternate payees, or other third parties; complainants; informants; witnesses; investigators; persons reviewing the allegations; Federal, state and local agencies; *FS-ISAC*; and investigative reports and records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information about covered individuals may be disclosed without consent as permitted by the Privacy Act of 1974, as amended, 5 U.S.C. 552a(b); and:

1. A record from this system may be disclosed to the Federal Bureau of Investigation; Department of Justice; Securities and Exchange Commission; Federal Trade Commission; Consumer Financial Protection Bureau; or the Financial Industry Regulatory Authority for further investigation, prosecution, or enforcement.

2. A record from this system may be disclosed to the Secret Service for the purpose of investigating forgery, and to the Department of Justice, when substantiated by the Secret Service.

3. A record pertaining to this system may be disclosed to the current or former employing agency of the participant, beneficiary, alternate payee, or third party alleged to have committed fraud or forgery against a participant account or the Thrift Savings Fund for the purpose of further investigation or administrative action.

4. A record from this system may be disclosed to informants, complainants, or victims to the extent necessary to provide those persons with information and explanations concerning the progress or results of the investigation.

5. Audit: A record from this system of records may be disclosed to an agency, organization, or individual for the purpose of performing an audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to FRTIB officers and employees.

6. Breach Mitigation and Notification: Response to Breach of FRTIB Records: A record from this system of records may be disclosed to appropriate agencies,

entities, and persons when (1) FRTIB suspects or has confirmed that there has been a breach of the system of records; (2) FRTIB has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, FRTIB (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with FRTIB's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. Response to Breach of Other Records: A record from this system of records may be disclosed to another Federal agency or Federal entity, when FRTIB determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

8. Congressional Inquiries: A record from this system of records may be disclosed to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the request of the individual to whom the record pertains.

9. Contractors, et al.: A record from this system of records may be disclosed to contractors, grantees, experts, consultants, the agents thereof, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for FRTIB, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to FRTIB officers and employees.

10. Investigations, Third Parties: A record from this system of records may be disclosed to third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the third party officer making the disclosure.

11. Investigations, Other Agencies: A record from this system of records may be disclosed to appropriate Federal, state, local, tribal, or foreign government agencies or multilateral governmental

organizations for the purpose of investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where FRTIB determines that the information would assist in the enforcement of civil or criminal laws.

12. Law Enforcement Intelligence: A record from this system of records may be disclosed to a Federal, state, tribal, local, or foreign government agency or organization, or international organization, lawfully engaged in collecting law enforcement intelligence information, whether civil or criminal, or charged with investigating, prosecuting, enforcing or implementing civil or criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities, including the collection of law enforcement intelligence.

13. Law Enforcement Referrals: A record from this system of records may be disclosed to an appropriate Federal, state, tribal, local, international, or foreign agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

14. Litigation, DOJ or Outside Counsel: A record from this system of records may be disclosed to the Department of Justice, FRTIB's outside counsel, other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (1) FRTIB, or (2) any employee of FRTIB in his or her official capacity, or (3) any employee of FRTIB in his or her individual capacity where DOJ or FRTIB has agreed to represent the employee, or (4) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and FRTIB determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which FRTIB collected the records.

15. Litigation, Opposing Counsel: A record from this system of records may be disclosed to a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement

negotiations or in connection with criminal law proceedings or in response to a subpoena.

16. NARA/Records Management: A record from this system of records may be disclosed to the National Archives and Records Administration (NARA) or other Federal Government agencies pursuant to the Federal Records Act.

17. Security Threat: A record from this system of records may be disclosed to Federal and foreign government intelligence or counterterrorism agencies when FRTIB reasonably believes there to be a threat or potential threat to national or international security for which the information may be useful in countering the threat or potential threat, when FRTIB reasonably believes such use is to assist in anti-terrorism efforts, and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in paper and electronic form, including on computer databases and cloud-based services, all of which are securely stored.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name or file number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records in this system are destroyed seven years after the case is closed.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FRTIB has adopted appropriate administrative, technical, and physical controls in accordance with FRTIB's security program to protect the security, confidentiality, availability, and integrity of the information, and to ensure that records are not disclosed to or accessed by unauthorized individuals.

Paper records are stored in locked file cabinets in areas of restricted access that are locked after office hours. Electronic records are stored on computer networks and protected by assigning usernames to individuals needing access to the records and by passwords set by authorized users that must be changed periodically.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records within this system must submit a request pursuant to 5 CFR part 1630. Attorneys or other persons acting on behalf of an individual must provide written authorization from that

individual, such as Power of Attorney, in order for the representative to act on their behalf.

CONTESTING RECORDS PROCEDURES:

See *Record Access Procedures above*.

NOTIFICATION PROCEDURES:

See *Record Access Procedures above*.

EXEMPTIONS CLAIMED FOR SYSTEM:

Pursuant to 5 U.S.C. 552a(k)(2), records in this system of records are exempt from the requirements of subsections (c)(3); (d); (e)(1); (e)(4)(G), (H), (I); and (f) of 5 U.S.C. 552a, provided, however, that if any individual is denied any right, privilege, or benefit that he or she would otherwise be entitled to by Federal law, or for which he or she would otherwise be eligible, as a result of the maintenance of these records, such material shall be provided to the individual, except to the extent that the disclosure of the material would reveal the identity of a source who furnished information to the Government with an express promise that the identity of the source would be held in confidence.

HISTORY:

81 FR 7,106 (Feb. 10, 2016).

[FR Doc. 2019-06165 Filed 3-29-19; 8:45 am]

BILLING CODE 6760-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve a revision and to extend the time period of the proposed information collection project "*The AHRQ Safety Program for Improving Antibiotic Use*."

DATES: Comments on this notice must be received by May 31, 2019.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at doris.lefkowitz@AHRQ.hhs.gov.

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT:

Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427-1477, or by emails at doris.lefkowitz@AHRQ.hhs.gov.

SUPPLEMENTARY INFORMATION:

Proposed Project

The AHRQ Safety Program for Improving Antibiotic Use

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501-3521, AHRQ invites the public to comment on this proposed information collection. The Agency for Healthcare Research and Quality (AHRQ) requests to revise and extend the currently approved *AHRQ Safety Program for Improving Antibiotic Use*. The AHRQ Safety Program for Improving Antibiotic Use (the "AHRQ Safety Program") aims to help facilities implement antibiotic stewardship programs and to reduce unnecessary antibiotic prescribing. The AHRQ Safety Program has already been implemented in a pilot of integrated delivery systems and a national cohort of 400 acute care hospitals, and is currently being implemented in a national cohort of 500 long-term care facilities. The AHRQ Safety Program was last approved by OMB on September 25, 2017 and will expire on September 30, 2020. The request for extension is to allow for completion of activities and data collection in the AHRQ Safety Program, which are scheduled to occur through March 30, 2021. The OMB control number for the AHRQ Safety Program is 0935-0238. All of the supporting documents for the current AHRQ Safety Program can be downloaded from OMB's website at https://www.reginfo.gov/public/do/PRAViewCR?ref_nbr=201707-0935-003.

The 2017 OMB clearance included one response for the Structural Assessment and the *Medical Office Survey on Patient Safety Culture (MOSOPS)*, but did not include electronic health record (EHR) data or a second response for the Structural Assessment or MOSOPS for the 4th cohort planned for ambulatory settings. This was because the original OMB clearance expiration date fell in the middle of the planned 4th cohort, so the second Structural Assessment and MOSOPS were not within the approved information collection period, and EHR data collection would have been incomplete. In addition, the project team was not certain that the ambulatory care practices would be able to access EHR data. Based on the experience of the pilot cohort, however, it is believed that many ambulatory practices can access this data, and that

these practices are more likely to feasibly participate in the AHRQ Safety Program. The revision also updates the estimated annual burden accordingly, and includes changes to the data collection forms which will be used for the ambulatory care cohort based on lessons learned during the pilot cohort.

Background for This Collection

As part of the Department of Health and Human Services (DHHS) Hospital Acquired Infection (HAI) National Action Plan (NAP), AHRQ has supported the implementation and adoption of the Comprehensive Unit-based Safety Program (CUSP) to reduce Central-Line Associated Bloodstream Infections (CLABSI) and Catheter-Associated Urinary Tract Infections (CAUTI), and subsequently applied CUSP to other clinical challenges, including reducing surgical site infections and improving care for mechanically ventilated patients. As part of the National Action Plan for Combating Antibiotic-Resistant Bacteria (CARB NAP) to increase antibiotic stewardship (defined as organized efforts to promote the judicious use of antibiotics) across all health care settings, AHRQ is applying the principles and concepts that have been learned from these HAI reduction efforts to antibiotic stewardship (AS).

Antibiotic therapy has saved countless lives over the past several decades. However, bacterial resistance to antibiotics has followed closely on the heels of each new agent's introduction. This has led to an epidemic of antibiotic resistance, with drug choices for some bacterial infections becoming increasingly limited, expensive, and in some cases nonexistent. While antibiotics remain a vital and necessary cornerstone to the treatment of infections, it is estimated that 20–50% of all antibiotics prescribed in U.S. acute care hospitals are either unnecessary or inappropriate. When antibiotics are used inappropriately, bacterial development of resistance is supported in the *absence* of any therapeutic benefit, and patients receiving unnecessary or inappropriate antibiotics are also exposed to the risk of adverse effects such as rash or renal injury as well as the risk of *Clostridioides difficile* infection which can cause a deadly diarrhea. Unlike misuse of other medications, the misuse of antibiotics can adversely impact the health of patients who are not even exposed to them because of the potential for spread of resistant organisms. The Centers for Disease Control and Prevention (CDC) estimates that each year at least two million

illnesses and 23,000 deaths are caused by drug-resistant bacteria in the United States alone.

While approaches including development of new antibiotic agents, increased surveillance for antibiotic resistance, prevention of HAIs, and prevention of transmission of resistant infections are important efforts to combat antibiotic resistance, it is critical to curb the inappropriate use of antibiotics to slow the emergence of antibiotic resistance and to preserve efficacy of existing antibiotics and those under development.

As of January 1st, 2017, The Joint Commission (TJC)'s new Antimicrobial Stewardship Standard requires that all acute care hospitals have robust antibiotic stewardship programs. In addition, starting on November 28, 2017, the Centers for Medicare & Medicaid Services (CMS) required that all long-term care facilities that receive reimbursement from CMS have antibiotic stewardship programs in place.

The Comprehensive Unit-Based Safety Program (CUSP), developed at the Armstrong Institute at Johns Hopkins University, combines improvement in patient safety culture, teamwork, and communication together with a technical bundle of interventions to improve patient safety. CUSP is a powerful culture change tool, which has been successfully utilized to reduce CLABSI in ICUs in Michigan and Rhode Island and subsequently to reduce CLABSI by 41% in more than 1,000 ICUs in 44 states, Puerto Rico and the District of Columbia. Although evidence-based recommendations for prevention of CLABSI had existed for years, the combination of safety culture change on units and implementation of technical interventions resulted in significant reductions in CLABSI and introduced the concept that a rate of zero CLABSIs is achievable. CUSP is also being used to reduce other HAIs in multiple settings (<http://www.ahrq.gov/professionals/quality-patient-safety/hais/index.html>).

This project will assist hospitals, nursing homes, and ambulatory care sites across the United States in adopting and implementing AS programs and interventions.

This project has the following goals:

- Identify best practices in the delivery of antibiotic stewardship in the acute care, long-term care and ambulatory care settings
 - Adapt the CUSP model to enhance antibiotic stewardship efforts in the health care settings
 - Develop a bundle of technical and adaptive interventions and associated

tools and educational materials designed to support enhanced antibiotic stewardship efforts

- Provide technical assistance and training to health care organizations nationwide (using a phased approach) to implement effective antibiotic stewardship programs and interventions
 - Improve communication and teamwork between health care workers surrounding antibiotic decision-making
 - Improve communication between health care workers and patients and families surrounding antibiotic decision-making
 - Conduct a comprehensive evaluation to assess the adoption of the CUSP for AS in acute care, long-term care and ambulatory care settings to identify the effectiveness of the program, process outcomes, and lessons learned

The project will be implemented in four cohorts: (1) Cohort 1 is a pilot limited to 10 facilities each in three integrated delivery systems spanning acute care, long-term care, and ambulatory settings; (2) Cohort 2 will expand to include 250–500 acute care hospitals; (3) Cohort 3 will include 250–500 long-term care facilities; and (4) Cohort 4 will include 250–500 ambulatory care facilities.

The AHRQ Safety Program is being undertaken pursuant to AHRQ's mission to enhance the quality, appropriateness, and effectiveness of health services, and access to such services, through the establishment of a broad base of scientific research and through the promotion of improvements in clinical and health systems practices, including the prevention of diseases and other health conditions. 42 U.S.C. 299.

Method of Collection

To achieve the goals of the AHRQ Safety Program, the following data collections will be implemented:

- (1) *Structural Assessments*: A brief, eight question, online Structural Assessment Tool will be administered at baseline (pre-intervention) and at the end of the intervention period to obtain general information about facilities and stewardship infrastructure and changes to stewardship infrastructure and interventions that are anticipated to be sustained as a result of the AHRQ Safety Program (*one response per facility for the 4th cohort in ambulatory settings was included in the original OMB review, this revision adds an additional response per facility, relevant changes made to line 1.b. in Exhibits A.1. and A.2.*).
- (2) *Team Antibiotic Review Form*: The Stewardship Team in hospitals and nursing homes will conduct monthly

reviews of at least 10 patients who received antibiotics and fill out an assessment tool in conjunction with frontline staff to determine if the “four moments of antibiotic decision-making” are being considered by providers. The four moments can be summarized as: (1) Is an infection present requiring antibiotics? (2) Are appropriate cultures being ordered and is the most optimal initial choice of antibiotics being prescribed? (3) (after at least 24 hours) Is it appropriate to make changes to the antibiotic regimen (e.g., stop therapy, narrow therapy, change from intravenous to oral therapy)? (4) What duration of therapy is appropriate?

(3) *The AHRQ Surveys on Patient Safety Culture*: The appropriate versions of these surveys and the MOSOPS will be administered to all participating staff at the beginning and end of the intervention. Each survey asks questions about patient safety issues, medical errors, and event reporting in the respective settings. The surveys will be administered to all participating staff at the beginning and end of the intervention. (One response per respondent for the 4th cohort in ambulatory settings was included in the original OMB review, this revision adds an additional response per respondent,

relevant changes made to line 3.d. in Exhibits A.1. and A.2.).

a. The *Hospital Survey on Patient Safety Culture (HSOPS)* will be utilized to evaluate safety culture for acute care hospitals.

b. The *Nursing Home Survey on Patient Safety Culture (NHSOPS)* will be administered in long-term care.

c. The *Medical Office Survey on Patient Safety Culture (MOSOPS)* will be administered in ambulatory care centers.

(4) *Semi-structured qualitative interviews*: During the project pilot period with Cohort 1, in-person and/or telephone discussions will be held before and after implementation with stewardship champions/organizational leaders, physicians, pharmacists, nurse practitioners, physician assistants, nurses, certified nursing assistants and others deemed relevant, to learn about the facilitators and barriers to a successful antibiotic stewardship program. Specific areas of interest include stakeholder perceptions of implementation process and outcomes, including successes and challenges with carrying out project tasks and perceived utility of the project; staff roles, engagement and support; and antibiotic prescribing etiquette & culture (i.e.,

social norms and local cultural factors that contribute to prescribing behavior at the facility/unit-level).

(5) *Electronic Health Record (EHR) data*: Unit-level antibiotic therapy prescriptions and antibiotic use for diagnosed respiratory conditions will be extracted from the Electronic Health Records (EHRs) of participating units and used to assess the impact of the AHRQ Safety Program. (4th cohort in ambulatory settings portion is new from original OMB review, noted in line 6 in Exhibits A.1. and A.2.).

Estimated Annual Respondent Burden

Exhibit A.1 shows the estimated annualized burden hours for the respondents’ time to complete the Structural Assessments, Team Antibiotic Review Forms, AHRQ Patient Safety Culture Surveys, semi-structured qualitative interviews, and EHR data extractions. Data will be collected from 30 acute care, long-term care, and ambulatory care sites during the Cohort 1 one-year pilot period; up to 500 acute care hospitals in Cohort 2; up to 500 long-term care facilities in Cohort 3; and up to 500 ambulatory care sites in Cohort 4. With this revision, the total estimated annualized burden hours for the data collection activities are 27,064.

EXHIBIT A.1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
1. Structural Assessments:				
a. Structural Assessments—Cohorts 1, 2 and 3 (baseline, post-intervention)	343	2	0.2	137
b. Structural Assessments—Cohort 4 (baseline and endline)	167	2	0.2	67
2. Team Antibiotic Review Form (Cohorts 1, 2, and 3)	337	90	0.25	7,583
3. AHRQ Patient Safety Culture Surveys:				
a. HSOPS, NHSOPS, MOSOPS (Cohort 1)	83	2	0.5	83
b. HSOPS (Cohort 2)	4,167	2	0.5	4,167
c. NHSOPS (Cohort 3)	4,167	2	0.5	4,167
d. MOSOPS (Cohort 4)	4,167	2	0.5	4,167
4. Semi-structured qualitative interviews (Cohort 1):				
a. Physicians	30	2	1	60
b. Other Health Practitioners	60	2	1	120
5. EHR data (Cohorts 1, 2, and 3)	334	12	1	4,008
6. EHR data (Cohort 4)	167	15	1	2,505
Total	14,022	.....	.....	27,030

Exhibit A.2 shows the estimated annualized cost burden based on the respondents’ time to complete the data

collection forms. The total cost burden is estimated to be \$1,311,096.

EXHIBIT A.2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate*	Total cost burden
1. Structural Assessments:				
a. Structural Assessments—Cohorts 1, 2 and 3 (baseline, post-intervention)	343	137	^a \$98.83	\$13,540

EXHIBIT A.2—ESTIMATED ANNUALIZED COST BURDEN—Continued

Form name	Number of respondents	Total burden hours	Average hourly wage rate*	Total cost burden
b. Structural Assessments—Cohort 4 (baseline and endline)	167	67	^a 98.83	6,622
2. Team Antibiotic Review Form (Cohorts 1, 2, and 3)	337	7,583	^a 98.83	749,428
3. AHRQ Patient Safety Culture Surveys:				
a. HSOPS, NHSOPS, MOSOPS (Cohort 1)	83	83	^b 27.87	2,313
b. HSOPS (Cohort 2)	4,167	4,167	^b 27.87	116,134
c. NHSOPS (Cohort 3)	4,167	4,167	^b 27.87	116,134
d. MOSOPS (Cohort 4)	4,167	4,167	^b 27.87	116,134
4. Semi-structured qualitative interviews (Cohort 1):				
a. Physicians	30	60	^a 98.83	5,930
b. Other Health Practitioners	60	120	^b 27.87	3,344
5. EHR data (Cohorts 1, 2, and 3)	334	4,008	^b 27.87	111,703
6. EHR data (Cohort 4)	167	2,505	^b 27.87	69,814
Total	14,022	27,064	.....	1,311,096

* National Compensation Survey: Occupational wages in the United States May 2016 “U.S. Department of Labor, Bureau of Labor Statistics:” http://www.bls.gov/oes/current/oes_stru.htm.

^a Based on the mean wages for 29–1069 Physicians and Surgeons, All Other.

^b Based on the mean wages for 29–9099 Miscellaneous Health Practitioners and Technical Workers: Healthcare Practitioners and Technical Workers, All Other.

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ’s information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ’s health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ’s estimate of burden (including hours and costs) of the proposed collection(s) of information; (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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency’s subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Gopal Khanna,

Director.

[FR Doc. 2019–06193 Filed 3–29–19; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project “*Online Submission Form for Supplemental Evidence and Data for Systematic Reviews for the Evidence-based Practice Center Program.*”

DATES: Comments on this notice must be received by May 31, 2019.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at doris.lefkowitz@AHRQ.hhs.gov.

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at doris.lefkowitz@AHRQ.hhs.gov.

SUPPLEMENTARY INFORMATION:

Proposed Project

Online Submission Form for Supplemental Evidence and Data for Systematic Reviews for the Evidence-Based Practice Center Program

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection. The AHRQ Evidence-based Practice Center (EPC) Program develops evidence reports and technology assessments that summarize evidence for federal and other partners on topics relevant to clinical and other health care organization and delivery issues—specifically those that are common, expensive, and/or significant for the Medicare and Medicaid populations. Better understanding and use of evidence in practice, policy, and delivery of care improves the quality of health care.

These reports, reviews, and technology assessments are based on rigorous, comprehensive syntheses and analyses of the scientific literature on topics. EPC reports and assessments emphasize explicit and detailed documentation of methods, rationale, and assumptions. EPC reports are conducted in accordance with an established policy on financial and nonfinancial interests.

This research has the following goals:

- Use research methods to gather knowledge on the effectiveness or comparative effectiveness of treatments, screening, diagnostic, management or health care delivery strategies for specific medical conditions, both published and unpublished, to evaluate the quality of research studies and the evidence from these studies.

- Promote the use of evidence in health care decision making to improve health care and health

- Identify research gaps to inform future research investments

The 2011 Institute of Medicine report “Finding What Works in Health Care: Standards for Systematic Review” includes an assessment of publication bias through the identification of unpublished studies. This is an important source for bias which could affect the nature and direction of research findings. Identifying and including the results of these additional unpublished studies may provide a more complete and accurate assessment of an intervention’s effect on outcomes. An important way to identify unpublished studies is through requests to medical device manufacturers, pharmaceutical companies, and other intervention developers.

The proposed project involves sending a notification via an email listserv and via **Federal Register** notice as needed of the opportunity to submit information on unpublished studies or other scientific information to the EPC Program website, with one request per systematic review topic. Because research on each topic must be completed in a timely manner in order for it to be useful, the collections are never ongoing—there is one request and collection per topic. Investigators in the EPC Program will review the information and assess potential risk of

bias from both published and unpublished studies and its impact on the EPC Program’s findings.

This study is being conducted by AHRQ, pursuant to AHRQ’s statutory authority to conduct and support research on health care and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of health care services. 42 U.S.C 299a(a)(1).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

- **Online Submission Form Instrument.** This information is collected for the purposes of providing supplemental evidence and data for systematic reviews (SEADS). The purpose of SEADS requests is not to collect generalizable data, but to supplement the published and grey literature searches EPC investigators are conducting. The online submission form (OSF) collects data from respondents on their name and the information packet. This happens following notification of opportunity to submit via email listserv and/or **Federal Register** notice as needed, with one request per topic. For the purposes of meta-analyses, trial summary data from missing and unidentified studies are sought. For the purposes of constructing evidence tables and quality ratings (e.g., on public reporting of cost measures or health

information exchange), data can vary (e.g., URLs, study designs, and consumer-mediated exchange forms). Submitters are informed of the types of information that would be most helpful to include in the information packet, which includes a list of all sponsored but unpublished studies (both completed and ongoing), as well as comment on the completeness of information provided.

The EPC Program currently uses a broad-based email announcement via email listserv and a **Federal Register** notice, as needed, to publicize the opportunity to submit scientific information about each topic. The proposed project does not duplicate other available sources of this information. Available study registries and databases may not sufficiently inform the Program’s research. The EPC Program does not anticipate more than 15 topics per year with SEADS requests.

Estimated Annual Respondent Burden

Exhibit 1 presents estimates of the reporting burden hours for the data collection efforts. Time estimates are based on pilot testing of materials and what can reasonably be requested of respondents. The number of respondents listed in “Number of respondents per SEADS request” of Exhibit 1 reflects a projected 33% response rate with approximately 1–2 responses per request and assumes about 15 SEADS requests per year.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of SEADS requests	Number of SEADS request that receive response	Number of responses per SEADS request	Annual number of SEADS responses	Hours per response	Total burden hours per annum
Online Submission Form (OSF)	15	5	1.5	7.5	15/60	1.87

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of SEADS requests	Total burden hours per SEADS	Average hourly wage rate *	Total cost burden
OSF	15	1.87	\$61.39 ^a	\$115.10

* Occupational Employment Statistics, May 2017 National Occupational Employment and Wage Estimates United States, U.S. Department of Labor, Bureau of Labor Statistics. https://www.bls.gov/oes/current/oes_nat.htm#11-0000.

^aBased on the mean wages for *Public Relations and Fundraising Managers, 11–2031*, the occupational group most likely tasked with completing the OSF.

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ’s information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper

performance of AHRQ’s health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ’s estimate of burden (including hours and costs) of the proposed

collection(s) of information; (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 upon the respondents, including the use of

automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Gopal Khanna,

Director.

[FR Doc. 2019-06192 Filed 3-29-19; 8:45 am]

BILLING CODE 4160-90-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE19-004, Etiologic and Effectiveness Research To Address Polysubstance Impaired Driving; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE19-004, Etiologic and Effectiveness Research to Address Polysubstance Impaired Driving; May 7-8, 2019; 8:30 a.m.–5:30 p.m., (EDT) which was published in the **Federal Register** on February 15, 2019, Volume 84, Number 32, page/s/4446-4447.

The meeting is being amended to change the meeting location to The W Buckhead, 3377 Peachtree Road, NE, Atlanta, GA 30326. The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Mikel L. Walters, M.A., Ph.D., Scientific Review Official, NCIPC, CDC, 4770 Buford Highway NE, Mailstop F-63, Atlanta, Georgia 30341, (404) 639-0913; mwalters@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. 2019-06146 Filed 3-29-19; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-1725-N]

Medicare Program; Meeting Announcement for the Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests

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

ACTION: Notice.

SUMMARY: This notice announces the next public meeting dates for the Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests (the Panel) on Monday, July 22, 2019 and Tuesday, July 23, 2019. The purpose of the Panel is to advise the Secretary of the Department of Health and Human Services and the Administrator of the Centers for Medicare & Medicaid Services on issues related to clinical diagnostic laboratory tests.

DATES: Meeting Dates: The meeting of the Panel is scheduled for Monday, July 22, 2019 from 8:00 a.m. to 4:30 p.m., Eastern Daylight Time (E.D.T.) and Tuesday, July 23, 2019, from 8:00 a.m. to 4:30 p.m., E.D.T. The Panel is also expected to participate in the Clinical Laboratory Fee Schedule (CLFS) Annual Public Meeting for Calendar Year (CY) 2020 on June 24, 2019 in order to gather information and ask questions to presenters. Notice of the CLFS Annual Public Meeting for CY 2020 is published elsewhere in this issue of the **Federal Register**.

Deadline for Registration: The public may attend the Panel meeting in person, view via webcast or listen via teleconference. Beginning Monday, April 8, 2019 and ending Monday, July 1, 2019 at 5:00 p.m. E.D.T., registration to attend the Panel meeting in person may be completed online at <http://cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html>. On this web page, under "Panel Meetings," click the "Register for July 22 through 23, 2019 Panel Meeting" link and enter the required information. We refer readers to Section IV. of this notice for additional details related to meeting registration.

Webinar, Webcast, and Teleconference Information: Teleconference dial-in instructions, and related webcast and webinar details will be posted on the meeting agenda, which will be available on the CMS website approximately 2 weeks prior to the meeting at <https://www.cms.gov/>

[Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html](https://www.cms.gov/Regulations-and-Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html). A preliminary agenda is described in Section II. of this notice.

ADDRESSES: The Panel meeting will be held in the auditorium of the Centers for Medicare & Medicaid Services (CMS), Central Building, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

FOR FURTHER INFORMATION CONTACT: Rasheeda Arthur, Ph.D., (410) 786-3434, email CDLTPanel@cms.hhs.gov. Press inquiries are handled through the CMS Press Office at (202) 690-6145. For additional information on the Panel, refer to the CMS website at <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html>.

SUPPLEMENTARY INFORMATION:

I. Background

The Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests (the Panel) is authorized by section 1834A(f)(1) of the Social Security Act (the Act) (42 U.S.C. 1395m-1), as established by section 216(a) of the Protecting Access to Medicare Act of 2014 (PAMA) (Pub. L. 113-93), enacted on April 1, 2014. The Panel is subject to the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory panels.

Section 1834A(f)(1) of the Act directs the Secretary of the Department of Health and Human Services (the Secretary) to consult with an expert outside advisory panel established by the Secretary, composed of an appropriate selection of individuals with expertise in issues related to clinical diagnostic laboratory tests, which may include the development, validation, performance, and application of such tests. Such individuals may include molecular pathologists, researchers, and individuals with expertise in laboratory science or health economics.

The Panel will provide input and recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services (CMS) on the following:

- The establishment of payment rates under section 1834A of the Act for new clinical diagnostic laboratory tests, including whether to use "crosswalking" or "gapfilling" processes to determine payment for a specific new test.

- The factors used in determining coverage and payment processes for new clinical diagnostic laboratory tests.

- Other aspects of the new payment system under section 1834A of the Act.

A notice announcing the establishment of the Panel and soliciting nominations for members was published in the October 27, 2014 **Federal Register** (79 FR 63919 through 63920). In the August 7, 2015 **Federal Register** (80 FR 47491), we announced membership appointments to the Panel along with the first public meeting date for the Panel, which was held on August 26, 2015. Subsequent meetings of the Panel were also announced in the **Federal Register**.

II. Agenda

The Agenda for the July 22 and 23, 2019 Panel meeting will provide for discussion and comment on the following topics as designated in the Panel's charter:

- Calendar Year (CY) 2020 Clinical Laboratory Fee Schedule (CLFS) new and reconsidered test codes, which will be posted on the CMS website at https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/Laboratory_Public_Meetings.html.

- Other CY 2020 CLFS issues designated in the Panel's charter and further described on the Agenda.

A detailed Agenda will be posted approximately 2 weeks before the meeting, on the CMS website at <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html>. The Panel will make recommendations to the Secretary and the Administrator of CMS regarding crosswalking and gapfilling for new and reconsidered laboratory tests discussed during the CLFS Annual Public Meeting for CY 2020. The Panel will also provide input on other CY 2020 CLFS issues that are designated in the Panel's charter and specified on the meeting agenda.

III. Meeting Participation

This meeting is open to the public. As noted previously, the public may participate in the meeting on-site, via teleconference, webcast, and webinar. The on-site check-in for visitors will be held from 7:30 a.m. to 8:00 a.m. E.D.T.

IV. Registration Instructions

Beginning Monday, April 8, 2019 and ending Monday, July 1, 2019 at 5:00 p.m. E.D.T., registration to attend the Panel Meeting in person may be completed online at <http://cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinical>

[DiagnosticLaboratoryTests.html](#). On this web page, under "Panel Meetings," click the "Register for July 22 through July 23, 2019 Panel Meeting" link and enter the required information. All of the following information must be submitted when registering:

- Name
- Company name
- Address
- Email addresses

Note: Participants who do not plan to attend the Panel meeting in person on July 22 or 23, 2019 should not register. No registration is required for participants who plan to view the Panel meeting via webcast or listen via teleconference.

V. Security, Building, and Parking Guidelines

The meeting will be held in a Federal government building; therefore, Federal security measures are applicable. In planning your arrival time, we recommend allowing additional time to clear security. We suggest that you arrive at the CMS campus and parking facilities between 7:00 a.m. and 8:00 a.m. E.D.T., so that you will be able to arrive promptly at the meeting by 8:00 a.m. E.D.T. Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. We note that the public may not enter the CMS building earlier than 7:15 a.m. E.D.T. (45 minutes before the convening of the meeting).

Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel. Persons without proper identification may be denied access to the building.

- Interior and exterior inspection of vehicles (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.

- Passing through a metal detector and inspection of items brought into the building. We note that all items brought to CMS, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

VI. Panel Recommendations and Discussions

The Panel's recommendations will be posted approximately 2 weeks after the meeting on the CMS website at <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html>.

VII. Special Accommodations

Individuals requiring special accommodations must include the request for these services during registration.

VIII. Copies of the Charter

The Secretary's Charter for the Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests is available on the CMS website at <http://cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonClinicalDiagnosticLaboratoryTests.html> or you may obtain a copy of the charter by submitting a request to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

IX. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: March 15, 2019.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2019-06147 Filed 3-29-19; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-1719-N]

Medicare Program; Public Meeting on June 24, 2019 Regarding New and Reconsidered Clinical Diagnostic Laboratory Test Codes for the Clinical Laboratory Fee Schedule for Calendar Year 2020

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

ACTION: Notice.

SUMMARY: This notice announces a public meeting to receive comments and

recommendations (including data on which recommendations are based) from the public on the appropriate basis for establishing payment amounts for new or substantially revised Healthcare Common Procedure Coding System (HCPCS) codes being considered for Medicare payment under the Clinical Laboratory Fee Schedule (CLFS) for calendar year (CY) 2020. This meeting also provides a forum for those who submitted certain reconsideration requests regarding final determinations made last year on new test codes and for the public to provide comment on the requests.

The Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests (Advisory Panel on CDLTs) will participate in this CLFS Annual Public Meeting by gathering information and asking questions to presenters, and will hold its next public meeting on July 22 and 23, 2019. The public meeting for the Advisory Panel on CDLTs will focus on the discussion of and recommendations for test codes presented during the June 24, 2019 CLFS Annual Public Meeting. The Panel meeting also will address any other CY 2020 CLFS issues that are designated in the Panel's charter and specified on the meeting agenda.

DATES:

CLFS Annual Public Meeting Date: The meeting is scheduled for Monday, June 24, 2019 from 8:00 a.m. to 4:30 p.m., E.D.T.)

Deadline for Registration of Presenters and Submission of Presentations: All presenters for the CLFS Annual Public Meeting must register and submit their presentations electronically to our CLFS dedicated email box at CLFS_Annual_Public_Meeting@cms.hhs.gov, by June 10, 2019 at 5:00 p.m. E.D.T. Any presentations received after that date and time will not be included in the meeting.

Deadline for Submitting Requests for Special Accommodations: Requests for special accommodations must be received no later than 5:00 p.m. E.D.T. on June 10, 2019.

Deadline for Submission of Written Comments Related to the CLFS Annual Public Meeting: Written comments regarding the presentations must be received by July 8, 2019 at 5:00 p.m. E.D.T. (2 weeks after the meeting).

Publication of Proposed Determinations: We intend to publish our proposed determinations for new test codes and our preliminary determinations for reconsidered codes (as described later in this notice in section II. "Format") for CY 2020 by early September 2019.

Deadline for Submission of Written Comments Related to Proposed

Determinations: Comments in response to the preliminary determinations will be due by early October 2019.

Where to Submit Written Comments: Interested parties should submit all written comments on presentations and preliminary determinations to the address specified in the **ADDRESSES** section of this notice or electronically to our CLFS dedicated email box, CLFS_Annual_Public_Meeting@cms.hhs.gov (the specific date for the publication of these determinations on the CMS website, as well as the deadline for submitting comments regarding these determinations, will be published on the CMS website).

ADDRESSES: The CLFS Annual Public Meeting will be held in the main auditorium of the Centers for Medicare & Medicaid Services (CMS), Central Building, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

FOR FURTHER INFORMATION CONTACT: Rasheeda Arthur, Ph.D., (410) 786-3434. Submit all inquiries to the CLFS dedicated email box, CLFS_Annual_Public_Meeting@cms.hhs.gov with the subject entitled "CLFS Annual Public Meeting Inquiry."

SUPPLEMENTARY INFORMATION:

I. Background

Section 531(b) of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106-554) required the Secretary of the Department of Health and Human Services (the Secretary) to establish procedures for coding and payment determinations for new clinical diagnostic laboratory tests under Part B of title XVIII of the Social Security Act (the Act) that permit public consultation in a manner consistent with the procedures established for implementing coding modifications for International Classification of Diseases (ICD-9-CM) (now, ICD-10-CM). The procedures and Clinical Laboratory Fee Schedule (CLFS) public meeting announced in this notice for new tests are in accordance with the procedures published on November 23, 2001 in the **Federal Register** (66 FR 58743) to implement section 531(b) of BIPA.

Section 942(b) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108-173) added section 1833(h)(8) of the Act. Section 1833(h)(8)(A) of the Act requires the Secretary to establish by regulation procedures for determining the basis for, and amount of, payment for any clinical diagnostic laboratory test for which a new or substantially revised Healthcare Common Procedure Coding System (HCPCS) code is

assigned on or after January 1, 2005 (hereinafter referred to as "new tests"). A code is considered to be substantially revised if there is a substantive change to the definition of the test or procedure to which the code applies (such as, a new analyte or a new methodology for measuring an existing analyte-specific test). (See section 1833(h)(8)(E)(ii) of the Act and 42 CFR 414.502).

Section 1833(h)(8)(B) of the Act sets forth the process for determining the basis for, and the amount of, payment for new tests. Pertinent to this notice, sections 1833(h)(8)(B)(i) and (ii) of the Act require the Secretary to make available to the public a list that includes any such test for which establishment of a payment amount is being considered for a year and, on the same day that the list is made available, cause to have published in the **Federal Register** notice of a meeting to receive comments and recommendations (including data on which recommendations are based) from the public on the appropriate basis for establishing payment amounts for the tests on such list. This list of codes for which the establishment of a payment amount under the CLFS is being considered for CY 2020 will be posted on the Center for Medicare & Medicaid Services (CMS) website concurrent with the publication of this notice and may be updated prior to the CLFS Annual Public Meeting. The CLFS Annual Public Meeting list of codes can be found on the CMS website at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/>. Section 1833(h)(8)(B)(iii) of the Act requires that we convene the public meeting not less than 30 days after publication of the notice in the **Federal Register**. The CLFS requirements regarding public consultation are codified at 42 CFR 414.506.

Two bases of payment are used to establish payment amounts for new clinical diagnostic laboratory tests (CDLTs). The first basis, called "crosswalking," is used when a new CDLT is determined to be comparable to an existing test, multiple existing test codes, or a portion of an existing test code. New CDLTs that were assigned new or substantially revised codes prior to January 1, 2018, are subject to provisions set forth under § 414.508(a). For a new CDLT that is assigned a new or significantly revised code on or after January 1, 2018, CMS assigns to the new CDLT code the payment amount established under § 414.507 of the comparable existing CDLT. Payment for

the new CDLT code is made at the payment amount established under § 414.507. (See § 414.508(b)(1)).

The second basis called “gapfilling,” is used when no comparable existing CDLT is available. When using this method, instructions are provided to each Medicare Administrative Contractor (MAC) to determine a payment amount for its Part B geographic area for use in the first year. In the first year, for a new CDLT that is assigned a new or substantially revised code on or after January 1, 2018, the MAC-specific amounts are established using the following sources of information, if available: (1) Charges for the test and routine discounts to charges; (2) resources required to perform the test; (3) payment amounts determined by other payers; (4) charges, payment amounts, and resources required for other tests that may be comparable or otherwise relevant; and (5) other criteria that CMS determines appropriate. In the second year, the test code is paid at the median of the MAC-specific amounts. (See § 414.508(b)(2)).

Under section 1833(h)(8)(B)(iv) of the Act and § 414.506(d)(1), CMS, taking into account the comments and recommendations (and accompanying data) received at the CLFS Annual Public Meeting, develops and makes available to the public a list of proposed determinations with respect to the appropriate basis for establishing a payment amount for each code, an explanation of the reasons for each determination, the data on which the determinations are based, and a request for public written comments on the proposed determinations. Under section 1833(h)(8)(B)(v) of the Act and § 414.506(d)(2), taking into account the comments received on the proposed determinations during the public comment period, CMS then develops and makes available to the public a list of final determinations of payment amounts for tests along with the rationale for each determination, the data on which the determinations are based, and responses to comments and suggestions received from the public.

Section 216(a) of the Protecting Access to Medicare Act of 2014 (PAMA) (Pub. L. 113–93) added section 1834A to the Act. The statute requires extensive revisions to the Medicare payment, coding, and coverage requirements for CDLTs. Pertinent to this notice, section 1834A(c)(3) of the Act requires the Secretary to consider recommendations from the expert outside advisory panel established under section 1834A(f)(1) of the Act when determining payment using crosswalking or gapfilling processes. In addition, section

1834A(c)(4) of the Act requires the Secretary to make available to the public an explanation of the payment rates for the new test codes, including an explanation of how the gapfilling criteria and panel recommendations are applied. These requirements are codified in § 414.506(d) and (e).

After the final determinations have been posted on the CMS website, the public may request reconsideration of the basis and amount of payment for a new CDLT as set forth in § 414.509. Pertinent to this notice, those requesting that CMS reconsider the basis for payment or the payment amount as set forth in § 414.509(a) and (b), may present their reconsideration requests at the following year’s CLFS Annual Public Meeting provided the requestor made the request to present at the CLFS Annual Public Meeting in the written reconsideration request. For purposes of this notice, we refer to these codes as the “reconsidered codes.” The public may comment on the reconsideration requests. (See the CY 2008 Physician Fee Schedule final rule with comment period published in the **Federal Register** on November 27, 2007 (72 FR 66275 through 66280) for more information on these procedures).

II. Format

We are following our usual process, including an annual public meeting to determine the appropriate basis and payment amount for new and reconsidered codes under the CLFS for CY 2020.

This meeting is open to the public. The on-site check-in for visitors will be held from 7:30 a.m. to 8:00 a.m. E.D.T., followed by opening remarks. Registered persons from the public may discuss and make recommendations for specific new and reconsidered codes for the CY 2020 CLFS.

As stated in the **SUMMARY** section of this notice, the Advisory Panel on CDLTs will participate in the CLFS Annual Public Meeting on June 24, 2019 by gathering information and asking questions to presenters, and will hold its own public meeting on July 22 and 23, 2019, to discuss matters of the Panel and make recommendations regarding the test codes presented at the CLFS Annual Public Meeting. The announcement for the Advisory Panel on CDLTs meeting is included in a separate **Federal Register** notice.

Due to time constraints, presentations must be brief, lasting no longer than 10 minutes, and must be accompanied by three written copies. In addition, presenters should make copies available for approximately 50 meeting participants, since CMS will not be

providing additional copies. Written presentations must be electronically submitted to CMS on or before June 10, 2019. Presentation slots will be assigned on a first-come, first-served basis. In the event there is not enough time for presentations by everyone who is interested in presenting, CMS will accept written presentations from those who were unable to present due to time constraints. Presentations should be sent via email to our CLFS dedicated email box, *CLFS_Annual_Public_Meeting@cms.hhs.gov*. In addition, individuals may also submit requests after the CLFS Annual Public Meeting to obtain electronic versions of the presentations. Requests for electronic copies of the presentations after the public meeting should be sent via email to our CLFS dedicated email box, noted above.

Presenters are required to submit all presentations using a standard PowerPoint template that is available on the CMS website, at https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/Laboratory_Public_Meetings.html, under the “Meeting Notice and Agenda” heading.

For reconsidered and new codes, presenters should address all of the following five items:

- (1) Reconsidered or new codes and descriptor.
- (2) Test purpose and method.
- (3) Costs.
- (4) Charges.
- (5) Recommendation with rationale for one of the two bases (crosswalking or gapfilling) for determining payment for reconsidered and new tests.

Additionally, presenters should provide the data on which their recommendations are based. Presentations regarding reconsidered and new test codes that do not address the above five items for presenters may be considered incomplete and may not be considered by CMS when making a determination. However, we may request missing information following the meeting to prevent a recommendation from being considered incomplete.

Taking into account the comments and recommendations (and accompanying data) received at the CLFS Annual Public Meeting, we intend to post our proposed determinations with respect to the appropriate basis for establishing a payment amount for each new test code and our preliminary determinations with respect to the reconsidered codes along with an explanation of the reasons for each determination, the data on which the determinations are based, and a request

for public written comments on these determinations on the CMS website by early September 2019. This website can be accessed at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/>. Interested parties may submit written comments on the preliminary determinations for new and reconsidered codes by early October 2019, to the address specified in the **ADDRESSES** section of this notice or electronically to our CLFS dedicated email box, CLFS_Annual_Public_Meeting@cms.hhs.gov (the specific date for the publication of the determinations on the CMS website, as well as the deadline for submitting comments regarding the determinations, will be published on the CMS website). Final determinations for new test codes to be included for payment on the CLFS for CY 2020 and reconsidered codes will be posted on the CMS website in November 2019, along with the rationale for each determination, the data on which the determinations are based, and responses to comments and suggestions received from the public. The final determinations with respect to reconsidered codes are not subject to further reconsideration. With respect to the final determinations for new test codes, the public may request reconsideration of the basis and amount of payment as set forth in § 414.509.

III. Registration Instructions

The Division of Ambulatory Services in the CMS Center for Medicare is coordinating the CLFS Annual Public Meeting registration. Beginning April 8, 2019, and ending June 10, 2019, registration may be completed on-line at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/>. On this web page, under the heading "Meeting Notice, Registration and Agenda," you will find a link entitled "Register for CLFS Annual Meeting". Click this link and enter the required information. All the following information must be submitted when registering:

- Name.
- Company name.
- Address.
- Telephone numbers.
- Email addresses.

When registering, individuals who want to make a presentation must also specify the new test codes on which they will be presenting comments. A confirmation will be sent upon receipt of the registration. Individuals must register by the date specified in the

DATES section of this notice. Registration is only required for individuals attending the meeting in person.

If not attending the CLFS Annual Public Meeting in person, the public may view the meeting via webcast or listen by teleconference. During the public meeting, webcasting is accessible online at <http://cms.gov/live>. Teleconference dial-in information will appear on the final CLFS Annual Public Meeting agenda, which will be posted on the CMS website when available at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/>.

IV. Security, Building, and Parking Guidelines

The meeting will be held in a Federal government building; therefore, Federal security measures are applicable. In planning your arrival time, we recommend allowing additional time to clear security. We suggest that you arrive at the CMS campus and parking facilities between 7:00 a.m. and 8:00 a.m. E.D.T., so that you will be able to arrive promptly at the meeting by 8:00 a.m. E.D.T. Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. We note that the public may not enter the CMS building earlier than 7:15 a.m. E.D.T. (45 minutes before the convening of the meeting).

Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel. Persons without proper identification may be denied access to the building.
- Interior and exterior inspection of vehicles (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.
- Passing through a metal detector and inspection of items brought into the building. We note that all items brought to CMS, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

V. Special Accommodations

Individuals attending the meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance, should provide that information upon registering for the meeting. The deadline for registration is listed in the **DATES** section of this notice.

VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: March 15, 2019.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2019-06148 Filed 3-29-19; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-3369-FN]

Medicare and Medicaid Programs: Application From the American Association for Accreditation of Ambulatory Surgery Facilities, Inc. (AAAASF) for Its Outpatient Physical Therapy and Speech Language Pathology Services Accreditation Program

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

ACTION: Final notice.

SUMMARY: This final notice announces our decision to approve the American Association for Accreditation of Ambulatory Surgery Facilities, Inc. (AAAASF) for continued recognition as a national accrediting organization for clinics, rehabilitation agencies, or public health agencies that furnish outpatient physical therapy and speech language pathology services that wish to participate in the Medicare or Medicaid programs.

DATES: The approval announced in this notice is effective on April 4, 2019 through April 4, 2025.

FOR FURTHER INFORMATION CONTACT: Erin Imhoff, (410) 786-2337; Monda Shaver, (410) 786-3410; or Tara Lemons, (410) 786-3030.

SUPPLEMENTARY INFORMATION:**I. Background**

Under Section 1861(p) of the Social Security Act (the Act), eligible beneficiaries may receive outpatient physical therapy and speech language pathology (OPT) services from a provider of services, a clinic, rehabilitation agency, a public health agency, or others, provided certain requirements are met. Section 1832(a)(2)(C) of the Act permits payment for OPT services. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 485 subpart H, specify the conditions that a clinic, rehabilitation agency or public health agency (“OPT providers”) must meet in order to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for OPT providers.

Generally, to enter into an agreement, an OPT provider must first be certified by a State survey agency as complying with the conditions of participation set forth in part 485, subpart H of our Medicare regulations. Thereafter, the OPT provider is subject to regular surveys by a state survey agency to determine whether it continues to meet these requirements.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by a Centers for Medicare & Medicaid Services (CMS) approved national accrediting organization (AO) that all applicable Medicare conditions are met or exceeded, we may deem those provider entities as having met the requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of the Department of Health and Human Services (the Secretary) as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body’s approved program may be deemed to meet the Medicare conditions. An AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of AOs are set forth at § 488.5.

II. Application Approval Process

Section 1865(a)(3)(A) of the Act provides a statutory timetable to ensure that our review of applications for CMS approval of an accreditation program is conducted in a timely manner. The Act provides us 210 days after the date of receipt of a complete application, with any documentation necessary to make the determination, to complete our survey activities and application process. Within 60 days after receiving a complete application, we must publish a notice in the **Federal Register** that identifies the national accrediting body making the request, describes the request, and provides no less than a 30-day public comment period. At the end of the 210-day period, we must publish a notice in the **Federal Register** approving or denying the application.

III. Provisions of the Proposed Notice

On October 30, 2018, we published a proposed notice in the **Federal Register** (83 FR 54591) announcing the American Association for Accreditation of Ambulatory Surgery Facilities, Inc. (AAAASF’s) request for continued approval of its Medicare OPT accreditation program. In the proposed notice, we detailed our evaluation criteria. Under Section 1865(a)(2) of the Act and in our regulations at § 488.5, we conducted a review of AAAASF’s Medicare OPT accreditation renewal application in accordance with the criteria specified by our regulations, which include, but are not limited to the following:

- An onsite administrative review of AAAASF’s: (1) Corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its OPT surveyors; (4) ability to investigate and respond appropriately to complaints against accredited OPTs; and, (5) survey review and decision-making process for accreditation.

- The comparison of AAAASF’s Medicare OPT accreditation program standards to our current Medicare OPT CoPs.

- A documentation review of AAAASF’s survey process to:

- ++ Determine the composition of the survey team, surveyor qualifications, and AAAASF’s ability to provide continuing surveyor training.

- ++ Compare AAAASF’s processes to those we require of state survey agencies, including periodic resurvey and the ability to investigate and respond appropriately to complaints against accredited OPTs.

- ++ Evaluate AAAASF’s procedures for monitoring OPTs it has found to be

out of compliance with AAAASF’s program requirements. (This pertains only to monitoring procedures when AAAASF identifies non-compliance. If noncompliance is identified by a state survey agency through a validation survey, the state survey agency monitors corrections as specified at § 488.9(c).)

- ++ Assess AAAASF’s ability to report deficiencies to the surveyed OPT and respond to the OPTs plan of correction in a timely manner.

- ++ Establish AAAASF’s ability to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization’s survey process.

- ++ Determine the adequacy of AAAASF’s staff and other resources.

- ++ Confirm AAAASF’s ability to provide adequate funding for performing required surveys.

- ++ Confirm AAAASF’s policies with respect to surveys being unannounced.

- ++ Obtain AAAASF’s agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

In accordance with section 1865(a)(3)(A) of the Act, the October 30, 2018 proposed notice also solicited public comments regarding whether AAAASF’s requirements met or exceeded the Medicare CoPs for OPTs. We received no comments in response to our proposed notice.

IV. Provisions of the Final Notice*A. Differences Between AAAASF’s Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements*

We compared AAAASF’s OPT accreditation program requirements and survey process with the Medicare CoPs at part 485 subpart H, and the survey and certification process requirements of parts 488 and 489. Our review and evaluation of AAAASF’s OPT application, which were conducted as described in section III of this final notice, yielded the following areas where, as of the date of this notice, AAAASF has revised its standards and certification processes in order to meet the requirements at:

- Section 485.701, to ensure AAAASF’s standards appropriately reference the CMS standards;

- Section 485.703, definition of “supervision” at (2)(ii), to ensure AAAASF’s standards appropriately reference the CMS standards;

- Section 485.705(a), to ensure AAAASF’s standards appropriately reference the CMS standards;

- Section 485.705(c)(2) through (c)(6), to ensure AAAASF's standards appropriately reference the CMS standards;

- Section 485.719(b)(3), to ensure AAAASF's standards appropriately reference the statutory requirements;

- Section 488.5(a)(4)(ii), to ensure that an appropriate number of medical records are fully reviewed during the survey process and that survey record totals are accurately reflected in the overall deficiency statement;

- Section 488.5(a)(4)(iv), to ensure all deficiencies found on survey are cited in AAAASF's final survey report;

- Section 488.5(a)(4)(vii), to ensure appropriate monitoring of non-compliance correction;

- Section 488.5(a)(11)(ii), to ensure accurate survey findings are reported to CMS;

- Section 488.5(a)(13)(ii), to ensure AAAASF notifies CMS regarding any decision to revoke, withdraw, or revise the accreditation status of a deemed status supplier;

- Section 488.26(b) and (c), to ensure deficiencies are cited at the appropriate level based on manner and degree of findings;

- Section 488.28(a), to ensure AAAASF's policies for an acceptable plan of correction meet the CMS requirements;

- Section 488.28(d), to ensure that AAAASF's policies for correction of deficiencies in OPTs is comparable to CMS requirements, requiring that deficiencies normally must be corrected within 60 days; and

- Section 489.13(b)(1), to ensure all enrollment requirements are met prior to AAAASF surveying an initial applicant.

B. Term of Approval

Based on our review and observations described in section III of this final notice, we approve AAAASF as a national accreditation organization for OPTs that request participation in the Medicare program, effective April 4, 2019 through April 4, 2025.

V. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Dated: March 15, 2019.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2019-06149 Filed 3-29-19; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2019-N-0895]

Issuance of Priority Review Voucher; Material Threat Medical Countermeasure Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a material threat medical countermeasure (MCM) product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the 21st Century Cures Act (Cures Act), authorizes FDA to award priority review vouchers to sponsors of approved material threat MCM product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. On July 13, 2018, FDA determined that TPOXX (tecovirimat), manufactured by SIGA Technologies, Inc., meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Elizabeth Sadove, Office of Counterterrorism and Emerging Threats, 10903 New Hampshire Ave., Silver Spring, MD 20993-0002, 301-796-8510.

SUPPLEMENTARY INFORMATION: FDA is announcing the issuance of a priority review voucher to the sponsor of an approved material threat MCM product application. Under section 565A of the FD&C Act (21 U.S.C. 360bbb-4a), which was added by the Cures Act, FDA will award priority review vouchers to sponsors of approved material threat MCM product applications that meet certain criteria. FDA has determined that TPOXX (tecovirimat), manufactured by SIGA Technologies, Inc., meets the criteria for a priority review voucher. TPOXX (tecovirimat) is indicated to treat human smallpox disease in adults and pediatric patients weighing at least 13 kilograms.

For further information about the material threat MCM Priority Review Voucher Program and for a link to the full text of section 565A of the FD&C

Act, go to <https://www.fda.gov/EmergencyPreparedness/Counterterrorism/MedicalCountermeasures/MCMLegalRegulatoryandPolicyFramework/ucm566498.htm#prv>. For further information about TPOXX (tecovirimat), go to the "Drugs@FDA" website at <https://www.accessdata.fda.gov/scripts/cder/daf/>.

Dated: March 26, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019-06145 Filed 3-29-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2019-N-0598]

Teva Women's Health, Inc., et al.; Withdrawal of Approval of 16 New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 16 new drug applications (NDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of May 1, 2019.

FOR FURTHER INFORMATION CONTACT: Kimberly Lehrfeld, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6226, Silver Spring, MD 20993-0002, 301-796-3137.

SUPPLEMENTARY INFORMATION: The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
NDA 007883	Antabuse (disulfiram) Tablets, 250 milligrams (mg) and 500 mg.	Teva Women's Health, Inc., 41 Moores Rd., P.O. Box 4011, Frazer, PA 19355.
NDA 011324	Sinografin (diatrizoate meglumine and iodipadimide meglumine) Injection, 52.7%/26.8%.	Bracco Diagnostic Inc., 259 Prospect Plains Rd., Bldg. H, Monroe Township, NJ 08831.
NDA 018932	ReVia (naltrexone hydrochloride) Tablets, 50 mg	Teva Women's Health, Inc.
NDA 019880	Paraplatin (carboplatin) Injection, 50 mg/vial, 150 mg/vial, and 450 mg/vial.	Corden Pharma Latina S.p.A., c/o Clinipace, Inc., 4840 Pearl East Circle, Suite 201E, Boulder, CO 80301.
NDA 020261	Lescol (fluvastatin sodium) Capsules, 20 mg and 40 mg	Novartis Pharmaceuticals Corp., One Health Plaza, East Hanover, NJ 07936-1080.
NDA 020452	Paraplatin (carboplatin) Injection in multiple dose vials, 50 mg/5 milliliters (mL), 150 mg/15 mL, 450 mg/45 mL, and 600 mg/60 mL.	Corden Pharma Latina S.p.A.
NDA 021431	Campral (acamprosate calcium) Delayed-Release Tablets, 333 mg.	Allergan Sales, LLC., 5 Giralda Farms, Madison, NJ 07940.
NDA 021551	Halflytely and Bisacodyl Tablet Bowel Prep Kit (polyethylene glycol 3350, potassium chloride, sodium bicarbonate, and sodium chloride powder for oral solution, 210 grams (g)/0.74 g/2.86 g/5.6 g; bisacodyl delayed-release tablet, 5 mg).	Braintree Laboratories, Inc., 60 Columbian St. West, P.O. Box 850929, Braintree, MA 02185.
NDA 021823	Actonel with Calcium (risedronate sodium tablets, 35 mg; calcium carbonate tablets USP, equivalent to 500 mg base).	Warner Chilcott Co., LLC., 100 Enterprise Dr., Rockaway, NJ 07866.
NDA 021905	Valtropine (somatropin) for Injection, 5 mg/vial	LG Chem, Ltd., c/o Parexel International, LLC., 4600 East-West Highway, Suite 350, Bethesda, MD 20814.
NDA 022396	Dyloject (diclofenac sodium) Injection, 37.5 mg/mL	Javelin Pharmaceuticals, Inc., c/o Hospira, Inc., 275 North Field Dr., Dept. 0389, HI-3S, Lake Forest, IL 60045.
NDA 050619	Mycostatin (nystatin) Pastilles, 200,000 Units	Delcor Asset Corp., c/o Mylan, Inc., 781 Chestnut Ridge Rd., P.O. Box 4310, Morgantown, WV 26504-4310.
NDA 050739	Omnicef (cefdinir) Capsules, 300 mg	AbbVie Inc., 1 North Waukegan Rd., North Chicago, IL 60064.
NDA 050749	Omnicef (cefdinir) Oral Suspension, 125 mg/5 mL and 250 mg/5 mL.	Do.
NDA 050757	PrevPAC (amoxicillin capsules USP, 500 mg; clarithromycin tablets USP, 500 mg; and lansoprazole delayed-release capsules, 30 mg).	Takeda Pharmaceuticals U.S.A., Inc., One Takeda Parkway, Deerfield, IL 60015.
NDA 202356	Docetaxel Injection, 20 mg/2 mL, 80 mg/8 mL, 130 mg/13 mL, and 200 mg/20 mL.	Pfizer Inc., 235 East 42nd St., New York, NY 10017.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of May 1, 2019. The drug product strengths listed in the table include all strengths FDA has identified as being previously approved under these NDAs. In each case, approval of the entire application is withdrawn, including any strengths inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on May 1, 2019 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: March 26, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019-06237 Filed 3-29-19; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Charter Renewal for the Advisory Committee on Interdisciplinary, Community-Based Linkages

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL or the Committee) has been rechartered. The effective date of the renewed charter is March 24, 2019.

FOR FURTHER INFORMATION CONTACT: Joan Weis, Ph.D., RN, CRNP, FAAN, Designated Federal Official, at 301-443-0430 or email at jweiss@hrsa.gov. A copy of the current committee membership, charter, and reports can be obtained at <https://www.hrsa.gov/advisory-committees/interdisciplinary-community-linkages/index.html>.

SUPPLEMENTARY INFORMATION: ACICBL provides advice and recommendations on policy and program development to the Secretary of HHS (Secretary) concerning the activities under Title VII, Part D of the Public Health Service Act, and is responsible for submitting an annual report to the Secretary and Congress describing the activities of the Committee, including findings and recommendations made by the Committee concerning the activities under Part D of Title VII. ACICBL develops, publishes, and implements performance measures and guidelines for longitudinal evaluations and recommends appropriation levels for programs under this part. The charter renewal for the ACICBL was approved on March 15, 2019 and the filing date is March 24, 2019. Renewal of the ACICBL charter gives authorization for the Committee to operate until March 24, 2021.

A copy of the ACICBL charter is available on the committee website at <https://www.hrsa.gov/advisory-committees/interdisciplinary-community-linkages/index.html>. A copy of the charter can also be obtained by

accessing the Federal Advisory Committee Act (FACA) database that is maintained by the Committee Management Secretariat under the General Services Administration. The website for the FACA database is <http://www.facadatabase.gov/>.

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2019-06162 Filed 3-29-19; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Charter Renewal for the Advisory Committee on Training in Primary Care Medicine and Dentistry

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD or the Committee) has been rechartered. The effective date of the renewed charter is March 24, 2019.

FOR FURTHER INFORMATION CONTACT:

Kennita R. Carter, MD, Designated Federal Official, at 301-945-3505 or email at BHWACTPCMD@hrsa.gov. A copy of the current committee membership, charter, and reports can be obtained by accessing the ACTPCMD's website at <https://www.hrsa.gov/advisory-committees/primarycare-dentist/index.html>.

SUPPLEMENTARY INFORMATION:

ACTPCMD provides advice and recommendations to the Secretary of HHS (Secretary) on policy, program development, and other matters of significance concerning the activities under section 747 of Title VII of the Public Health Service (PHS) Act, as it existed upon the enactment of Section 749 of the PHS Act in 1998. ACTPCMD prepares an annual report describing the activities of the Committee, including findings and recommendations made by the Committee concerning the activities under section 747, as well as training programs in oral health and dentistry. The annual report is submitted to the Secretary and Chair and ranking members of the Senate Committee on Health, Education, Labor and Pensions, and the House of Representatives Committee on Energy and Commerce. The Committee also develops,

publishes, and implements performance measures and guidelines for longitudinal evaluations of programs authorized under Title VII, Part C, of the PHS Act, and recommends appropriation levels for programs under this Part. Meetings are held not less than twice a year. The recharter for the ACTPCMD was approved on March 20, 2019, and the filing date is March 24, 2019. Recharter of the ACTPCMD gives authorization for the Committee to operate until March 24, 2021.

A copy of the ACTPCMD charter is available on the ACTPCMD website at <https://www.hrsa.gov/advisory-committees/primarycare-dentist/index.html>. A copy of the charter can also be obtained by accessing the Federal Advisory Committee Act (FACA) database that is maintained by the Committee Management Secretariat under the General Services Administration. The website for the FACA database is <http://www.facadatabase.gov/>.

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2019-06161 Filed 3-29-19; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Global Affairs: Stakeholder Listening Session in Preparation for the 72nd World Health Assembly

Time and date: Monday, May 6, 2019, 10:00 a.m.–11:30 a.m. EST.

Place: Hubert H. Humphrey Building, Auditorium, 200 Independence Ave. SW, Washington, District of Columbia 20201.

Status: Open, but requiring RSVP to OGA.RSVP@hhs.gov by Friday, April 26, 2019.

Purpose: The U.S. Department of Health and Human Services (HHS)—charged with leading the U.S. delegation to the 72nd World Health Assembly—will hold an informal Stakeholder Listening Session on *Monday, May 6 from 10:00 a.m. to 11:30 a.m.*, in the Hubert H. Humphrey Building Auditorium, 200 Independence Ave. SW, Washington, DC 20201. The Stakeholder Listening Session will help the HHS Office of Global Affairs prepare the U.S. delegation for the World Health Assembly by taking full advantage of the knowledge, ideas, feedback, and suggestions from all individuals interested in and affected by agenda items to be discussed at the 72nd World Health Assembly.

Time allotted to each attendee who wishes to comment, not to exceed three minutes, will be communicated at the beginning of session, and will depend on the number of comments anticipated. Written comments are welcome and encouraged, even if you are planning on attending in person. Please send your written comments to OGA.RSVP@hhs.gov.

Your input will contribute to informing U.S. positions as we negotiate with our international colleagues at the World Health Assembly on these important health topics.

The draft agenda for the 72nd World Health Assembly can be found at this website: http://apps.who.int/gb/ebwha/pdf_files/WHA72/A72_1-en.pdf.

The HHS Office of Global Affairs will organize the listening session by agenda item, and welcomes participation from all individuals, including individuals familiar with the following topics and groups:

- Public health and advocacy activities;
- State, local, and Tribal issues;
- Private industry;
- Minority health organizations; and
- Academic and scientific organizations.

RSVP: Due to security restrictions for entry into the HHS Hubert H. Humphrey Building, RSVPs are required for this event. Please send your full name and organization to OGA.RSVP@hhs.gov. Please RSVP no later than Friday, April 26, 2019.

If you are *not* a U.S. citizen *and* do not have a U.S. government issued form of identification, please note this in the subject line of your RSVP, and our office will contact you to gain additional biographical information required for your clearance. Photo identification for all attendees is required for building access without exception.

We look forward to hearing your comments related to the 72nd World Health Assembly agenda items.

Dated: March 22, 2019.

Glenn Garrett Grigsby,

Director for Global Affairs.

[FR Doc. 2019-06207 Filed 3-29-19; 8:45 am]

BILLING CODE 4150-38-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against

Edward J. Fox, Ph.D. (Respondent), Acting Assistant Professor in the Department of Pathology, University of Washington (UW). Dr. Fox engaged in research misconduct in research supported by National Cancer Institute (NCI), National Institutes of Health (NIH), grants R01 CA193649, R01 CA160674, P01 CA77852, and R01 CA102029. The administrative actions, including supervision for a period of one (1) year, were implemented beginning on March 18, 2019, and are detailed below.

FOR FURTHER INFORMATION CONTACT:

Wanda K. Jones, Dr. P.H., Interim Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453-8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Edward J. Fox, Ph.D., University of Washington: Based on Respondent's admission, an inquiry conducted by UW, and additional analysis conducted by ORI in its oversight review, ORI found that Dr. Edward J. Fox, Acting Assistant Professor in the Department of Pathology, UW, engaged in research misconduct in research supported by NCI, NIH, grants R01 CA193649, R01 CA160674, P01 CA77852, and R01 CA102029.

Respondent neither admits nor denies ORI's finding of research misconduct related to grant application R01 CA193649-01A1. Respondent and ORI desire to close this matter without further expense of time and other resources and thus have entered into a Voluntary Settlement Agreement (Agreement). With respect to grant application R01 CA193649-01A1, Respondent acknowledges that his research records were poorly maintained and lacked the documentation necessary to support the reported preliminary results.

ORI found that Respondent engaged in research misconduct by intentionally, knowingly, or recklessly:

- Fabricating data and analyses in a manuscript submitted to *Nature*,¹ which was subsequently voluntarily withdrawn. These fabricated data and analyses also appear in Figure 1 of grant progress report R01 CA193649-02.²

¹ Fox, E.J., Schmitt, M.W., Reid-Bayliss, K.S., Geraghty, R., O'Donoghue, D.P., Mulcahy, H.E., Leahy, D.T., Sheahan, K., Beckman, R.A., & Loeb, L.A. "Extensive subclonal mutations in human colorectal cancers detected by duplex sequencing." Accepted for publication in *Nature* (hereafter referred to as the "Nature manuscript").

² The subsequent grant progress report noted these data might not be reliable and indicated that the experiments were being re-run.

Respondent stated during the inquiry that two abstracts that appear in *Cancer Research*³ are based on the fabricated data and analyses.

- fabricating or falsifying data and analyses in the preliminary results section of grant application R01 CA193649-01A1, section C.1.a(iv). Specifically, ORI found that in the *Nature* manuscript and, where noted below, in grant progress report R01 CA193649-02 submitted to NCI, NIH, Respondent intentionally, knowingly, or recklessly:

- Fabricated data for Figures 1c and 1d to show that the frequency of unique subclonal mutations in normal cells increases as people age, while the frequency of subclonal mutations in cancerous cells does not.

- fabricated Figure 2b to show a pattern of subclonal mutations for the fabricated data from Figures 1c and 1d and fabricated the statistical analysis results to show statistically significant differences between tumor and normal mucosa; this figure also appears as Figure 1 in R01 CA193649-02.

- fabricated data for Figure 3b to show predominantly neutral subclonal evolution.

- fabricated the Extended Data Figures 1-5 and Extended Data Tables 3-5 by using the fabricated data from Figure 3b.

- presented methods and data-based explanations that are fabricated because they were based on the fabricated data.

ORI also specifically found that in grant application R01 CA193649-01A1, Respondent intentionally, knowingly, or recklessly:

- Fabricated or falsified data for Figures 7, 8, and 9 to show how duplex sequencing methodology can document the distribution of subclonal mutations that are present in colorectal cancer.C

- presented data-based explanations that are fabricated or falsified because some of them were based on the fabricated or falsified data.

Dr. Fox entered into an Agreement and voluntarily agreed:

(1) To have his research supervised for a period of one (1) year beginning on

³ Fox, E.J.P., Schmitt, M.W., Reid-Bayliss, K.S., Beckman, R.A., & Loeb, L.A. "Extensive subclonal mutations in human colorectal cancers detected by duplex sequencing." [Abstract]. In: Proceedings of the 107th Annual Meeting of the American Association for Cancer Research, 2016 Apr 16-20, New Orleans, LA. Philadelphia (PA): AACR; *Cancer Res.* 76(14 Suppl.):Abstract nr LB-338, 2016.

Fox, E.J.P., Schmitt, M.W., Reid-Bayliss, K.S., Beckman, R.A., & Loeb, L.A. "Extensive subclonal mutations in human colorectal cancers detected by Duplex Sequencing." [Abstract]. In: Proceedings of the AACR Special Conference on Colorectal Cancer: From Initiation to Outcomes, 2016 Sep 17-20, Tampa, FL. Philadelphia (PA): AACR; *Cancer Res.* 77(3 Suppl.):Abstract nr A08, 2017.

March 18, 2019; Respondent agreed that prior to submission of an application for U.S. Public Health Service (PHS) support for a research project on which Respondent's participation is proposed and prior to Respondent's participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of Respondent's duties is submitted to ORI for approval; the supervision plan must be designed to ensure the scientific integrity of Respondent's research contribution; Respondent agreed that he shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI; Respondent agreed to maintain responsibility for compliance with the agreed upon supervision plan;

(2) that for a period of one (1) year beginning on March 18, 2019, any institution employing him shall submit, in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract;

(3) that if no supervisory plan is provided to ORI, Respondent will provide certification to ORI at the conclusion of the supervision period that he has not engaged in, applied for, or had his name included on any application, proposal, or other request for PHS funds without prior notification to ORI;

(4) to exclude himself from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of one (1) year beginning on March 18, 2019; and

(5) as a condition of the Agreement, Respondent will recommend to the American Association for Cancer Research that the following two *Cancer Research* abstracts should be retracted:

- *Cancer Res.* 76(14 Suppl.):Abstract nr LB-338, 2016

- *Cancer Res.* 77(3 Suppl.):Abstract nr A08, 2017

Respondent will copy ORI and UW on this correspondence.

Wanda K. Jones,

Interim Director, Office of Research Integrity.

[FR Doc. 2019-06206 Filed 3-29-19; 8:45 am]

BILLING CODE 4150-31-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Clinical Center Notice of Meeting**

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors of the NIH Clinical Center.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Board of Scientific Counselors of the NIH Clinical Center.

Date: April 22–23, 2019.

Time: April 22, 2019, 8:00 a.m. to 10:15 a.m.

Agenda: Biothetic Presentations 1–3.

Place: National Institutes of Health, Building 10, CRC Medical Board Room, 10 Center Drive, Bethesda, MD 20892.

Time: April 22, 2019, 11:00 a.m. to 11:30 a.m.

Agenda: Bioethics Presentations 4–6.

Place: National Institutes of Health Bethesda, MD.

Time: April 22, 2019, 12:45 p.m. to 5:00 p.m.

Agenda: To review and evaluate documents.

Place: National Institutes of Health Bethesda, MD.

Time: April 23, 2019, 8:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate documents.

Place: National Institutes of Health Bethesda, MD.

Contact Person: John I. Gallin M.D., Director, Office of Director, NIH Clinical Center, 1 Center Drive, Room 201, Bethesda, MD 20892, 301–827–5428.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: March 26, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–06230 Filed 3–29–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Digestive SBIR Clinical Applications.

Date: April 12, 2019.

Time: 3:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ryan G. Morris, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7015, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–594–4721, ryan.morris@nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 26, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–06232 Filed 3–29–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Office of the Director, National Institutes of Health; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Council of Councils.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Council of Councils.

Date: April 24, 2019.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 1, 1 Center Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Franziska Grieder, D.V.M., Ph.D., Executive Secretary, Council of Councils, Director, Office of Research Infrastructure Programs, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH, 6701 Democracy Boulevard, Room 948, Bethesda, MD 20892, GriederF@mail.nih.gov, 301–435–0744.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: March 26, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–06233 Filed 3–29–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Cancer Institute; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project I (P01).

Date: May 16–17, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Sanita Bharti, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W122, Bethesda, MD 20892–9750, 240–276–5909, sanitab@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI U54 Immuno-engineering to Improve Immunotherapy (i3) Centers Review.

Date: June 19–20, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W120, Bethesda, MD 20892–9750, 240–276–6457, mh101v@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: March 26, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–06231 Filed 3–29–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Substance Abuse and Mental Health Services Administration (SAMHSA)****Advisory Committee for Women's Services (ACWS); Notice of Meeting**

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Advisory Committee for Women's Services (ACWS) on May 29, 2019.

The meeting will include discussions on assessing SAMHSA's current strategies, including the mental health and substance use needs of the pregnant and parenting women population. Additionally, the ACWS will be speaking with the Assistant Secretary for Mental Health and Substance Use regarding priorities and directions around behavioral health services and access for women and children.

The meeting is open to the public and will be held virtually only (not in person), by SAMHSA, 5600 Fishers Lane, Rockville, MD 20857. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions should be forwarded to the contact person (below) by May 15, 2019. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations must notify the contact person on or before May 15, 2019. Five minutes will be allotted for each presentation.

The meeting may be accessed via telephone or WebEx. To obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at <http://snacregister.samhsa.gov/MeetingList.aspx>, or communicate with SAMHSA's Designated Federal Officer, Ms. Valerie Kolick (see contact information below).

Substantive meeting information and a roster of ACWS members may be obtained either by accessing the SAMHSA Committees' Web <https://www.samhsa.gov/about-us/advisory-councils/meetings>, or by contacting Ms. Kolick.

Committee Name: Substance Abuse and Mental Health Services Administration, Advisory Committee for Women's Services (ACWS).

Date/Time/Type: Wednesday, May 29, 2019, from: 9:00 a.m. to 3:45 p.m. EDT. Open.

Place: Virtual and phone meeting only.

Contact: Valerie Kolick, Designated Federal Official, SAMHSA's Advisory Committee for Women's Services, 5600 Fishers Lane, Rockville, MD 20857, Telephone: (240) 276–1738, Email: Valerie.kolick@samhsa.hhs.gov.

Dated: March 27, 2019.

Carlos Castillo,

Committee Management Officer, Substance Abuse and Mental Health, Services Administration.

[FR Doc. 2019–06255 Filed 3–29–19; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard**

[Docket No. USCG–2018–1085]

RIN 1625–AA09

Extension of Comment Period for the 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: Extension of comment period.

SUMMARY: The United States Coast Guard is extending the comment period for the draft Environmental Assessment (EA) which appeared in the **Federal Register** on February 6, 2019 for the proposed construction of railroad bridges across Lake Pend Oreille and Sand Creek at Sandpoint, Bonner County, Idaho. The draft EA addresses environmental impacts and socioeconomic effects related to the proposed construction of railroad bridges built parallel to existing bridges crossing the same waterbodies. The comment period has been extended an additional 30 days to May 1, 2019.

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 May 1, 2019.

ADDRESSES: You may submit comments identified by docket number USCG–2018–1085 using the Federal eRulemaking Portal at <http://www.regulations.gov>. The direct link to

the draft EA and related documents is: <https://www.regulations.gov/docket?D=USCG-2018-1085>.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice please contact Mr. Steven Fischer, District Bridge Manager, Thirteenth Coast Guard District, U.S. Coast Guard; telephone 206-220-7282.

Dated: March 27, 2019.

Brian L. Dunn,

Chief, Office of Bridge Programs, U.S. Coast Guard.

[FR Doc. 2019-06241 Filed 3-29-19; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-HQ-IA-2019-0011; FXIA1671090000-178-FF09A30000]

Foreign Endangered Species; Marine Mammals; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA) and foreign or native species for which the Service has jurisdiction under the Marine Mammal Protection Act (MMPA). With some exceptions, the ESA and the MMPA prohibit activities with listed species unless Federal authorization is issued that allows such activities. The ESA and MMPA also require that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA or MMPA with respect to any endangered species or marine mammals.

DATES: We must receive comments by May 1, 2019.

ADDRESSES: Obtaining Documents: The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at <http://www.regulations.gov> in Docket No. FWS-HQ-IA-2019-0011.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- **Internet:** <http://www.regulations.gov>. Search for and

submit comments on Docket No. FWS-HQ-IA-2019-0011.

- **U.S. mail or hand-delivery:** Public Comments Processing, Attn: Docket No. FWS-HQ-IA-2019-0011; U.S. Fish and Wildlife Service Headquarters, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 22041-3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, by phone at 703-358-2104, via email at DMAFR@fws.gov, or via the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or fax, or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at <http://www.regulations.gov>, unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at <http://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes

personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and section 104(c) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA and MMPA prohibit certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17. Service regulations regarding permits for any activity otherwise prohibited by the MMPA with respect to any marine mammals are available in title 50 of the Code of Federal Regulations in part 18. Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the marine mammal applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

III. Permit Applications

We invite comments on the following applications.

A. Endangered Species

Applicant: Tony Goldberg, University of Wisconsin, Madison, WI; Permit No. 09881D

The applicant requests a permit to import biological samples of wild-born and captive-born chimpanzees (*Pan troglodytes*) from Ngamba Island Chimpanzee Sanctuary, Uganda, for the

purpose of scientific research. This notification is for a single import.

Applicant: Denver Zoological Foundation, Denver, CO; Permit No. 17573D

The applicant requests a permit to export one captive-born Malay tapir (*Tapirus indicus*) to Africom, Mexico, for the purpose of enhancing the propagation or survival of the species. This notification is for a single export.

Applicant: University of Illinois, Veterinary Diagnostic Laboratory, Brookfield, IL; Permit No. 21469B

The applicant requests to import biological samples from chimpanzee (*Pan troglodytes*) in Tanzania for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: LMBI, Fort Worth, TX; Permit No. 18708D

The applicant requests a permit to export one captive-born southern black rhino (*Diceros bicornis*) to Taronga Zoo, Australia, for the purpose of enhancing the propagation or survival of the species. This notification is for a single export.

Applicant: Duke University Lemur Center, Durham, NC; Permit No. 21559D

The applicant requests a permit to export one male and one female captive-born Coquerel's sifaka (*Propithecus coquereli*) to Tierpark Berlin, Berlin, Germany, for the purpose of enhancing the propagation or survival of the species. This notification is for a single export.

Applicant: Elliot Jacobson, University of Florida, Gainesville, FL; Permit No. 21270D

The applicant requests a permit to import biological tissue samples of Central American river turtle (*Dermatemys mawii*) from Unitedville, Belize, for the purpose of scientific research. This notification is for a single import.

Applicant: Omaha's Henry Doorly Zoo & Aquarium, Omaha, NE; Permit No. 22215D

The applicant requests a permit to import one live captive-bred male Siberian tiger (*Panthera tigris altaica*) from Moscow Zoo, Moscow, Russian Federation, for the purpose of enhancing the propagation or survival of the species. This notification is for a single import.

Applicant: Cleveland Metroparks Zoo, Cleveland, OH; Permit No. 04323D

The applicant requests a permit to import one female captive-born Siberian tiger (*Panthera tigris altaica*) for the purpose of enhancing the propagation or survival of the species. This notification is for a single import.

Applicant: Seneca Park Zoo, Rochester, NY; Permit No. 02406D

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for snow leopard (*Panthera uncia*) and African penguin (*Spheniscus demersus*) to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Virginia Safari Park, Natural Bridge, VA; Permit No. 02395D

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for African penguin (*Spheniscus demersus*) and southern white rhino (*Ceratotherium simum simum*) to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Los Angeles Zoo and Botanical Garden, Los Angeles, CA; Permit No. 11986D

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the following species listed in the table below, to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Common name	Scientific name
African wild dog	<i>Lycaon pictus</i>
Andean condor	<i>Vultur gryphus</i>
Anoa	<i>Bubalus depressicornis</i>
Asian elephant	<i>Elephas maximus</i>
Baird's tapir	<i>Tapirus bairdii</i>
Bali mynah	<i>Leucopsar rothschildi</i>
Black lemur	<i>Eulemur macaco</i>
Blue-billed curassow	<i>Crax alberti</i>
Blue-throated macaw	<i>Ara glaucogularis</i>
Bornean orangutan ...	<i>Pongo pygmaeus pygmaeus</i>
Buru babirusa	<i>Babyrousa celebensis</i>
Chimpanzee	<i>Pan troglodytes</i>
Francois' langur	<i>Trachypithecus francoisi</i>
Giant otter	<i>Pteronura brasiliensis</i>
Golden-lion tamarin ...	<i>Leontopithecus rosalia</i>
Grevy's zebra	<i>Equus grevyi</i>
Harpy eagle	<i>Harpia harpyja</i>
Komodo monitor	<i>Varanus komodoensis</i>

Common name	Scientific name
Mandrill	<i>Mandrillus sphinx</i>
Maned wolf	<i>Chrysocyon brachyurus</i>
Peninsular pronghorn	<i>Antilocapra americana peninsularis</i>
Radiated tortoise	<i>Astrochelys radiata</i>
Ring-tailed lemur	<i>Lemur catta</i>
San Esteban Island chuckwalla	<i>Sauromalus varius</i>
Siamang	<i>Symphalangus syndactylus</i>
Snow leopard	<i>Uncia uncia</i>
Southern pudu	<i>Pudu puda</i>
Tiger	<i>Panthera tigris</i>
Tomistoma	<i>Tomistoma schlegelii</i>
Verreaux's sifaka	<i>Propithecus verreauxi</i>
Western gorilla	<i>Gorilla gorilla</i>
Woylie	<i>Bettongia penicillata</i>
Yellow-footed rock wallaby	<i>Petrogale xanthopus</i>

Applicant: William Tatom, Amarillo, TX; Permit No. 98275C

The applicant requests a permit to import the sport-hunted trophy of one scimitar-horned oryx (*Oryx dammah*) culled from a captive herd in Mexico, for the purpose of enhancing the propagation or survival of the species.

Applicant: Rita Kalmon, Medford, WI; Permit No. 98276C

The applicant requests a permit to import the sport-hunted trophy of one scimitar-horned oryx (*Oryx dammah*) culled from a captive herd in Mexico, for the purpose of enhancing the propagation or survival of the species.

Applicant: Nathan Somero, New Ipswich, NH; Permit No. 98249C

The applicant requests a permit to import the sport-hunted trophy of one scimitar-horned oryx (*Oryx dammah*) culled from a captive herd in Mexico, for the purpose of enhancing the propagation or survival of the species.

Applicant: David Baldauf, Gilbert, AZ; Permit No. 98253C

The applicant requests a permit to import the sport-hunted trophy of one scimitar-horned oryx (*Oryx dammah*) culled from a captive herd in Mexico, for the purpose of enhancing the propagation or survival of the species.

Applicant: Anthony Deshaw, Rochester Hills, MI; Permit No. 14599D

The applicant requests a permit to import the sport-hunted trophy of one scimitar-horned oryx (*Oryx dammah*) culled from a captive herd in Mexico, for the purpose of enhancing the propagation or survival of the species.

Multiple Trophy Applicants

The following applicants request permits to import sport-hunted trophies

of male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancing the propagation or survival of the species.

Applicant: Steven Crews, Natchitoches, LA; Permit No. 15034D

Applicant: Donald Youngblood, Keizer, OR; Permit No. 17070D

Applicant: Donald Wehmeyer, Abilene, TX; Permit No. 17570D

Applicant: Scott Ames, Tulsa, OK; Permit No. 21256D

B. Endangered Marine Mammals and Marine Mammals

Applicant: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Admin, Marine Mammal Health and Stranding Response Program, Silver Spring, MD; Permit No. 009526

NMFS, the applicant, requests renewal of their permit in order to salvage, receive, possess, analyze, transfer, import, and export samples and parts of all marine mammal species under U.S. Fish and Wildlife Service (USFWS) jurisdiction and also for incidental take of all marine mammals under USFWS jurisdiction that may occur while NMFS is performing research or emergency response activities on marine mammals under NMFS jurisdiction under NMFS permit no. 18786-02. They are also requesting Level B coverage for incidental harassment that may occur to the four marine mammal species that are found in U.S. waters; the possible incidental harassment would occur as a result of activities conducted under NMFS's Marine Mammal Health and Stranding Response Program permit for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: U.S. Geological Survey, National Wildlife Health Center, Madison, WI; Permit No. 51164C

The applicant requests authorization for the following activities, for the purpose of scientific research (in order to determine possible causes of disease and mortality):

To receive and process northern sea otter (NSO) carcasses stranded in Washington and Alaska;

To transport tissue samples from these NSO carcasses to other lab facilities within the United States for diagnostic testing; and

To export biological specimens to the Department of Fisheries and Oceans in

Canada of northern sea otter (*Enhydra lutris kenyoni*), Pacific walrus (*Odobenus rosmarus*), West Indian manatee (*Trichechus manatus*), and polar bear (*Ursus maritimus*).

This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Florida Fish and Wildlife Research Institute, St. Petersburg, FL; Permit No. 773494

The applicant requests renewal of their research permit to conduct aerial surveys on West Indian Florida manatee (*Trichechus manatus*). They are also requesting to import, export, or re-export biological samples (tissues, parts, samples, or carcasses) of West Indian manatee, Amazonian manatee (*Trichechus inunguis*), African manatee (*Trichechus senegalensis*), and dugong (*Dugong dugon*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <http://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to [regulations.gov](http://www.regulations.gov) and search for "12345A".

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations, and the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and its implementing regulations.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2019-06212 Filed 3-29-19; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R5-ES-2019-N034;
FXES11130500000-190-FF05E00000]

Endangered and Threatened Species; Receipt of Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before May 1, 2019.

ADDRESSES: Use one of the following methods to request documents or submit comments. Requests and comments should specify the applicant name(s) and application number(s) (*e.g.*, TE123456):

- *Email:* permitsR5ES@fws.gov.
- *U.S. Mail:* Abby Gelb, Ecological Services, U.S. Fish and Wildlife Service, 300 Westgate Center Dr., Hadley, MA 01035.

FOR FURTHER INFORMATION CONTACT:

Abby Gelb, 413-253-8212 (phone), or permitsR5ES@fws.gov (email).

Individuals who are hearing or speech impaired may call the Federal Relay Service at 1-800-877-8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for permits under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permits would allow the applicants to conduct activities intended to promote recovery of species that are listed as endangered or threatened under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of "take" includes such activities as pursuing, harassing,

trapping, capturing, or collecting in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that

promote recovery or for enhancement of propagation or survival of the species. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for

endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

We invite local, State, and Federal agencies; Tribes; and the public to comment on the following applications.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
TE29073D	University of Maine, Orono, ME.	Atlantic salmon (<i>Salmo salar</i>).	Maine	Fish assemblage survey, monitor.	Electrofishing, capture, harass, handle.	New.
TE33186D	Martha's Vineyard Land Bank Commission, Edgartown, MA.	Roseate tern (<i>Sterna dougallii dougallii</i>), Piping plover (<i>Charadrius melodus</i>).	Massachusetts	Research on impacts of small Unmanned Aircraft System flight altitude on nesting shorebirds.		New.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Martin Miller,

Chief, Division of Endangered Species, Ecological Services, Northeast Region.

[FR Doc. 2019-06169 Filed 3-29-19; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX19ED00CPN00; OMB Control Number 1028-0119/Renewal]

Agency Information Collection Activities; Earth Explorer User Registration Service

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before May 31, 2019.

ADDRESSES: Send your comments on the information collection request (ICR) by mail to the U.S. Geological Survey, Information Collections Clearance Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to gs-info_collections@usgs.gov. Please reference OMB Control Number 1028-0119 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Ryan Longhenry by email at rlonghenry@usgs.gov, or by telephone at 605-591-6179.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal

agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed information collection request (ICR) that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The USGS proposes to collect general demographic information about public users that download products from the USGS using Earth Explorer (EE) application. This information is used to help address reports to Congress, OMB and DOI management with planning public uses of Landsat and other remote sensing data. The most common uses of these data are used to justify the maintenance and the free distribution of the USGS land remote sensing data. EE also stores information about users that download source code products, Global Visualization Viewer (GloVis) for example. The information collected in the database includes the names, affiliations, addresses, email address and telephone numbers of individuals. The information is gathered to facilitate the reporting of demographic data for use of the EE Application. Demographic data is also used to make decisions on future functional requirements within the system.

Earth Explorer is a Web application that enables users to find, preview, and download or order digital data published by the U.S. Geological Survey. There are more than 300 USGS Datasets available from the site. To download or order products from EE, users must register with the EE system.

The information is stored on an internal encrypted database. The data is provided by the customer and utilized to notify the customer of data ready for download. If downloads are unsuccessful, the customer is contacted to provide updated information. In addition, EE requires certain fields to be completed such as name, address, city and zip code before an account can be established and an order can be submitted.

EE does not derive new data and does not create new data through aggregation.

Personal information is not used as search criteria. Access to the information uses the least privileged access methodology. Authorized individuals with specifically granted access to the Privacy Act data can retrieve only by account number or order number. Personal data is encrypted while stored in the Database.

Title of Collection: Earth Explorer User Registration Service.

OMB Control Number: 1028-0119.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Private individuals who have requested USGS products from USGS/Earth Explorer application are covered in this system.

Total Estimated Number of Annual Respondents: 84,000.

Total Estimated Number of Annual Responses: Approximately 84,000 on an annual basis.

Estimated Completion Time per Response: We estimate that it will take 2 minutes per response to submit the requested information.

Total Estimated Number of Annual Burden Hours: 2,800.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: The information is collected at the time of registration and is only updated by the individual.

Total Estimated Annual Non-hour Burden Cost: None.

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 authorities for this action are the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

Christopher Loria,

USGS EROS Center Director.

[FR Doc. 2019-06196 Filed 3-29-19; 8:45 am]

BILLING CODE 4338-11-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[190A2100DD/AAKC001030/
A0A501010.999900]

HEARTH Act Approval of Minnesota Chippewa Tribe, Minnesota, Fond du Lac Band Leasing Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: On March 6, 2019, the Bureau of Indian Affairs (BIA) approved the Minnesota Chippewa Tribe, Minnesota, Fond du Lac Band leasing ordinance under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act). With this approval, the Tribe is authorized to enter into leases for agricultural, residential, business, wind and solar, wind energy evaluation, and other authorized purposes without further BIA approval.

FOR FURTHER INFORMATION CONTACT: Ms. Sharlene Round Face, Bureau of Indian Affairs, Division of Real Estate Services, MS-4642-MIB, 1849 C Street NW, Washington, DC 20240, at (202) 208-3615.

SUPPLEMENTARY INFORMATION:

I. Summary of the HEARTH Act

The HEARTH Act makes a voluntary, alternative land leasing process

available to Tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The HEARTH Act authorizes Tribes to negotiate and enter into agricultural and business leases of Tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior (Secretary). The HEARTH Act also authorizes Tribes to enter into leases for residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating Tribes develop Tribal leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The HEARTH Act requires the Secretary to approve Tribal regulations if the Tribal regulations are consistent with the Department of the Interior's (Department) leasing regulations at 25 CFR part 162 and provide for an environmental review process that meets requirements set forth in the HEARTH Act. This notice announces that the Secretary, through the Assistant Secretary—Indian Affairs, has approved the Tribal regulations for the Minnesota Chippewa Tribe, Minnesota, Fond du Lac Band.

II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian Tribe with jurisdiction. See 25 CFR 162.017. As explained further in the preamble to the final regulations, the Federal government has a strong interest in promoting economic development, self-determination, and Tribal sovereignty. 77 FR 72,440, 72,447-48 (December 5, 2012). The principles supporting the Federal preemption of State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under Tribal leasing regulations approved by the Federal government pursuant to the HEARTH Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1157 (9th Cir. 2013) (citing

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)). Similarly, section 5108 preempts state taxation of rent payments by a lessee for leased trust lands, because “tax on the payment of rent is indistinguishable from an impermissible tax on the land.” See *Seminole Tribe of Florida v. Stranburg*, No. 14–14524, *13–*17, n.8 (11th Cir. 2015). In addition, as explained in the preamble to the revised leasing regulations at 25 CFR part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a backdrop of “traditional notions of Indian self-government,” requires a particularized examination of the relevant State, Federal, and Tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR at 72,447–48, as supplemented by the analysis below.

The strong Federal and Tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department’s leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to Tribal leasing regulations approved under the HEARTH Act. Congress’s overarching intent was to “allow Tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in Tribal communities.” 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford Tribes “flexibility to adapt lease terms to suit [their] business and cultural needs” and to “enable [Tribes] to approve leases quickly and efficiently.” *Id.* at 5–6.

Assessment of State and local taxes would obstruct these express Federal policies supporting Tribal economic development and self-determination, and also threaten substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. See *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (determining that “[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding”). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a Tribe that, as a result, might refrain from exercising its own sovereign right to

impose a Tribal tax to support its infrastructure needs. See *id.* at 2043–44 (finding that State and local taxes greatly discourage Tribes from raising tax revenue from the same sources because the imposition of double taxation would impede Tribal economic growth).

Similar to BIA’s surface leasing regulations, Tribal regulations under the HEARTH Act pervasively cover all aspects of leasing. See 25 U.S.C. 415(h)(3)(B)(i) (requiring Tribal regulations be consistent with BIA surface leasing regulations). Furthermore, the Federal government remains involved in the Tribal land leasing process by approving the Tribal leasing regulations in the first instance and providing technical assistance, upon request by a Tribe, for the development of an environmental review process. The Secretary also retains authority to take any necessary actions to remedy violations of a lease or of the Tribal regulations, including terminating the lease or rescinding approval of the Tribal regulations and reassuming lease approval responsibilities. Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the Tribal regulations according to the Part 162 regulations.

Accordingly, the Federal and Tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by Tribal leasing regulations or Part 162. Improvements, activities, and leasehold or possessory interests may be subject to taxation by the Minnesota Chippewa Tribe, Minnesota, Fond du Lac Band.

Dated: March 6, 2019.

Tara Sweeney,

Assistant Secretary, Indian Affairs.

[FR Doc. 2019–06295 Filed 3–29–19; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[190A2100DD/AAKC001030/
A0A501010.999900253G]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment in the State of South Dakota

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Amended Gaming Compact between the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (Tribe) and the State of South Dakota (Amendment).

DATES: The compact amendment takes effect on April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA) Public Law 100–497, 25 U.S.C. 2701 *et seq.*, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment increases the number of slot machines the Tribe may operate, decreases certain regulatory costs for emergency services agreements, and eliminates tribal contributions paid from pari-mutuel gaming to schools. The Amendment is approved.

Dated: March 13, 2019.

John Tahsuda,

Principal Deputy Assistant Secretary, Indian Affairs.

[FR Doc. 2019–06296 Filed 3–29–19; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCA942000 L57000000.BX0000 18X
L5017AR; MO#4500132333]

Filing of Plats of Survey: California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of lands described in this notice are scheduled to be officially filed in the Bureau of Land Management (BLM), California State Office, Sacramento, California, 30 calendar days from the date of this publication. The surveys, which were executed at the request of the U.S. Forest Service and the Bureau of Land Management, are necessary for the management of these lands.

DATES: Unless there are protests to this action, the plats described in this notice will be filed on May 1, 2019.

ADDRESSES: You may submit written protests to the BLM California State Office, Cadastral Survey, 2800 Cottage Way, W-1623, Sacramento, CA 95825. A copy of the plats may be obtained from the BLM California State Office, Public Room, 2800 Cottage Way, W-1623, Sacramento, California 95825, upon required payment.

FOR FURTHER INFORMATION CONTACT: Jon Kehler, Chief, Branch of Cadastral Survey, Bureau of Land Management, California State Office, 2800 Cottage Way, W-1623, Sacramento, California 95825; 1-916-978-4323; jkeehler@blm.gov. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1-800-877-8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lands surveyed are:

Mount Diablo Meridian, California

- T. 27 N, R. 13 E, dependent resurvey and subdivision, accepted March 5, 2019.
T. 14 N, R. 5 W, dependent resurvey, subdivision and metes-and-bounds survey, accepted March 7, 2019.

A person or party who wishes to protest one or more plats of survey must file a written notice of protest within 30 calendar days from the date of this publication at the address listed in the **ADDRESSES** section of this notice. Any notice of protest received after the due date will be untimely and will not be considered. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed at the same address within 30 calendar days after the notice of protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved.

Before including your address, phone number, email address, or other personal identifying information in your notice of protest or statement of reasons, you should be aware that the documents you submit—including your personal identifying information—may be made publicly available at any time. While you can ask the BLM to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C., Chapter 3.

Jon L. Kehler,

Chief Cadastral Surveyor.

[FR Doc. 2019-06277 Filed 3-29-19; 8:45 am]

BILLING CODE 4310-40-P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS-WASO-NAGPRA-NPS0027398;
PPWOCRADN0-PCU00RP14.R50000]**

Notice of Inventory Completion: Sam Noble Oklahoma Museum of Natural History, Norman, OK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Sam Noble Oklahoma Museum of Natural History (Museum) at the University of Oklahoma has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Museum. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Sam Noble Oklahoma Museum of Natural History at the address in this notice by May 1, 2019.

ADDRESSES: Dr. Marc Levine, Assistant Curator of Archaeology, Sam Noble Oklahoma Museum of Natural History, University of Oklahoma, 2401 Chautauqua Avenue, Norman, OK 73072-7029, telephone (405) 325-1994, email mlevine@ou.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory

of human remains and associated funerary objects under the control of the Sam Noble Oklahoma Museum of Natural History, Norman, OK. The human remains and associated funerary objects were removed from the following counties in the State of Oklahoma: Cherokee, Delaware, Haskell, Hughes, Latimer, McClain, Muskogee, Oklahoma, Payne, and Pontotoc.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Sam Noble Oklahoma Museum of Natural History professional staff in consultation with representatives of the Caddo Nation of Oklahoma and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma.

History and Description of the Remains

In 1939, human remains representing, at minimum, 21 individuals were removed from the Brackett site (34Ck43), located along the Illinois River in Cherokee County, OK. The excavations were carried out by the Works Progress Administration, and cultural materials were subsequently donated to the Museum on an unknown date.

The human remains include bone fragments and/or teeth of one child, 4-6 years old; one child, 7-9 years old; one adolescent, 12-20 years old of indeterminate sex; one adolescent or young adult of indeterminate sex; one adult, greater than 20 years old, probably a male; one adult, greater than 20 years old of indeterminate sex; one young adult, 20-35 years old of indeterminate sex; one middle-aged adult, 35-50 years old of indeterminate sex; and one older adult, greater than 50 years old of indeterminate sex. The remains also include two commingled sets of remains: One containing an adolescent and one adult male, and the other containing one young adult, 20-35 years old, and one middle-aged adult, 35-50 years old, both of indeterminate sex. No known individuals were identified. The 78 associated funerary objects are one stone double-bit axe, one stone biface, four stone blade fragments, one quartzite core, one stone core fragment, six stone flakes, one chipped-

stone hoe, one stone knife, two stone spear points, three stone projectile points, five stone projectile point fragments, two stone scrapers, two stone scraper fragments, one stone ear spool, four stone ear spool fragments, one ground stone hoe fragment, one mano, three mano fragments, one quartz abrader, one hammerstone, one burned rock, five unmodified rocks, two ceramic pipe fragments, two ceramic bottles, one ceramic effigy vessel fragment, six restored ceramic vessels, three unrestored ceramic vessels, 15 sherds, and one shell fragment.

The Brackett site was occupied during the Mississippian Period (A.D. 1000–1500). Diagnostic artifacts, architectural features, and radiocarbon dates indicate that the human remains were probably buried during the Harlan and Norman phases (A.D. 1100–1350).

In 1939–1940, human remains representing, at minimum, eight individuals were removed from the Smullins 1 site (34Ck44), located along the Illinois River in Cherokee County, OK. This site was discovered by the University of Oklahoma while supervising excavations by the Works Progress Administration, and were subsequently donated to the Museum on an unknown date. The human remains include a complete skeleton of one adult female, 35–50 years old; one complete skeleton of an adult male, 20–35 years old; one partial skeleton of an adult male, 25–40 years old; one fragmentary skeleton of an adolescent, 12–14 years old; three partial skeletons of infants, each approximately one year old; and a partial skeleton of a young child, 2–4 years old. No known individuals were identified. The 26 associated funerary objects are four faunal bones, 12 faunal bone fragments, one faunal bone bead, two stone points, three stone scrapers, two stone flakes, one stone blade, and one shell fragment.

Diagnostic artifacts from 34Ck44 demonstrate that the site was occupied intermittently during the Middle to Late Archaic (4000–300 B.C.) and Woodland (300 B.C.–A.D. 1000) Periods, though the burials probably date to the latter period.

In 1939, human remains representing, at minimum, 23 individuals were removed from the Smullins 2 site (34Ck45), located along the Illinois River in Cherokee County, OK. The associated material was collected by the Works Progress Administration, and was later transferred to the Museum on an unknown date. The human remains include complete skeletons of one young adult male, 25–30 years old, and a child, 6–7 years old; partial skeletons of one older adult female greater than 50

years old; a child, 6–7 years old; and an infant less than 6 months old; and fragmentary skeletons of one older adult male, greater than 50 years old; one older adult female greater than 50 years old; one middle-aged adult male, 35–50 years old; one young adult female, 20–25 years old; two additional adults, one probably a male and the other of indeterminate sex; a child, 6–8 years old; and one infant approximately one year old. The human remains also include the commingled remains of one infant less than six months; one infant approximately a year and a half old; one infant, 2–3 years old; two children, 6–8 years old; one child, 7–9 years old; one adolescent, 12–15 years old; two young adults of indeterminate sex, 18–22 years old; and one older adult male greater than 50 years old. No known individuals were identified. The 330 associated funerary objects are three ash samples, three bone awls, 10 bone beads, one polished faunal bone fragment, 180 faunal bone and tooth fragments, two stone axes, one stone biface, one stone biface fragment, 72 stone flakes, two stone knives, three stone knife fragments, 11 stone projectile points, six stone projectile point fragments, two stone scraper fragments, two manos, one hammerstone fragment, five unmodified rocks, two bags of red ochre, three pottery sherds, four modified large bivalve shells, five unmodified large bivalve shells, and 11 shells and shell fragments.

Diagnostic artifacts associated with the Smullins 2 site burials indicate the interments most likely occurred during the Mississippian Period (A.D. 1000–1500).

In 1985–1986, human remains representing, at minimum, 4 individuals were removed from the Bohannon site (34Hu61) in Hughes County, OK. The site was excavated by the Oklahoma Conservation Commission, the associated materials were transferred to the Museum in 2006. The human remains include complete skeletons of two adult males, 30–45 years old and 35–50 years old; a fragmentary skeleton of an adult female; and bone fragments of an adult of indeterminate sex. No known individuals were identified. The 4,528 associated funerary objects are 28 charcoal samples, 2,005 faunal bone fragments, one faunal bone hair pin, four stone bifaces, two stone biface fragments, three stone projectile points, one stone core, 23 chipped stone debris fragments, 1,308 stone flakes, six cobbles, one green paint stone, 174 ground stone fragments, 14 hematite fragments, 498 unmodified pebbles, 78 sandstone fragments, four sandstone

spalls, 198 clay fragments, 10 pottery sherds, 84 samples of botanical remains, 19 shell fragments, five turtle shell fragments, and 62 soil samples.

Diagnostic artifacts and radiocarbon dates indicate that 34Hu61 dates to the Washita River phase of the Plains Village Period (A.D. 1100–1450). The human remains and associated material were probably buried at that time as well.

In 1976–1977, human remains representing, at minimum, 44 individuals were removed from the McCutchan-McLaughlin site (34Lt11). The site is located along the Fourche Maline Creek in Latimer County, OK. Excavations at 34Lt11 were carried out by the University of Oklahoma archeological field school and the Oklahoma Anthropological Society, and the associated materials were transferred to the Museum in 1980. The human remains include complete skeletons of four young adult females, 25–35 years old, and three middle-aged adult females, 35–50 years old; partial skeletons of one child, 8–10 years old; one adolescent female, 16–18 years old; one young adult male, 20–35 years old; four middle-aged adult males, 35–50 years old; one middle-aged adult of indeterminate sex, 35–50 years old; and one older adult male, greater than 50 years old; fragmentary skeletons of one child, 3–5 years old; one child, 5–7 years old; one adolescent, 10–15 years old; one adult greater than 20 years old, probably a female; one young adult male, 20–35 years old; one young adult of indeterminate sex, 20–35 years old; one young adult male, 25–35 years old; one middle-aged adult female, 35–50 years old; two older adult males, greater than 40 years old; and one older female, greater than 40 years old; and bone fragments of two fetuses or newborns; one infant, 6 months to one year old; four infants, 1–3 years old; one child 3–4 years old; one adolescent of indeterminate sex, 15–20 years old; three adults of indeterminate sex, greater than 20 years old; one adult male, greater than 20 years old; one young adult female, 20–30 years old; and three middle-aged adult females, 35–50 years old. No known individuals were identified. The 7,890 associated funerary objects are one dog burial, two bone beads, four bone awls, three bone fish hooks, one canine tooth pendant, 3,545 faunal bone fragments, four bifaces, six biface fragments, one cobble fragment, one stone core, 3,549 stone flakes, one stone knife, one stone knife fragment, 37 stone projectile points, 22 stone projectile point fragments, three stone scrapers, one boat stone, three manos, three mano fragments, five

hematite stones, one limonite stone, three sandstone fragments, two unmodified rocks, two ceramic sherds, five seed pods, 309 shell beads, 356 shells and shell fragments, one pearl, and 18 charcoal samples.

Diagnostic artifacts and radiocarbon dates demonstrate at least two distinct occupations at 34Lt11, one during the Late Archaic (1500–300 B.C.), and the other during the Woodland Period (300 B.C.–A.D. 1000). Most, if not all, of the human remains were probably buried during the Woodland Period occupation.

In 1947, human remains representing, at minimum, 3 individuals were removed from the Allcorn site (34Ml1), located on a bluff overlooking the Canadian River in McClain County, OK. The site was excavated by the University of Oklahoma, and the associated materials were transferred to the Museum in 1981. The human remains include a complete skeleton of a middle-aged adult, 35–50 years old, probably a male; a mandible of an adult, probably a male; and bone fragments of an adult, probably a male. No known individuals were identified. The nine associated funerary objects are two bone awls and seven faunal bone fragments.

Diagnostic artifacts from 34Ml1 indicate that the human remains were probably buried during the Village Farming Period (A.D. 1000–1500) and possibly the succeeding early contact era. Although located in central Oklahoma, analyses of the cultural materials from the site suggest the site was occupied by Arkansas River Basin Caddoan people.

In 1974–1978, human remains representing, at minimum, one individual were removed from the Gann site (34Ms22) in Muskogee County, OK. This site was first recorded by the University of Oklahoma in 1963. The individual was found during a follow up survey conducted by the Oklahoma Archaeological Survey, and the associated materials were turned over to the Museum in 1978. The human remains include bone fragments of an adolescent of indeterminate sex, 16–22 years old. No known individual was identified. No associated funerary objects are present. The Gann site dates to the Mississippian Period (A.D. 1000–1500), and the human remains were probably interred at that time.

In 1969, human remains representing, at minimum, one individual were removed from the Wybark site (34Ms76) in Muskogee County, OK. The site was discovered during road construction, and was excavated by the Oklahoma Archeological Survey. The human remains and associated funerary objects

were turned over to the Museum in 1969. The human remains include a partial skeleton of a middle-aged adult male, 35–50 years old. No known individuals were identified. The 781 associated funerary objects are three bison scapula hoes, 32 bison scapula hoe fragments, 445 faunal bone fragments, 38 pottery sherds, 86 stone flakes, one burned corn kernel, one mussel shell, three snail shells, two ground stone fragments, 31 daub fragments, one charcoal sample, 137 sandstone fragments, and one bag of burial matrix. A review of diagnostic artifacts from 34Ms76 indicate that the human remains and associated funerary objects were buried during the Fort Coffee phase of the Mississippian Period (A.D. 1450–1600).

In 1956–1957, human remains representing, at minimum, 20 individuals were removed from the Nagle site (34Ok4), located along the North Canadian River in Oklahoma County, OK. The Ashland Oil Corporation discovered the human remains and associated funerary objects while working on a gas line. The University of Oklahoma conducted salvage excavations and the materials were transferred to the Museum in 1957. The human remains include complete skeletons of one older adult male, greater than 50 years old; one young adult male, 20–25 years old; and one young adult male, 25–30 years old; one partial skeleton of a child, 6–8 years old; and fragmentary skeletons of one young adult male, 25–35 years old; one adolescent female, 17–20 years old; and five infants all less than three years of age. The human remains also include bone fragments of one infant, 1–2 years old; one fetus or newborn; and one adult female; as well as commingled remains of two adults; 1 child, 1–3 years old; two children, 7–10 years old; and one infant less than six months old. No known individuals were identified. The 53 associated funerary objects are three stone flakes, four stone projectile points, one stone scraper, two stone ear spoons, one stone abrader, one red paint stone, one unmodified rock, one ceramic jar, one ceramic bowl, 27 shell beads, seven mussel shell fragments, and four faunal bone fragments.

Diagnostic artifacts and radiocarbon dates from site 34Ok4 indicate that the human remains were probably buried circa A.D. 1200. Although located in central Oklahoma, analyses of the cultural material from the site suggest it was occupied by Arkansas River Basin Caddoan people.

In 1934, human remains representing, at minimum, five individuals were excavated by an amateur archaeologist

at the Pickett Switch site (34Pn1) in Pontotoc County, OK. The human remains were subsequently transferred to the Museum at an unknown date. The human remains include one fragmentary skeleton of one infant, six months to one year old; and commingled remains of four adults, greater than 20 years old. One of these adults is male, another is probably male, and two are of indeterminate sex. No known individuals were identified. The 262 associated funerary objects are 56 faunal bones fragments, one projectile point, 54 chipped stones, two ground stone celt fragments, 14 daub fragments, 120 pottery sherds, one corn seed fragment, and 14 basketry textile fragments. Diagnostic artifacts and radiocarbon dates suggest that the burials were probably interred around A.D. 1200 or slightly later.

In 1975, human remains representing, at minimum, one individual was removed from the Perkins Burial site (34Py4) in Payne County, OK. Human remains and associated funerary objects were recovered from an eroding stream bank, and were donated to Oklahoma State University. They were later transferred to the Museum in 1977. The human remains include a partial skeleton of one young adult female, 20–35 years old. No known individuals were identified. The five associated funerary objects are two stone flakes, one grinding stone, one pottery sherd, and one shell fragment. Diagnostic artifacts from 34Py4 indicate that the human remains were buried during the Woodland Period (300 B.C.–A.D. 1000) or Plains Village Period (A.D. 900–1500).

All of the human remains detailed in this notice were determined to be Native American based on their archeological context and collection history. Furthermore, all of the human remains and associated funerary offerings were most likely buried during the Woodland Period (300 B.C.–A.D. 1000) or Mississippian Period (A.D. 1000–1500). No lineal descendants associated with the burials have been identified. Diagnostic artifacts (*e.g.*, ceramics, chipped stone, ground stone, bone tools, and ornaments) from these sites are consistent with cultural patterns in the Arkansas River Valley. The archeological data, together with ethnohistoric data, ethnographic data, and tribal oral histories, support the finding that the human remains and associated funerary objects listed herein can be culturally affiliated with both the Caddo Nation of Oklahoma and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma.

Determinations Made by the Sam Noble Oklahoma Museum of Natural History

Officials of the Sam Noble Oklahoma Museum of Natural History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 131 individuals of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(3)(A), the 13,962 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Caddo Nation of Oklahoma and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. Marc Levine, Assistant Curator of Archaeology, Sam Noble Oklahoma Museum of Natural History, University of Oklahoma, 2401 Chautauqua Avenue, Norman, OK 73072-7029, telephone (405) 325-1994, email mlevine@ou.edu, by May 1, 2019. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Caddo Nation of Oklahoma and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma may proceed.

The Sam Noble Oklahoma Museum of Natural History is responsible for notifying the Caddo Nation of Oklahoma and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma, that this notice has been published.

Dated: February 25, 2019.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2019-06268 Filed 3-29-19; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NRNL-DTS#-27506; PPWOCRADIO, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before March 16, 2019, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by April 16, 2019.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before March 16, 2019. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State Historic Preservation Officers:

WEST VIRGINIA

Barbour County

Golden Rule, The 122 Crim Avenue, Belington, SG100003667

Ohio County

South Wheeling Historic District, Roughly bounded by WV 2, 31st, 41st & Chapline Sts., Wheeling, SG100003668

Roane County

McWhorter, Honorable Joseph Marcellus, House 412 Church St., Spencer, SG100003669

A request for removal has been made for the following resources:

GEORGIA

Baldwin County

Old State Prison Building, 3 mi. (4.8 km) W of Milledgeville on GA 22, Milledgeville vicinity, OT79000694

Fulton County

Western and Atlantic Railroad Zero Milepost, Central Ave. between Wall St. and Railroad Ave., Atlanta, OT77000435

Gwinnett County

Hudson—Nash House and Cemetery, 3490 Five Forks Trickum Rd., Lilburn, OT89002264

Additional documentation has been received for the following resources:

VIRGINIA

Bath County

Warm Springs Bathhouses, NE of Warm Springs off Rt. 220, Warm Springs vicinity, AD69000222

Hanover County

Ashland Historic District Center, Racecourse, James, Howard, Clay Sts., Hanover and Railroad Aves., Ashland, AD83003284

Norfolk Independent City

Christ and St. Luke's Church, 560 W Olney Rd., Norfolk, AD79003286

St. Mary's Church, 232 Chapel St., Norfolk, AD79003287

Prince William County

Buckland Historic District, 7980—8205 Buckland Mill Rd. and 16206, 16208, 16210, and 16211 Lee Hwy., Buckland, AD88000681

Authority: Section 60.13 of 36 CFR part 60.

Dated: March 19, 2019.

Kathryn G. Smith,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2019-06208 Filed 3-29-19; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Control Number 1010-0006; Docket ID: BOEM-2019-0016]

Agency Information Collection Activities; 30 CFR Parts 550, 556, 560, Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Ocean Energy Management (BOEM) is proposing to renew an information collection request.

DATES: Interested persons are invited to submit comments on or before May 31, 2019.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to the BOEM Information Collection Clearance Officer, Anna Atkinson, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166; or by email to anna.atkinson@boem.gov. Please reference OMB Control Number 1010-0006 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Anna Atkinson by email, or by telephone at 703-787-1025.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of BOEM; (2) Will this information be processed and used in a timely manner; (3) Is the estimate of burden accurate; (4) How might BOEM enhance the quality, utility, and clarity of the information to be collected; and (5) How might BOEM minimize the burden of this collection on the respondents, including minimizing the burden through the use of information technology?

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB for approval of this ICR. Before including your address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. In order for BOEM to withhold from disclosure your personally identifiable information, you must identify any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe

any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Abstract: The information collection request concerns the paperwork requirements in the regulations under 30 CFR part 550, part 556, and part 560, Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf.

The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.*, and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs; balance orderly energy resource development with protection of human, marine, and coastal environments; ensure the public a fair and equitable return on the resources of the OCS; and preserve and maintain free enterprise competition. Also, the Energy Policy and Conservation Act of 1975 (EPCA) prohibits certain lease bidding arrangements (42 U.S.C. 6213(c)).

The Independent Offices Appropriations Act (31 U.S.C. 9701), the Omnibus Appropriations Act (Pub. L. 104-133, 110 Stat. 1321, April 26, 1996), and Office of Management and Budget (OMB) Circular A-25, authorize Federal agencies to recover the full cost of services that provide special benefits. Under the Department of the Interior's (DOI) implementing policy, BOEM is required to charge the full cost for services that provide special benefits or privileges to an identifiable non-Federal recipient above and beyond those that accrue to the public at large. Approval of transfer of a lease or interest are subject to cost recovery, and BOEM regulations specify the filing fee for these transfer applications.

This notice concerns the reporting and recordkeeping requirements of BOEM regulations at 30 CFR part 550, subpart J, Pipelines and Pipeline Rights-of-Way; 30 CFR part 556, Leasing of Sulphur or Oil and Gas in the OCS; 30 CFR part 560, OCS Oil and Gas Leasing; as well as the related Notices to Lessees and Operators (NLTs) that clarify and provide additional guidance on some aspects of these regulations. This ICR also concerns the use of forms to

process bonds, transfer interest in leases, and file relinquishments.

BOEM protects proprietary information in accordance with the Freedom of Information Act (5 U.S.C. 552) and the Department of the Interior's implementing regulations (43 CFR part 2), and under regulations at 30 CFR 580.70 and applicable sections of 30 CFR parts 550 and 552 promulgated pursuant to Outer Continental Shelf Lands Act (OCSLA) at 43 U.S.C. 1352(c).
Title of Collection: Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf (30 CFR part 550, part 556, and part 560).

OMB Control Number: 1010-0006.

Form Number:

- BOEM-0150, Assignment of Record Title Interest in Federal OCS Oil and Gas Lease,
- BOEM-0151, Assignment of Operating Rights Interest in Federal OCS Oil and Gas Lease,
- BOEM-0152, Relinquishment of Federal OCS Oil and Gas Lease,
- BOEM-2028, Outer Continental Shelf (OCS) Mineral Lessee's or Operator's Bond,
- BOEM-2028A, Outer Continental Shelf (OCS) Mineral Lessee's or Operator's Supplemental Bond, and
- BOEM-2030, Outer Continental Shelf (OCS) Pipeline Right-of-Way Grant Bond.

Type of Review: Renewal of a currently approved collection.

Respondents/Affected Public: Federal oil, gas, or sulphur lessees and/or operators.

Total Estimated Number of Annual Responses: 10,307 responses.

Total Estimated Number of Annual Burden Hours: 19,054 hours.

Respondent's Obligation: Mandatory or Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion or annual.

Total Estimated Annual Non-hour Burden Cost: \$766,053.

Estimated Reporting and Recordkeeping Hour Burden: We expect the burden estimate for the renewal will be 19,054 hours, which reflects a decrease of 400 hour burdens. A reduction of 80 hours is related to respondents' submission of designation of operator form (Form BOEM-1123); this burden is now captured in OMB control number 1010-0114. And the remaining reduction of 320 hours is for activities within 30 CFR part 556, subpart B that are not considered information collection activities under 5 CFR 1320.3(h)(4), but were previously counted as information collection activities.

The following table details the individual components and respective hour burden estimates of this ICR.

BURDEN TABLE

30 CFR Part 550 Subpart J	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours
		Non-Hour Cost Burdens		
550.1011(a)	Provide surety bond (Form BOEM-2030) and required information.	GOM 0.25	52	13
	.....	Pacific 3.5	3	11
30 CFR 550, Subpart J, Total			55	24
30 CFR Part 556 and NTLs	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours
		Non-hour cost burdens		
Subpart A				
104(b)	Submit confidentiality agreement	0.25	500	125
106	Cost recovery/service fees; confirmation receipt	Cost recovery/service fees and associated documentation are covered under individual reqts. throughout part.		0
107	Submit required documentation electronically through BOEM-approved system; comply with filing specifications, as directed by notice in the FEDERAL REGISTER in accordance with 560.500.	Burden covered in 560.500.		0
107	File seals, documents, statements, signatures, etc., to establish legal status of all future submissions (paper and/or electronic).	10 min	400	67
Subtotal			900	192
Subpart B				
201-204	Submit nominations, suggestions, comments, and information in response to Request for Information/Comments, draft and/or proposed 5-year leasing program, etc., including information from States/local governments, Federal agencies, industry, and others.	Not considered IC as defined in 5 CFR 1320.3(h)(4).		0
202-204	Submit nominations & specific information requested in draft proposed 5-year leasing program, from States/local governments.	4	69	276
Subtotal			69	276
Subpart C				
301; 302	Submit response & specific information requested in Requests for Industry Interest and Calls for Information and Nominations, etc., on areas proposed for leasing; including information from States/local governments.	Not considered IC as defined in 5 CFR 1320.3(h)(4).		0
302(d)	Request summary of interest (nonproprietary information) for Calls for Information/Requests for Interest, etc..	1	5	5
305; 306	States or local governments submit comments, recommendations, other responses on size, timing, or location of proposed lease sale. Request extension; enter agreement.	4	25	100

30 CFR Part 556 and NTLs	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours
		Non-hour cost burdens		
Subtotal			30	105
Subpart D				
400–402; 405	Establish file for qualification; submit evidence/certification for lessee/bidder qualifications. Provide updates; obtain BOEM approval & qualification number.	2	107	214
403(c)	Request hearing on disqualification	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
403; 404	Notify BOEM if you or your principals are excluded, disqualified, or convicted of a crime—Federal non-procurement debarment and suspension requirements; request exception; enter transaction.	1.5	50	75
405	Notify BOEM of all mergers, name changes, or change of business.	Requirement not considered IC under 5 CFR 1320.3(h)(1).		0
Subtotal			157	289
Subpart E				
500; 501	Submit bids, deposits, and required information, including GDIS & maps; in manner specified. Make data available to BOEM.	5	2,000	10,000
500(e); 517	Request reconsideration of bid decision	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
501(e)	Apply for reimbursement	Burden covered in 1010–0048, 30 CFR 551.		0
511(b); 517	Submit appeal of listing on restricted joint bidders list; appeal bid decision.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
513; 514	File statement and detailed report of production. Make documents available to BOEM.	2	100	200
515	Request exemption from bidding restrictions; submit appropriate information.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
516	File agreement on determination of lessee following BOEM's notice of tie bid.	3.5	2	7
520; 521; 600(c)	Execute lease (includes submission of evidence of authorized agent/completion and request effective date of lease); submit required data and rental.	1	852	852
520(b)	Provide acceptable bond for payment of a deferred bonus.	0.25	1	1
Subtotal			2,955	11,060
Subparts F, G, H				
Subpart F, G, H	References to requests of approval for various operations or submit plans or applications. Burden included with other approved collections for BOEM 30 CFR 550 (Subpart A 1010–0114; Subpart B 1010–0151) and for BSEE 30 CFR 250 (Subpart A 1014–0022; Subpart D 1014–0018)			0
701(c); 716(b); 801(b); 810(b).	Submit new designation of operator (Form BOEM–1123)	Burden covered in 1010–0114.		0
700–716	File application and required information for assignment/transfer of record title/lease interest (Form BOEM–0150) (includes sale, sublease, segregation exchange, transfer); request effective date/confidentiality; provide notifications.	1	1,414	1,414

30 CFR Part 556 and NTLs	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours
		Non-hour cost burdens		
		\$198 fee x 1,414 forms = \$279,972.		
715(a); 808(a)	File required instruments creating or transferring working interests, etc., for record purposes.	1	2,369	2,369
		\$29 fee x 2,369 filings = \$68,701.		
715(b); 808(b)	Submit "non-required" documents, for record purposes that respondents want BOEM to file with the lease document. (Accepted on behalf of lessees as a service; BOEM does not require nor need them.)	\$29 fee x 11,518 filings = \$334,022.		
800-810	File application and required information for assignment/transfer of operating interest (Form BOEM-0151) (includes sale, sublease, segregation exchange, severance, transfer); request effective date; provide notifications.	1	421	421
		\$198 fee x 421 forms = \$83,358.		
Subtotal		4,204		4,204
		\$766,053		
Subpart I				
900(a)-(e); 901; 902; 903(a)	Submit OCS Mineral Lessee's and Operator's Bond (Form BOEM-2028); execute bond.	0.33	135	45
900(c), (d), (f), (g); 901(c), (d), (f); 902(e).	Demonstrate financial worth/ability to carry out present and future financial obligations, request approval of another form of security, or request reduction in amount of supplemental bond required on BOEM-approved forms. Monitor and submit required information.	3.5	166	581
900(e); 901; 902; 903(a)	Submit OCS Mineral Lessee's and Operator's Supplemental Plugging & Abandonment Bond (Form BOEM-2028A); execute bond.	0.25	141	35
900(f), (g)	Submit authority for Regional Director to sell Treasury or alternate type of securities.	2	12	24
901	Submit EP, DPP, DOCs	IC burden covered in 1010-0151, 30 CFR 550, Subpart B.		0
901(f)	Submit oral/written comment on adjusted bond amount and information.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
903(b)	Notify BOEM of any lapse in bond coverage/action filed alleging lessee, surety, or guarantor is insolvent or bankrupt.	1	4	4
904	Provide plan/instructions to fund lease-specific abandonment account and related information; request approval to withdraw funds.	12	2	24
905	Provide third-party guarantee, indemnity agreement, financial and required information, related notices, reports, and annual update; notify BOEM if guarantor becomes unqualified.	19	46	874
905(d)(3); 906	Provide notice of and request approval to terminate period of liability, cancel bond, or other security; provide required information.	0.5	378	189
907(c)(2)	Provide information to demonstrate lease will be brought into compliance.	16	5	80
Subtotal		889		1,856

30 CFR Part 556 and NTLs	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours
Non-hour cost burdens				
Subpart K				
1101	Request relinquishment (Form BOEM–0152) of lease; submit required information.	1	247	247
1102	Request additional time to bring lease into compliance ...	1	1	1
1102(c)	Comment on cancellation	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
Subtotal			248	248
30 CFR 556 Total			9,452	18,230
			\$766,053 Non-Hour Cost Burdens	
30 CFR 560	Reporting requirement *	Hour burden	Average number of annual responses	Annual burden hours
560.224(a)	Request BOEM to reconsider field assignment of a lease	Requirement not considered IC under under 5 CFR 1320.3(h)(9).		
560.500	Submit required documentation electronically through BOEM-approved system; comply with filing specifications, as directed by notice in the <i>Federal Register</i> (e.g., bonding info.).	1	800	800
30 CFR 560 Total			800	800
Total Reporting for Collection			10,307	19,054
			\$766,053 non-hour cost burdens.	

* In the future, BOEM may require electronic filing of certain submissions.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Deanna Meyer-Pietruszka,
Chief, Office of Policy, Regulation, and Analysis.

[FR Doc. 2019–06219 Filed 3–29–19; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1206 (Review)]

Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan; 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 diffusion-annealed, nickel-plated flat-rolled steel products from Japan 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 April 1, 2019. To be assured of consideration, the deadline for responses is May 1, 2019. Comments on the adequacy of responses may be filed with the Commission by June 13, 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 May 29, 2014, the Department of Commerce (“Commerce”) issued an antidumping duty order on imports of diffusion-annealed, nickel-plated flat-rolled steel products from Japan (79 FR 30816). The Commission is conducting a 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 Japan.

(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, the Commission defined a single *Domestic Like Product* consisting of diffusion-annealed, nickel-plated flat-rolled steel products, as 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 determination, the Commission defined the *Domestic Industry* as the domestic producer of diffusion-annealed, nickel-plated flat-rolled steel products.

(5) The *Order Date* is the date that the antidumping duty order under review became effective. In this review, the *Order Date* is May 29, 2014.

(6) 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 May 1, 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 June 13, 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. 19–5–428, 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 since the *Order Date*.

(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 short tons 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 short tons 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 short tons 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* since the *Order*

Date, 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: March 26, 2019.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2019-06195 Filed 3-29-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-455 and 731-TA-1149 (Second Review)]

Circular Welded Carbon Quality Steel Line Pipe 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 circular welded carbon quality steel line pipe 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 April 1, 2019. To be assured of consideration, the deadline for responses is May 1, 2019. Comments on the adequacy of responses may be filed with the Commission by June 13, 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 January 23, 2009, the Department of Commerce issued a countervailing duty order on imports of circular welded carbon quality steel line pipe from China (74 FR 4136). On May 13, 2009, the Department of Commerce issued an antidumping duty order on imports of circular welded carbon quality steel line pipe from China (74 FR 22515). Following the first five-year reviews by Commerce and the Commission, effective May 20, 2014, Commerce issued a continuation of the antidumping and countervailing duty orders on imports of circular welded carbon quality steel line pipe from China (79 FR 28894). 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 circular welded carbon quality steel line pipe, 16 inches or less in outside diameter, corresponding to 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 and its expedited first five-year review determinations, the Commission defined a single *Domestic Industry* consisting of all domestic producers of line pipe.

(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 May 1, 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 June 13, 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. 19–5–426, 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 2013.

(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 short tons 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 short tons 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 short tons 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 2013, 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: March 26, 2019.

Katherine M. Hiner,

Acting Secretary to the Commission.

[FR Doc. 2019-06189 Filed 3-29-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332-503]

Earned Import Allowance Program: Evaluation of the Effectiveness of the Program for Certain Apparel From the Dominican Republic, Tenth Annual Review

AGENCY: United States International Trade Commission.

ACTION: Notice of opportunity to provide written comments in connection with the Commission's tenth and final annual review.

SUMMARY: The U.S. International Trade Commission (Commission) has announced its schedule, including deadlines for filing written submissions, in connection with preparing a report on its tenth and final annual review in investigation No. 332-503, *Earned Import Allowance Program: Evaluation of the Effectiveness of the Program for Certain Apparel from the Dominican Republic, Tenth Annual Review*.

DATES:

June 7, 2019: Deadline for filing written submissions.

September 20, 2019: Transmittal of tenth report to House Committee on Ways and Means and Senate Committee on Finance.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions, including statements, and briefs, should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW, Washington, DC 20436. The public file for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Project leader Laura V. Rodriguez (202-205-3499 or laura.rodriguez@usitc.gov) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202-205-3091 or william.gearhart@usitc.gov). The media should contact Margaret O'Laughlin, Office of External Relations (202-205-1819 or margaret.olaughlin@usitc.gov). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its website (<https://www.usitc.gov>). 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.

Background: Section 404(b) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (CAFTA-DR Act) (19 U.S.C. 4112(b)) required the Secretary of Commerce to establish an Earned Import Allowance Program (EIAP) and directed the Commission to conduct annual reviews of the program to evaluate its effectiveness and make recommendations for improvements. Section 404(c) of the CAFTA-DR Act authorized certain apparel articles wholly assembled in an eligible country to enter the United States free of duty if accompanied by a certificate that shows evidence of the purchase of certain U.S. fabric. The term "eligible country" was defined to mean the Dominican Republic. More specifically, the program allowed producers (in the Dominican Republic) that purchased a certain quantity of qualifying U.S. fabric to produce certain cotton bottoms in the

Dominican Republic to receive a credit that can be used to ship a certain quantity of eligible apparel using third-country fabrics from the Dominican Republic to the United States free of duty.

Section 404(d)(1) of the CAFTA-DR Act directs the Commission to conduct an annual review of the program to evaluate the effectiveness of the program and make recommendations for improvements. Section 404(d)(2) of the CAFTA-DR Act requires the Commission to submit annually its reports containing the results of its reviews to the House Committee on Ways and Means and the Senate Committee on Finance. Section 404(e) of the CAFTA-DR Act states that the program is to be in effect for the 10-year period beginning on the date on which the President certifies to the appropriate congressional committees that sections A, B, C, and D of the Annex to Presidential Proclamation 8213 (December 20, 2007) have taken effect. In Presidential Proclamation 8323 (November 25, 2008), the President certified that the provisions of Proclamation 8213 referenced in section 404(e)(1) of the CAFTA-DR Act, as amended, have taken effect. Commerce has announced that the program expired on December 1, 2018 with no more entries allowed after November 30, 2018. The Commission expects to submit its report on its tenth annual review by September 20, 2019.

Copies of the Commission's prior reports are available on the Commission's website at www.usitc.gov, including the ninth annual report, which was published on August 3, 2018 (ITC Publication 4809). The Commission instituted this investigation pursuant to section 332(g) of the Tariff Act of 1930 to facilitate docketing of submissions and to facilitate public access to Commission records through the Commission's EDIS electronic records system. The Commission published notice of institution of this investigation in the **Federal Register** on April 29, 2009 (47 FR 19592), and published notice of the Commission's invitation to submit information in connection with the ninth annual report in the **Federal Register** on March 2, 2018 (83 FR 9028).

Written Submissions: Interested parties are invited to file written submissions concerning this tenth and final annual review. All written submissions should be addressed to the Secretary, and all such submissions should be received no later than 5:15 p.m., June 7, 2019. All written submissions must conform to the provisions of section 201.8 of the

Commission's Rules of Practice and Procedure (19 CFR 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures require that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 noon eastern time on the next business day. If confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraphs for further information regarding confidential business information). Persons with questions regarding electronic filing should contact the Office of the Secretary, Docket Services Division (202-205-1802).

Confidential Business Information. Any submissions that contain confidential business information must also conform to the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information is clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

The Commission will not include any confidential business information in the report that it sends to the Committees or makes available to the public. However, all information, including confidential business information, submitted in this investigation may be disclosed to and used: (i) By the Commission, its employees and offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel for cybersecurity purposes. The Commission will not otherwise disclose any confidential business information in a manner that would reveal the operations of the firm supplying the information.

Summary of Written Submissions: The Commission intends to publish a summary of the written submissions of interested persons in an appendix to its report. Persons wishing to have a summary of their position included in

the appendix should include a summary with their written submission and should include a statement that the summary is included for this purpose. The summary may not exceed 500 words, should be in MSWord format or a format that can be easily converted to MSWord, and should not include any confidential business information. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. In the appendix the Commission will identify the name of the organization furnishing the summary, and will include a link to the Commission's Electronic Document Information System (EDIS) where the full written submission can be found.

By order of the Commission.

Issued: March 26, 2019.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2019-06191 Filed 3-29-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1057; (Enforcement Proceeding)]

Certain Robotic Vacuum Cleaning Devices and Components Thereof Such as Spare Parts; Notice of Institution of Formal Enforcement Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has instituted a formal enforcement proceeding related to cease and desist orders issued in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://>

edis.usitc.gov. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted an investigation on May 23, 2017, based on a complaint filed by iRobot Corporation of Bedford, Massachusetts ("iRobot"). 82 FR 23593-94. The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain robotic vacuum cleaning devices and components thereof such as spare parts that infringe certain claims of, *inter alia*, U.S. Patent No. 9,038,233 ("the '233 patent"). *Id.* The Commission's notice of investigation named as a respondent, *inter alia*, Shenzhen Silver Star Intelligent Technology Co., Ltd., of Shenzhen, China ("Silver Star") and bObsweep USA of Henderson, Nevada and bObsweep, Inc. of Toronto, Canada (together, "bObsweep"). *Id.* at 23593. The Office of Unfair Import Investigations did not participate in the investigation. *Id.*

On November 30, 2018, the Commission found, *inter alia*, that Silver Star and bObsweep violated section 337 with respect to the '233 patent, and issued a limited exclusion order ("LEO") against, *inter alia*, Silver Star with respect to claims 1, 10, 11, and 14-16 of the '233 patent. 83 FR 63186-87. The Commission also issued cease and desist orders ("CDOs") against Silver Star's customer bObsweep regarding those same claims. *Id.*

On January 30, 2019, Silver Star filed a request for an advisory opinion that eight of its products do not violate the LEO and CDOs. On February 11, 2019, iRobot opposed the advisory opinion request on numerous grounds. On March 15, 2019, the Commission determined to institute an advisory opinion proceeding and delegated the proceeding to an administrative law judge.

On February 21, 2019, iRobot filed a complaint requesting that the Commission institute a formal enforcement proceeding under Commission Rule 210.75(b) to investigate alleged violations of the CDOs by bObsweep. On March 5, 2019, bObsweep filed a letter opposing the institution of a formal enforcement proceeding.

Having examined the enforcement complaint and the supporting documents, as well as the letter, the

Commission has determined to institute a formal enforcement proceeding to determine whether bObsweep is in violation of the CDOs issued in the original investigation and what, if any, enforcement measures are appropriate. The following entities are named as parties to the formal enforcement proceeding: (1) Complainant iRobot; (2) respondents bObsweep USA and bObsweep, Inc.; and (3) the Office of Unfair Import Investigations. The Commission has further determined to consolidate the enforcement proceeding with the advisory opinion proceeding.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: March 26, 2019.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2019-06194 Filed 3-29-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-752 (Fourth Review)]

Crawfish Tail Meat 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 crawfish tail meat 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 April 1, 2019. To be assured of consideration, the deadline for responses is May 1, 2019. Comments on the adequacy of responses may be filed with the Commission by June 13, 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 September 15, 1997, the Department of Commerce (“Commerce”) issued an antidumping duty order on imports of crawfish tail meat from China (62 FR 48218). Following the first five-year reviews by Commerce and the Commission, effective August 13, 2003, Commerce issued a continuation of the antidumping duty order on imports of crawfish tail meat from China (68 FR 48340). Following the second five-year reviews by Commerce and the Commission, effective December 11, 2008, Commerce issued a continuation of the antidumping duty order on imports of crawfish tail meat from China (73 FR 75392). Following the third five-year reviews by Commerce and the Commission, effective May 16, 2014, Commerce issued a continuation of the antidumping duty order on imports of crawfish tail meat from China (79 FR 28483). 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, full first five-year review determination, and expedited second and third five-year review determinations, the Commission defined the *Domestic Like Product* as crawfish tail meat, 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 determination, full first five-year review determination, and expedited second and third five-year review determinations, the Commission defined the *Domestic Industry* to encompass all domestic producers of crawfish tail meat, including processors but not the farmers and fishermen who harvest live crawfish.

(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 May 1, 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 June 13, 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. 19-5-427, 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 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: March 26, 2019.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2019-06190 Filed 3-29-19; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1065]

Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof; Notice of the Commission's Final Determination Finding No Violation of Section 337; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (the "Commission") has determined that no violation of Section 337 of the Tariff Act of 1930 ("Section 337"), has been proven in the above-captioned investigation and accordingly no remedial orders shall be issued, which renders moot any issues of remedy, the public interest, or bonding. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Carl P. Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2382. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436,

telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's Electronic Docket Information System ("EDIS") (<https://edis.usitc.gov>). Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: On August 14, 2017, the Commission instituted this investigation based on a Complaint and amendment thereto filed by Qualcomm Incorporated of San Diego, California ("Qualcomm"). 82 FR 37899 (Aug. 14, 2017). The Complaint alleged that 19 U.S.C. 1337, as amended ("Section 337"), has been violated by way of importation into the United States, sale for importation, or sale within the United States after importation of certain mobile electronic devices and radio frequency and processing components thereof that infringe one or more claims of U.S. Patent No. 9,535,490 ("the '490 patent"), U.S. Patent No. 8,698,558 ("the '558 patent"), U.S. Patent No. 8,633,936 ("the '936 patent"), U.S. Patent No. 8,838,949 ("the '949 patent"), U.S. Patent No. 9,608,675 ("the '675 patent"), and U.S. Patent No. 8,487,658 ("the '658 patent"). The notice of investigation named Apple Inc. of Cupertino, California ("Apple") as Respondent. The Commission also named the Office of Unfair Import Investigations ("OUII") as a party.

The Commission, following Qualcomm's motions, partially terminated the investigation with respect to the following claims and patents: All asserted claims of the '658, '949, and '675 patents; claims 1, 20-24, 26, 38, 67, and 68 of the '936 patent; claims 1, 6, and 8-20 of the '558 patent; and claims 1-6, 8, 10, and 16-17 of the '490 patent. Comm'n Notice (July 17, 2018) (*aff'g* Order No. 43); Comm'n Notice (May 23, 2018) (*aff'g* Order No. 37); Comm'n Notice (May 9, 2018) (amending notice of investigation); Comm'n Notice (Apr. 6, 2018) (*aff'g* Order No. 34); Comm'n Notice (Mar. 22, 2018) (*aff'g* Order No. 24); Comm'n Notice (Sept. 20, 2017) (*aff'g* Order No. 6). The only claims that remain at issue in this investigation are claim 31 of the '490 patent, claim 7 of the '558 patent, and claims 19, 25, and 27 of the '936 patent.

The ALJ held an evidentiary hearing from June 19-27, 2018. On September 28, 2018, the ALJ issued a combined initial determination ("ID") on violation

issues and recommended determination (“RD”) on remedy, the public interest, and bonding in this investigation. The ID found a violation of Section 337 due to infringement of the ’490 patent. ID at 197. The ID found no infringement and hence no violation of Section 337 with respect to the ’558 patent or the ’936 patent. *Id.* The ID found that Qualcomm satisfied the technical and economic prongs of the domestic industry requirement with respect to the ’490 patent, but did not satisfy the technical prong with respect to the ’558 patent or the ’936 patent. *Id.* The ID also found that it was not shown by clear and convincing evidence that any asserted claim was invalid. *Id.* The ALJ further recommended that no limited exclusion order or cease-and-desist order be issued in this investigation due to their prospective effects on competitive conditions in the United States, national security, and other public interest concerns. RD at 199–200. The ALJ recommended that bond be set at zero-percent of entered value during the Presidential review period, if any. *Id.* at 201.

Apple and Qualcomm filed their respective petitions for review on October 15, 2018. The parties, including OUII, filed their respective responses to the petitions on October 23, 2018. The parties also filed their submissions on the public interest on October 31, 2018. Intel Corporation, an interested third party, submitted its comments on the public interest on November 8, 2018.

On December 18, 2018, the Commission determined to review the final ID in part with respect to certain findings regarding the ’490 patent. 83 FR 64875 (Dec. 18, 2018). The Commission determined to review the ID’s construction of the term “hold” and its findings on infringement and the technical prong of domestic industry to the extent they may be affected by that claim construction. *Id.* at 64876. The Commission further determined to review the ID’s findings as to whether claim 31 of the ’490 patent is invalid as obvious. *Id.* at 64876–77. The Commission determined not to review any of the ID’s findings with respect to the ’558 patent, the ’936 patent, or the economic prong of the domestic industry requirement. *Id.* at 64876.

In the same notice, the Commission asked the parties to brief issues of remedy, the public interest, and bonding. *Id.* at 64877. The Commission also invited members of the public and interested government agencies to comment on the RD’s findings on the public interest, remedy, and bonding. *Id.* The Commission received a number of public interest statements from third

parties, including but not limited to Intel Corporation; ACT/The App Association; the American Antitrust Institute; the American Conservative Union; Americans for Limited Government; the Club for Growth; the Computer and Communications Industry Association; Conservatives for Property Rights; Frances Brevets; Frontiers of Freedom; Innovation Alliance; Inventors Digest; IP Europe; Public Knowledge and Open Markets (a joint submission); R Street Institute, the Electronic Frontier Foundation, Engine Advocacy, and Lincoln Network (a joint submission), *et al.*; RED Technologies; TiVo; certain members of the U.S. Senate and the U.S. House of Representatives; Hon. Paul Michel, former Chief Judge, U.S. Court of Appeals for the Federal Circuit; and various professors of law or economics.

On March 19, 2019, while Commission review was ongoing, the parties informed the Commission of a jury verdict in a parallel lawsuit in the U.S. District Court for the Southern District of California, *Qualcomm Inc. v. Apple Inc.*, Case No. 3:17-cv-01375 (S.D. Cal.). *See* Letter of D. Okun to D. Johanson, Chairman, U.S. International Trade Commission of March 19, 2019 (“Qualcomm Letter”); Respondent Apple Inc.’s Request for Leave to Submit a Supplemental Response to Question D of the Commission’s Questions on the Public Interest (“Apple Request”). The jury found that the accused Apple iPhones infringe three Qualcomm patents. Qualcomm Letter at 1–2. Two of those three patents, the ’490 and ’936 patents, are also part of this investigation. *Id.* The jury was not asked to determine, nor did it determine, whether any claim of the ’490, ’936, or ’949 patents is invalid as obvious. *Id.*

In view of the jury’s verdict and damages award, Apple requested leave to supplement its response to the Commission’s Question D on public interest, as set forth in the Commission’s notice of partial review. *See* 83 FR at 64877. Qualcomm filed an opposition to Apple’s request. The Commission has determined to grant Apple’s request for the limited purpose of supplementing the record with respect to the jury’s verdict. Neither Apple’s nor Qualcomm’s submissions affect the outcome of this investigation or any issue decided by the Commission.

On review of the submissions from the parties and the public, the prior art, the ID, and the evidence of record, the Commission has determined: (1) The term “hold” in claim 31 of the ’490 patent means “to prevent data from traveling across the bus, or to store,

buffer, or accumulate data”; and (2) Apple has shown by clear and convincing evidence that claim 31 of the ’490 patent is invalid as obvious over U.S. Patent No. 9,329,671 (Heinrich) in combination with U.S. Patent No. 8,160,000 (Balasubramanian), which reflects knowledge in the art.

The Commission previously declined to review, and therefore adopted, the ID’s finding that there is no infringement of either of the other two patents asserted in this investigation, the ’558 patent or the ’936 patent. 83 FR at 64876. Accordingly, the Commission has concluded that Complainant has not shown a violation of Section 337 and no remedial orders shall be issued, which renders moot any issues of remedy, the public interest, or bonding.

The authority for the Commission’s determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: March 26, 2019.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2019-06209 Filed 3-29-19; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On March 25, 2019, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of Maine, in the lawsuit entitled *United States v. Global Partners, LP, Global Companies LLC, and Chelsea Sandwich LLP*, Civil Action No. 19-cv-00122.

The United States filed this lawsuit under Section 113(a)(1) of the Clean Air Act, 42 U.S.C. 7413(a)(1), and the Maine state implementation plan. The United States’ complaint seeks civil penalties and injunctive relief arising from alleged excess emissions of volatile organic compounds (VOC) at the defendants’ petroleum storage facility in South Portland, Maine.

The consent decree requires the defendants to pay a civil penalty of \$40,000, plus interest accruing from the date of lodging to the payment date; to perform a supplemental environmental project involving the replacement of old wood stoves with cleaner units, with a minimum expenditure of \$150,000; and to perform certain measures at the

facility to address past VOC emissions and to limit future VOC emissions.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Global Partners LP, et al.*, D.J. Ref. No. 90–5–2–1–11428. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
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 consent decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$6.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Maher,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–06257 Filed 3–29–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Assistant Secretary for Administration and Management; Agency Information Collection Activities; Extension Without Change; Comment Request; DOL Generic Solution for Solicitation for Funding Opportunity Announcement Responses

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL), as part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA), is

soliciting comments concerning a proposed extension of the authorization to conduct the DOL Generic Solution for Solicitation for Funding Opportunity Announcement Responses information collection.

DATES: Submit written comments on or before May 30, 2019.

ADDRESSES: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov to request additional information, including requesting a copy of this Information Collection Request (ICR).

Submit comments regarding this ICR, including suggestions for reducing the burden, by sending an email to DOL_PRA_PUBLIC@dol.gov. Comments may also be sent to Michel Smyth, Departmental Clearance Officer, U.S. Department of Labor, Office of the Chief Information Officer, 200 Constitution Avenue NW, Room N–1301, Washington, DC 20210.

SUPPLEMENTARY INFORMATION: The DOL, 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 an opportunity to comment on proposed, revised, and continuing information collections before submitting them to the OMB. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Periodically the DOL solicits grant applications by issuing a Funding Opportunity Announcement. To ensure grants are awarded to the applicant(s) best suited to perform the functions of the grant, applicants are generally required to submit a two-part application. The first part of DOL grant applications consists of submitting Standard Form 424, Application for Federal Assistance. The second part of a grant application usually requires a technical proposal demonstrating the applicant's capabilities in accordance with a statement of work and/or selection criteria. This information collection is subject to the PRA.

A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the Office of Management and Budget (OMB) under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person

shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1225–0086. The DOL intends to seek continued approval for this collection of information, without change, for an additional three years.

Interested parties are encouraged to provide comments to the individual listed in the **ADDRESSES** section above. Comments must be written to receive consideration, and they will be summarized and may be included in the request for OMB approval of the final ICR. The comments will also become a matter of public record. Comments responsive to this request will be made available on-line, without redaction, as part of the submission to OMB; therefore,

The DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL—Office of the Assistant Secretary for Administration and Management.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: DOL Generic Solution for Solicitation for Funding Opportunity Announcement Responses.

OMB Control Number: 1225–0086.

Affected Public: State, Local, and Tribal Governments; Private Sector—businesses or other for-profits and not for-profit institutions.

Estimated Number of Respondents: 5,500.

Frequency: On occasion.

Total Estimated Annual Responses: 6,000.

Estimated Average Time per Response: 25 hours.
Estimated Total Annual Burden Hours: 150,000 hours.
Total Estimated Annual Other Cost Burden: \$0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2019-06210 Filed 3-29-19; 8:45 am]

BILLING CODE 4510-04-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2018-0005]

Whistleblower Stakeholder Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of public meeting.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is announcing a public meeting to solicit comments and suggestions from stakeholders on issues facing the agency in the administration of the whistleblower protection provisions under Section 11(c) of the Occupational Safety and Health Act.

DATES: The public meeting will be held on May 14, 2019, from 1:00 p.m. to 4:00 p.m., ET. Persons interested in attending the meeting must register by April 30, 2019. In addition, comments relating to the "Scope of Meeting" section of this document must be submitted in written or electronic form by May 7, 2019.

ADDRESSES: The public meeting will be held in Room S-3215A-C, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

Written Comments: Submit written comments to the OSHA Docket Office, Docket No. OSHA-2018-0005, Room N-3653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone (202) 693-2350. You may submit materials, including attachments, electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the on-line instructions for submissions. All comments should be identified with Docket No. OSHA-2018-0005.

Registration To Attend and/or To Participate in the Meeting: If you wish to attend the public meeting, make an oral presentation at the meeting, or participate in the meeting via telephone, you must register using this link <https://www.eventbrite.com/e/occupational-safety-and-health-administration-11c-stakeholder-meeting-tickets->

58582935136 by close of business on April 30, 2019. Participants may speak and hand out written materials, but there will not be an opportunity to give an electronic presentation. Actual times provided for presentation will depend on the number of requests, but no more than 10 minutes per participant. There is no fee to register for the public meeting. Registration on the day of the public meeting will be permitted on a space-available basis beginning at 12:00 p.m., ET. After reviewing the requests to present, each participant will be contacted prior to the meeting with the approximate time that the participant's presentation is scheduled to begin.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone (202) 693-1999, email meilinger.francis2@dol.gov.

For general information: Mr. Anthony Rosa, Deputy Director, OSHA Directorate of Whistleblower Protection Programs, U.S. Department of Labor, telephone (202) 693-2199, email osha.dwpp@dol.gov.

SUPPLEMENTARY INFORMATION:

Scope of Meeting

OSHA is interested in obtaining information from the public on key issues facing the agency's whistleblower program. This meeting is the third in a series of meetings requesting public input on this program. For this meeting, OSHA is focusing on issues relating to whistleblower protection under Section 11(c) of the Occupational Safety and Health Act. In particular, the agency invites input on the following:

1. How can OSHA deliver better whistleblower customer service?
2. What kind of assistance can OSHA provide to help explain the whistleblower laws it enforces?

Request for Comments

Regardless of attendance at the public meeting, interested persons may submit written or electronic comments (see **ADDRESSES**). Submit a single copy of electronic comments or two paper copies of any mailed comments. To permit time for interested persons to submit data, information, or views on the issues in the "Scope of Meeting" section of this notice, submit comments by May 7, 2019, please include Docket No. OSHA-2018-0005. Comments received may be seen in the OSHA Docket Office, (see **ADDRESSES**), between 10:00 a.m. and 3:00 p.m., ET, Monday through Friday.

Access to the Public Record

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, also are available on the Directorate of Whistleblower Protection Programs' web page at: <http://www.whistleblowers.gov>.

Authority and Signature

Loren Sweatt, Acting Assistant Secretary for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by Secretary's Order 01-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); 29 U.S.C. 660(c); 49 U.S.C. 31105; 49 U.S.C. 20109, and 6 U.S.C. 1142.

Signed at Washington, DC, on March 21, 2019.

Loren Sweatt,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019-06267 Filed 3-29-19; 8:45 am]

BILLING CODE 4510-26-P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 2008-2 CRB CD 2000-2003 (Phase II) (Remand)]

Distribution of 2000-2003 Cable Royalty Funds

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice requesting comments.

SUMMARY: The Copyright Royalty Judges solicit comments on a motion of Independent Producers Group for partial distribution of 2000-2003 cable royalty funds.

DATES: Comments are due on or before May 1, 2019.

ADDRESSES: You may submit comments and proposals, identified by docket number 2008-2 CRB CD 2000-2003 (Phase II) (Remand), by any of the following methods:

CRB's electronic filing application: Submit comments online in eCRB at <https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-

6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

Instructions: Unless submitting online, commenters must submit an original, two paper copies, and an electronic version on a CD. All submissions must include a reference to the CRB and this docket number. All submissions will be posted without change to eCRB at <https://app.crb.gov/> including any personal information provided.

Docket: For access to the docket to read submitted documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 2008-2 CRB CD 2000-2003 (Phase II) (Remand).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, Program Specialist, by telephone at (202) 707-7658 or email at crb@loc.gov.

SUPPLEMENTARY INFORMATION: Each year cable systems must submit royalty payments to the Register of Copyrights as required by the statutory license set forth in sec. 111 of the Copyright Act for the retransmission to cable subscribers of over-the-air television and radio broadcast signals. See 17 U.S.C. 111(d). The Copyright Royalty Judges (Judges) oversee distribution of royalties to copyright owners whose works were included in a qualifying transmission and who timely filed a claim for royalties.

Allocation of the royalties collected occurs in one of two ways. In the first instance, the Judges may authorize distribution in accordance with a negotiated settlement among all claiming parties. 17 U.S.C. 111(d)(4)(A). If all claimants do not reach agreement with respect to the royalties, the Judges must conduct a proceeding to determine the distribution of any royalties that remain in controversy. 17 U.S.C. 111(d)(4)(B). Alternatively, the Judges may, on motion of claimants and on notice to all interested parties, authorize a partial distribution of royalties, reserving on deposit sufficient funds to resolve identified disputes. 17 U.S.C. 111(d)(4)(C), 801(b)(3)(C).

On April 21, 2017, Worldwide Subsidy Group LLC dba Independent Producers Group ("IPG") filed with the Judges a motion requesting a partial distribution amounting to 21.52% of the cable royalty funds for 2000-2003 in the Devotional Category pursuant to sec. 801(b)(3)(C) of the Copyright Act. 17

U.S.C. 801(b)(3)(C). Motion at 1, 5. IPG arrived at 21.52% by multiplying IPG's final distribution of 28.7% of funds in the Devotional Category for 1999 by 75%,

On April 26, 2017, the Settling Devotional Claimants ("SDC") filed an opposition to IPG's motion arguing, among other things, that IPG is not an established claimant (but rather is a "commercial entity representing claimants") and that "there are strong reasons to doubt that its single final distribution for 1999 will be predictive of results in later years." SDC Opposition at 1-2. The SDC also questioned whether IPG would be willing and able to disgorge funds if necessary. *Id.*

On May 2, 2017, IPG replied to the SDC's opposition, contending that IPG was already deemed an "established claimant" in the program suppliers' category with respect to 2004-2009 cable royalties and that IPG should not be precluded from receiving a partial distribution merely because it is a claimant representative as opposed to an actual claimant. IPG Reply at 2-3. IPG noted that "[t]he vast majority of entities receiving advances are 'agents' of claimants." *Id.* at 3. IPG argues that the SDC seeks to distinguish between IPG and other agents, such as the Motion Picture Association of America ("MPAA"), the National Association of Broadcasters ("NAB"), and PBS, which have received partial distributions in the past, on the ground that MPAA, NAB, and PBS are not commercially motivated, unlike IPG. IPG questioned the relevancy of the distinction between for-profit organizations and not for profit organizations, contending that "while many of the entities receiving advances are ostensibly non-commercial, they nonetheless represent (and have received partial distributions on behalf of) commercially motivated agents and commercially motivated claimants." *Id.* at 4. IPG argued that were there such a rule precluding for-profit entities from receiving partial distributions, IPG would not have been permitted to receive a partial distribution of royalties in the program suppliers' category. *Id.* at 4-5.¹ IPG dismissed the SDC's concerns regarding IPG's ability or willingness to disgorge funds if necessary as "unsubstantiated

¹ For its part, the SDC concedes that, based on IPG's final award for 2000-2003 in the program suppliers' category, MPAA conceded that IPG was entitled to a partial distribution in that category for 2004-2009 and that the Judges accepted MPAA's concession. Nevertheless, the SDC "did not and do not make such a concession in the Devotional category based on IPG's final award for a single year." SDC Opposition at n.2.

and non-sequitur 'suspicions' of IPG's alleged insolvency and alleged refusal to abide by its contractual relationships." *Id.* at 8.

Prior to ruling on a motion for partial distribution filed under § 801(b)(3)(C) of the Copyright Act, the Judges must publish a notice in the **Federal Register** to determine whether any interested claimant entitled to receive such royalty fees has a reasonable objection to the partial distribution. Accordingly, this Notice seeks comments from interested claimants on whether any reasonable objection exists that would preclude the distribution of 21.52% of the 2000-2003 cable royalty funds in the Devotional category to IPG. As the Judges have commenced a distribution proceeding concerning 2000-03 cable royalties, only claimants that have filed petitions to participate in the proceeding (or are included in a petition to participate filed on their behalf) are "interested claimants" for purposes of this Notice. Interested claimants objecting to the partial distribution must advise the Judges of the existence and extent of all objections by the end of the comment period. The Judges will not consider any objections with respect to the partial distribution motion that come to their attention after the close of the comment period.

Dated: March 27, 2019.

Jesse M. Feder,

Chief Copyright Royalty Judge.

[FR Doc. 2019-06222 Filed 3-29-19; 8:45 am]

BILLING CODE 1410-72-P

NUCLEAR REGULATORY COMMISSION

[NRC-2019-0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of April 1, 8, 15, 22, 29, May 6, 2019.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of April 1, 2019

Thursday, April 4, 2019

10:00 a.m. Meeting with the Advisory Committee on the Medical Uses of Isotopes (Public Meeting); (Contact: Kellee Jamerson: 301-415-7408).

This meeting will be webcast live at the Web address—<http://www.nrc.gov/>.

Week of April 8, 2019—Tentative

There are no meetings scheduled for the week of April 8, 2019.

Week of April 15, 2019—Tentative

There are no meetings scheduled for the week of April 15, 2019.

Week of April 22, 2019—Tentative

Tuesday, April 23, 2019

10:00 a.m. Strategic Programmatic Overview of the Fuel Facilities and the Nuclear Materials Users Business Lines (Public Meeting); (Contact: Paul Michalak: 301-415-5804).

This meeting will be webcast live at the Web address—<http://www.nrc.gov/>.

Week of April 29, 2019—Tentative

Tuesday, April 30, 2019

10:00 a.m. Briefing on the Annual Threat Environment (Closed Ex. 1).

Week of May 6, 2019—Tentative

There are no meetings scheduled for the week of May 6, 2019.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Denise McGovern at 301-415-0681 or via email at Denise.McGovern@nrc.gov. The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: <http://www.nrc.gov/public-involve/public-meetings/schedule.html>.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify Kimberly Meyer-Chambers, NRC Disability Program Manager, at 301-287-0739, by videophone at 240-428-3217, or by email at Kimberly.Meyer-Chambers@nrc.gov. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301-415-1969), or by email at Wendy.Moore@nrc.gov.

Dated at Rockville, Maryland, this 28th day of March, 2019.

For the Nuclear Regulatory Commission.

Denise L. McGovern,
Policy Coordinator, Office of the Secretary.
[FR Doc. 2019-06402 Filed 3-28-19; 4:15 pm]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2018-0138]

Information Collection: Request for Information Regarding Recommendations 2.1, 2.3 and 9.3, of the Near Term Task Force Review of Insights From the Fukushima Dai-ichi Event

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, "Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendations 2.1, 2.3 and 9.3, of the Near Term Task Force Review of Insights from the Fukushima Dai-ichi Event."

DATES: Submit comments by May 1, 2019.

ADDRESSES: Submit comments directly to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150-0211), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: oirq_submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; Email: INFOCOLLECTS.Resource@nrc.gov.

SUPPLEMENTARY INFORMATION:**I. Obtaining Information and Submitting Comments****A. Obtaining Information**

Please refer to Docket ID NRC-2018-0138 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2018-0138. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC-2018-0138 on this website.

- *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. A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML12053A340. The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML19010A177 and ML18254A274.

- *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.

- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: INFOCOLLECTS.Resource@NRC.GOV.

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at <http://www.regulations.gov> and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, "Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendations 2.1, 2.3 and 9.3, of the Near Term Task Force Review of Insights from the Fukushima Dai-ichi event." The NRC hereby informs potential respondents that an

agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on December 11, 2018 (83 FR 63687).

1. *The title of the information collection:* Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendations 2.1, 2.3 and 9.3, of the Near Term Task Force Review of Insights from the Fukushima Dai-ichi event.

2. *OMB approval number:* 3150–0211.

3. *Type of submission:* Extension.

4. *The form number if applicable:* Not applicable.

5. *How often the collection is required or requested:* Once.

6. *Who will be required or asked to respond:* 12 power reactor licensees.

7. *The estimated number of annual responses:* 4 (12 power reactors will each respond once over the course of the three-year clearance period).

8. *The estimated number of annual respondents:* 4 (12 power reactors will each respond once over the course of the three-year clearance period).

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 11,000 hours.

10. *Abstract:* Following events at the Fukushima Dai-ichi nuclear power plant resulting from the March 11, 2011, earthquake and subsequent tsunami, and in response to requirements contained in section 402 of the Consolidated Appropriations Act (Pub. L. 112–074), the NRC requested information from power reactor licensees pursuant to title 10 of the *Code of Federal Regulations* part 50.54(f). The information requested includes seismic risk assessments. The NRC will use the information provided by licensees to determine if additional regulatory action is necessary. Licensees will have already completed submittals in response to this 50.54(f) request for seismic and flooding walkdown reports, seismic hazard reevaluations, seismic risk assessment, seismic high and low frequency confirmations, seismic spent fuel pool evaluations, flooding hazard reevaluations, flooding integrated assessments, focused evaluations of local intense precipitation and available physical margin, communications analyses, and initial and final staffing analyses.

Dated at Rockville, Maryland, on March 26, 2019.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2019–06157 Filed 3–29–19; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Cancellation of Upcoming Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: The Federal Prevailing Rate Advisory Committee is issuing this notice to cancel the April 18, 2019, public meeting scheduled to be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street NW, Washington, DC. The original **Federal Register** notice announcing this meeting was published Friday, November 16, 2018, at 83 FR 57754.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, 202–606–2838, or email pay-leave-policy@opm.gov.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2019–06173 Filed 3–29–19; 8:45 am]

BILLING CODE 6325–39–P

POSTAL SERVICE

Temporary Emergency Committee of the Board of Governors; Sunshine Act Meeting

DATES AND TIMES: Tuesday, April 9, 2019, at 10:00 a.m.

PLACE: Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Tuesday, April 9, 2019, at 10:00 a.m.

1. Strategic Issues.
2. Financial Matters.
3. Compensation and Personnel Matters.
4. Executive Session—Discussion of prior agenda items and Board governance.

GENERAL COUNSEL CERTIFICATION: The General Counsel of the United States Postal Service has certified that the meeting may be closed under the Government in the Sunshine Act.

CONTACT PERSON FOR MORE INFORMATION: Michael J. Elston, Acting Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC

20260–1000. Telephone: (202) 268–4800.

Michael J. Elston,

Acting Secretary.

[FR Doc. 2019–06407 Filed 3–28–19; 4:15 pm]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Advisers Act Release No. 5213/
File No. 803–00245]

Generation Investment Management US LLP and Generation Investment Management LLP

March 26, 2019.

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Notice.

Notice of application for an exemptive order under Section 206A of the Investment Advisers Act of 1940 (the “Act”) and rule 206(4)–5(e) under the Act.

APPLICANTS: Generation Investment Management US LLP (“Generation US”) and Generation Investment Management LLP (“Generation UK”) (collectively, “Generation,” “Applicants” or “Advisers”).

SUMMARY OF APPLICATION: Applicants request that the Commission issue an order under Section 206A of the Act and rule 206(4)–5(e) under the Act exempting them from rule 206(4)–5(a)(1) under the Act to permit Applicants to receive compensation from a government entity for investment advisory services provided to the government entity within the two-year period following a contribution by a covered associate of the Applicants to an official of the government entity.

FILING DATES: The application was filed on March 1, 2018, and amended and restated applications were filed on August 31, 2018, and January 28, 2019.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 22, 2019, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a

hearing on the matter, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. Applicants: Generation Investment Management US LLP, 555 Mission Street, Suite 3400, San Francisco, CA 94105 and Generation Investment Management LLP, 20 Air Street, 7th Floor, London, UK W1B 5AN.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551-6811 or Holly Hunter-Ceci, Assistant Chief Counsel, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website at <http://www.sec.gov/rules/ia/releases.shtml> or by calling (202) 551-8090.

Applicants' Representations

1. Generation US is a financial services firm registered with the Commission as an investment adviser under the Act. Generation UK, the 99.9 percent owner of Generation US, is an exempt reporting adviser under rule 204-4(a) under the Act. The Applicants provide discretionary investment advisory services to a wide variety of investors.

2. The individual who made the campaign contribution that triggered the two-year compensation ban (the "Contribution") is Colin le Duc (the "Contributor"). The Contributor is a founding partner of Generation UK, who also serves on the Management Committee of Generation UK, Generation's governing body. On October 4, 2017, Generation announced that the Contributor had been appointed Co-President of Generation US's new office in San Francisco, its U.S. headquarters, with joint Management Committee responsibility for the office. On June 30, 2018, the Contributor assumed sole responsibility for the office after the other Co-President retired. In his current capacity as President of Generation US's office (and in his former capacity as Co-President of the office), the Contributor is responsible for reporting on United States operations to the Management Committee and for the culture of the office. As a member of the Management Committee of Generation UK and the President (and previously Co-President)

of Generation US's office, the Contributor is, and was at the time of the Contribution, an executive officer of the Advisers. Applicants submit that, because the Contributor is, and at the time of the Contribution was, an executive officer of Generation UK and Generation US under rule 206(4)-5(f)(4), he is, and at all relevant times was, a covered associate.

3. The California State Teachers Retirement System (the "Client"), one of Generation US's clients, is a government entity in the State of California. Generation UK acts as a sub-adviser to Generation US with respect to the Client's investments. The Client is a "government entity" as defined in rule 206(4)-5(f)(i).

4. The recipient of the Contribution was "Newsom for California—Governor 2018," the campaign committee for the California gubernatorial campaign of Gavin Newsom (the "Official"), who, at the time of the Contribution, was the Lieutenant Governor of the State of California. The Client is a state pension fund with a twelve-member board; one board member is the Director of Finance, who is appointed by the Governor of California, and five other board members are directly appointed by the Governor of California. Because he was seeking the office of Governor at the time of the Contribution, the Official was an "official" of the Client within the meaning of rule 206(4)-5(f)(6)(ii). The Contribution that triggered rule 206(4)-5's prohibition on compensation under rule 206(4)-5(a)(1) was made on June 7, 2017, for the amount of \$5,000. Applicants submit that the Contribution was not motivated by any desire to influence the award of investment advisory business. The Contribution was made, after the Contributor's next-door neighbor sent him, on June 3, 2017, a text message inviting him to a fundraising event for the Official's gubernatorial campaign. His decision to make the Contribution was spontaneous and motivated by his neighbor's request and because the Contributor and his neighbor's children attended the same school. Applicants represent that the Contributor did not have any intention to seek, and no action was taken by the Contributor or the Applicants to obtain, any direct or indirect influence from the Official or any other person.

5. Generation US has been doing business with the Client since 2007. The investments were all made in 2007 and 2008, before the date of the Contribution and before the Official took office. The Client has not materially added to its assets under management by the Advisers, initiated new mandates, or opened new accounts since 2008,

although the Client in February 2018 announced that a different Generation investment fund that is also not managed by the Contributor was eligible to receive a commitment from the Client. Neither the Contributor nor anyone whom he supervises was in any way involved in soliciting the Client with respect to its current business or with respect to the Client's February 2018 announcement that a different Generation investment fund was eligible to receive a commitment.

6. The Applicants learned of the Contribution on December 1, 2017, after the Contributor disclosed it in an interview with a regulatory compliance firm engaged by the Applicants to complete its annual "mock audit." Upon discovery of the Contribution, the Contributor, through counsel, requested a refund of the full \$5,000 the next business day, and received the refund on December 8, 2017. The Applicants established an escrow account on February 27, 2018 into which they have been depositing an amount equal to the compensation received with respect to the Client's investments since the Contribution Date. Applicants submit that all management fees and incentive fees earned with respect to the Client's investments since the Contribution Date have been placed in escrow and will continue to be placed in escrow pending the outcome of the application.

7. The Applicants' pay-to-play Policy (the "Policy") was adopted and implemented in 2011. The Policy requires that all contributions by the Advisers' managing members, executive officer and other "covered associates," as well as all employees, partners, spouses and family members of "covered associates," to any person (including any election committee for the person) who was at the time of the contribution an incumbent, candidate or successful candidate for an elective office of a government entity are prohibited. There is no *de minimis* exemption from the contribution prohibition. Under the Policy, the Advisers circulated multiple compliance alerts reminding employees of the Policy and the strict prohibition on political contributions. After the discovery of the Contribution, the Advisers updated the Policy, which formerly required partners and employees to certify annually to their compliance with the Policy, to certify compliance with the Policy quarterly. In addition, the Advisers retain a compliance vendor to conduct periodic audits and testing of compliance with a variety of restrictions, including those covered in the Policy.

Applicants' Legal Analysis

1. Rule 206(4)–5(a)(1) under the Act prohibits a registered investment adviser from providing investment advisory services for compensation to a government entity within two years after a contribution to an official of a government entity is made by the investment adviser or any covered associate of the investment adviser. The Client is a “government entity,” as defined in rule 206(4)–5(f)(5), the Contributor is a “covered associate” as defined in rule 206(4)–5(f)(2), and the Official is an “official” as defined in rule 206(4)–5(f)(6).

2. Section 206A of the Act authorizes the Commission to “conditionally or unconditionally exempt any person or transaction . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].”

3. Rule 206(4)–5(e) provides that the Commission may conditionally or unconditionally grant an exemption to an investment adviser from the prohibition under rule 206(4)–5(a)(1) upon consideration of the factors listed below, among others:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act;

(2) Whether the investment adviser: (i) Before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of the rule; (ii) prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and (iii) after learning of the contribution: (A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and (B) has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the investment adviser, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.*, federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution which resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

4. Applicants request an order pursuant to Section 206A and rule 206(4)–5(e), exempting them from the two-year prohibition on compensation imposed by rule 206(4)–5(a)(1) with respect to investment advisory services provided to the Client within the two-year period following the Contribution.

5. Applicants submit that the exemption is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants further submit that the other factors set forth in rule 206(4)–5(e) similarly weigh in favor of granting an exemption to the Applicants to avoid consequences disproportionate to the violation.

6. Applicant contends that given the nature of the Contribution, and the lack of any evidence that the Advisers or the Contributor intended to, or actually did, interfere with the Client's merit-based process for the selection or retention of investment advisers, the Client's interests are best served by allowing the Advisers and their Client to continue their relationship uninterrupted. Applicants state that causing the Advisers to serve without compensation for a two-year period could result in a financial loss potentially hundreds or thousands of times the amount of the Contribution. Applicants suggest that the policy underlying rule 206(4)–5 is served by ensuring that no improper influence is exercised over investment decisions by governmental entities as a result of campaign contributions, and not by withholding compensation as a result of unintentional violations.

7. Applicants represent that the Policy was adopted and implemented well before the Contribution was made. Applicants further represent that, the Policy is fully compliant with the requirements of rule 206(4)–5 and has been more rigorous than rule 206(4)–5's requirements as the Advisers retain an outside compliance firm to conduct internet testing and review compliance with the Policy as part of the firm's periodic audit process and requires covered associates to certify their compliance with the Policy quarterly.

8. Applicants assert that aside from the Contributor, no employees or covered associates of the Advisers, or any executive or employee of the Advisers' affiliates knew of the Contribution.

9. Applicants assert that after learning of the Contribution, the Advisers caused the Contributor to obtain immediately a full refund of the Contribution.

Applicants have, since the discovery of the Contribution updated the Policy to mandate annual live or video-conference training on the Policy, increased the frequency of the internal compliance certifications from annually to quarterly, and increased the frequency of quarterly campaign finance database testing and reviews from annually to quarterly.

10. Applicants state that after learning of the Contribution, it confirmed that although the Contributor's job would not ordinarily cause him to interact with the Client, the Advisers instructed him not to solicit or otherwise communicate with the Client for two years following the date of the Contribution.

11. Applicants state that the Client's investments with the Advisers substantially pre-date the Contribution. They were made on an arms' length basis, and neither the Contributor nor the Advisers took any action to obtain any direct or indirect influence from the Official. Furthermore, no investments were made in the period between the date of the Contribution and the day it was refunded. Applicants also submit that the apparent intent in making the Contribution was not to influence the selection or retention of the Advisers. Applicants represent that the Contributor and the Official have a relationship that arises out of the fact that their children were classmates in the same primary school. Applicants finally state that it was because of that relationship, and the fact that the Contribution was solicited by the Contributor's next-door neighbor, and not because of any desire to influence the award of investment advisory business that the Contributor made the Contribution to the Official's campaign.

12. Applicants submit that neither the Advisers nor the Contributor sought to interfere with the Client's merit-based selection process for advisory services, nor did they seek to negotiate higher fees or greater ancillary benefits than would be achieved in arms' length transactions. Applicants further submit that there was no violation of the Advisers' fiduciary duty to deal fairly or disclose material conflicts given the absence of any intent or action by the Advisers or the Contributor to influence the selection process. Applicants contend that in the case of the Contribution, the imposition of the two-year prohibition on compensation does not achieve rule 206(4)–5's purposes and would result in consequences

disproportionate to the mistake that was made.

Applicants' Conditions

The Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. The Contributor will be prohibited from discussing the business of the Advisers with any "government entity" client or prospective client for which the Official is an "official," each as defined in rule 206(4)–5(f) until June 7, 2019.

2. The Contributor will receive a written notification of this condition and will provide a quarterly certification of compliance until June 7, 2019. Copies of the certifications will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Advisers, and be available for inspection by the staff of the Commission.

3. The Advisers will conduct testing reasonably designed to prevent violations of the conditions of the Order and maintain records regarding such testing, which will be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the Advisers, and be available for inspection by the staff of the Commission.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–06158 Filed 3–29–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85414; File No. SR–CboeEDGX–2019–011]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Rules Related to the Designated Primary Market-Maker ("DPM") Participation Entitlements

March 26, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b–4 thereunder,² notice is hereby given that on March 15, 2019, Cboe EDGX Exchange, Inc. ("Exchange" or "EDGX") filed with the

Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 the Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX") proposes to amend the Rules related to the Designated Primary Market-Maker ("DPM") participation entitlements. The text of the proposed rule change is provided below and in Exhibit 1.

(additions are *italicized*; deletions are [bracketed])

* * * * *

Rules of Cboe EDGX Exchange, Inc.

* * * * *

Rule 21.8. Order Display and Book Processing

(a)–(c) No change.

(d) Additional Priority Overlays Applicable to the Pro-Rata Allocation Method. In connection with the allocation methodology set forth in paragraph (c) above, the Exchange may apply, on a class-by-class basis, one or more of the following designated market participant overlay priorities in a sequence determined by the Exchange. The Exchange will issue a notice to Options Members which will specify which classes of options are initially subject to these additional priority overlays and will provide such Options Members with reasonable advance notice of any changes to the application of such overlays.

(1)–(2) No change.

(3) Designated Primary Market Maker. The Exchange may determine to grant Designated Primary Market Makers ("DPMs") the DPM participation entitlement[s] *and/or the DPM small order entitlement* pursuant to the provisions of paragraph (g) below. As indicated in such paragraph, *neither* the DPM participation entitlement *nor the DPM small order entitlement* may [only] be in effect [when] *in a class unless* the Customer Overlay is also in effect.

(e)–(f) No change.

(g) Designated Primary Market Maker [Participation] Entitlements. A DPM may be appointed by the Exchange in option classes in accordance with Rule 22.2. [The] *Neither the DPM participation entitlement[s] nor DPM small order entitlement may* [shall not] be in effect *in a class unless* the Customer Overlay is *also* in effect. [and] *When in effect,* the DPM participation entitlement[s] *and/or DPM small order entitlement* shall only apply to any remaining balance after Priority Customer Orders have been satisfied. The DPM [participation] entitlements are as follows:

(1) *DPM Participation Entitlement.* For each incoming order, if the DPM has a

priority quote at the NBBO, its participation entitlement is equal to the greater of (i) the proportion of the total size at the best price represented by the size of its quote, or (ii) sixty percent (60%) of the contracts to be allocated if there is only one (1) other Market Maker quotation or non-Customer order at the NBBO and forty percent (40%) if there are two (2) or more other Market Maker quotes and/or non-Customer orders at the NBBO.

(2) *DPM Small Order Entitlement.* Small size orders will be allocated in full to the DPM if the DPM has a priority quote at the NBBO. The Exchange will review this provision quarterly and will maintain the small order size at a level that will not allow small size orders executed by DPMs to account for more than 40% of the volume executed on the Exchange. Small size orders are defined as incoming orders of five (5) or fewer contracts.

(h) Conditions of Participation Entitlements. In allocating the participation entitlements set forth in this Rule 21.8 to the PMM and the DPM, the following shall apply:

(1) In a class of options where [both] the PMM *participation entitlement*, [and] the DPM participation entitlement[s], *and the DPM small order entitlement* are in effect and an Options Member has preferred an order to a PMM:

(A) if the PMM's priority quote is at the NBBO, the PMM's participation entitlement will supersede the DPM's participation entitlement[s], *and the DPM small order entitlement*, for an order preferred to such PMM;

(B) if the PMM's priority quote is not at the NBBO, the DPM's participation entitlement *or DPM small order entitlement, as applicable*, will apply to that order, provided the DPM's priority quote is at the NBBO;

(C) if an order is preferred to the DPM (*i.e.*, the DPM is also the PMM), the DPM receives the DPM participation entitlement *or DPM small order entitlement, as applicable*, provided the DPM/PMM's priority quote is at the NBBO; and

(D) if neither the PMM's nor the DPM's priority quote is at the NBBO then executed contracts will be allocated in accordance with the pro-rata allocation methodology as described in paragraphs (c) and (e) above without regard to any participation entitlement.

(2) If an incoming order has not been preferred to a PMM by an Options Member, then the DPM[s] participation entitlement *or DPM small order entitlement, as applicable*, will apply to that order, provided the DPM's priority quote is at the NBBO.

(3) The participation entitlements shall not be in effect unless the Customer Overlay is also in effect and the participation entitlements shall only apply to any remaining balance after Priority Customer Orders have been satisfied.

(4) Neither the DPM nor the PMM may be allocated a total quantity greater than the quantity they are quoting at the execution price. If the DPM's or the PMM's allocation of an order pursuant to its participation entitlement is greater than its pro-rata share of priority quotes at the best price at the time

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

that the participation entitlement is granted, neither the DPM nor the PMM shall receive any further allocation of that order.

(5) In establishing the counterparties to a particular trade, the participation entitlements must first be counted against the DPM's highest priority bids and offers or the PMM's highest priority bids or offers.

(6) These participation entitlements only apply to the allocation of executions among competing Market Maker priority quotes existing on the EDGX Options Book at the time the order is received by the Exchange. No market participant is allocated any portion of an execution unless it has an existing interest at the execution price. Moreover, no market participant can execute a greater number of contracts than is associated with its interest at a given price. Accordingly, the DPM participation entitlement, the DPM small order entitlement, and the PMM participation entitlement[s] contained in this Rule are not guarantees.

* * * * *

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), 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 proposed rule change amends the Designated Primary Market-Maker ("DPM") participation entitlements in Rule 21.8(d) and (g). Pursuant to Rule 21.8(d), the Exchange currently may determine to grant DPMs participation entitlements as set forth in Rule 21.8(g). The DPM participation entitlement currently consists of two parts:

- For each incoming order, if the DPM has a priority quote at the national best bid or offer ("NBBO"), its participation entitlement is equal to the greater of (i) the proportion of the total size at the best price represented by the

size of its quote or (ii) 60% of the contracts to be allocated if there is only one other Market Maker quotation or non-Customer order at the NBBO and 40% if there are two or more other Market Maker quotes and/or non-Customer orders at the NBBO (the "DPM participation entitlement").

- Small size orders will be allocated in full to the DPM if the DPM has a priority quote at the NBBO (the "DPM small order entitlement").³

If the Exchange grants DPMs participation entitlements in a class, then both the DPM participation entitlement and the DPM small order entitlement apply. Therefore, if a DPM is to receive a participation entitlement for an incoming order, it will receive the DPM participation entitlement if the order has more than five contracts or the DPM small order entitlement if the order has five or fewer contracts.

The proposed changes to Rule 21.8(d) and (g) provide that the Exchange may grant DPMs either the DPM participation entitlement, the DPM small order entitlement, or both in a class.⁴ This flexibility will permit the Exchange to apply the market model it deems most appropriate to each class. For example, the Exchange may believe a DPM in a class should receive the DPM participation entitlement but not the DPM small order entitlement. For classes in which the Exchange grants both entitlements to a DPM, there will be no change, as the DPM will continue to receive the DPM participation entitlement or the DPM small order entitlement, depending on the size of the order.⁵ For classes in which the Exchange grants the DPM priority

³ Small size orders are defined as incoming orders of five or fewer contracts. The Exchange will review this provision quarterly and will maintain the small order size at a level that will not allow small size orders executed by DPMs to account for more than 40% of the volume executed on the Exchange.

⁴ The proposed rule change makes corresponding changes to Rule 21.8(h) to reflect the separation of the two DPM entitlements. The Exchange will announce this determination to Options Members by Exchange Notice or technical specifications on its public website, and will provide Options Members with sufficient advanced notice of any determination it makes.

⁵ The Exchange has no current plans to change the allocation algorithm for any currently listed classes. However, it may determine to apply the DPM participation entitlement but not the DPM small order entitlement to a class it intends to list for trading in the future. The Exchange plans to begin listing XSP options on April 8, 2019, and intends to apply the DPM participation entitlement (and Customer Overlay) but not the DPM small order entitlement to that class. As noted in footnote 2, the Exchange will announce any such determination to Options Members by Exchange Notice or technical specifications on its public website, and will provide Options Members with sufficient advanced notice of any determination it makes.

entitlement but not the DPM small order entitlement, the DPM would have the opportunity to receive the DPM participation entitlement on small size orders (*i.e.*, 60% or 40%) rather than the entire size of the small size order (after Priority Customer Orders were satisfied).⁶ Additionally, the Exchange may not apply either DPM entitlement to a class unless the Customer Overlay is also in effect (and thus both entitlements will apply to any remaining balance after Priority Customer Orders have been satisfied).⁷ The Exchange will continue to review the DPM small order entitlement quarterly and will maintain the small order size at a level that will not allow small size orders executed by DPMs to account for more than 40% of the volume executed on the Exchange. The proposed rule change is based on the rules of another options exchange.⁸

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.⁹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁰ 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)¹¹ requirement that

⁶ Other participants would have an opportunity to trade against the remaining size of these small size orders in those classes.

⁷ See Rule 21.8(g) and (h)(3).

⁸ See Cboe Exchange, Inc. ("Cboe Options") Rule 6.45(a)(ii)(B) and (a)(ii)(c) (which permits Cboe Options to apply the DPM participation entitlement and/or the small order preference to a class). Cboe Options applies the DPM participation entitlement but not the small order preference to certain classes, while it applies both the DPM participation entitlement and the small order preference to other classes. See Cboe Options Operational Settings (RTH Session), at <https://www.cboe.org/publish/opsettingsrth/operational-settings-for-rth.pdf> (electronic allocation and priority for simple orders and quotes).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ *Id.*

the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change will benefit investors and promote just and equitable principles of trade, as it provides the Exchange with flexibility to establish a more appropriate market model for a class that may exhibit different trading characteristics than other classes. The proposed rule change does not modify the amount of contracts to which a DPM may be entitled or the criteria that must be met for a DPM to receive an entitlement; it merely provides the Exchange with flexibility regarding which entitlements it may grant to DPMs. For classes in which the Exchange grants both entitlements to a DPM, there will be no change, as the DPM may continue to receive the DPM participation entitlement or the DPM small order entitlement, depending on the size of the order. If the Exchange determines to not apply the DPM small order entitlement, but does apply the DPM participation entitlement, to a class, DPMs will still be entitled to a significant participation right of 40% or 60%, as applicable, of small orders, which will continue to provide an appropriate balance with their corresponding obligations.

The proposed rule change will continue to protect Priority Customers, because the Exchange may not grant either DPM entitlement unless the Customer Overlay is also in effect, and the entitlements will apply to the contracts remaining after Priority Customer Orders have been satisfied. The proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, because the rules of another options exchange provide similar flexibility.¹²

As noted above, the Exchange has no current plans to change the allocation algorithm for any currently listed classes. However, the Exchange plans to begin listing XSP options on April 8, 2019, and intends to apply the DPM participation entitlement (and Customer Overlay) but not the DPM small order entitlement to that class. The Exchange will announce any such determination to Options Members by Exchange Notice or technical specifications on its public website, and will provide Options Members with sufficient advanced notice of any determination it makes.

¹² See Cboe Exchange, Inc. (“Cboe Options”) Rule 6.45(a)(ii)(B) and (a)(ii)(C) (which permits Cboe Options to apply the DPM participation entitlement and/or the small order preference to a class).

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change will not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because the proposed rule change will apply in the same manner to all DPMs. The proposed rule change does not modify the amount of contracts to which a DPM may be entitled or the criteria that must be met for a DPM to receive an entitlement; it merely provides the Exchange with flexibility regarding which entitlements it may grant to DPMs. For classes in which the Exchange grants both entitlements to a DPM, there will be no change, as the DPM may continue to receive the DPM participation entitlement or the DPM small order entitlement, depending on the size of the order. If the Exchange determines to not apply the DPM small order entitlement, but does apply the DPM participation entitlement, to a class, DPMs will still be entitled to a significant participation right of 40% or 60%, as applicable, of small orders, which will continue to provide an appropriate balance with their corresponding obligations. The proposed rule change will not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because the rules of another options exchange provide similar flexibility.¹³

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section

¹³ See Cboe Exchange, Inc. (“Cboe Options”) Rule 6.45(a)(ii)(B) and (C) (which permits Cboe Options to apply the DPM participation entitlement and/or the small order preference to a class).

19(b)(3)(A)(iii) of the Act¹⁴ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁵

A proposed rule change filed under Rule 19b-4(f)(6)¹⁶ normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)¹⁷ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become effective and operative immediately upon filing. The Exchange notes that it plans to begin listing XSP options on April 8, 2019, and intends to apply the DPM participation entitlement (and Customer Overlay), but not the DPM small order entitlement to that class. The Exchange states that waiver of the operative delay would permit the Exchange to apply the market model it believes is most appropriate for XSP options on its planned launch date. The Exchange also states that the proposed rule change will benefit investors that are members of both EDGX Options and its affiliated exchange Cboe Options to have corresponding rules regarding participation entitlements, as it may reduce confusion. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.¹⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

¹⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁶ 17 CFR 240.19b-4(f)(6).

¹⁷ 17 CFR 240.19b-4(f)(6)(iii).

¹⁸ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-CboeEDGX-2019-011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeEDGX-2019-011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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-CboeEDGX-2019-011 and should be submitted on or before April 22, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-06179 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85417; File No. SR-NYSEArca-2019-02]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Relating to the Listing and Trading of the Shares of the ProShares UltraPro 3x Natural Gas ETF and ProShares UltraPro 3x Short Natural Gas ETF Under NYSE Arca Rule 8.200-E

March 26, 2019.

On January 28, 2019, NYSE Arca, Inc. ("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 of the ProShares UltraPro 3x Natural Gas ETF and ProShares UltraPro 3x Short Natural Gas ETF under NYSE Arca Rule 8.200-E. The proposed rule change was published for comment in the **Federal Register** on February 15, 2019.³ The Commission has received no comment letters on the proposed rule change.

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 April 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 the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates May 16, 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-NYSEArca-2019-02).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-06178 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85425; File No. SR-NYSEAMER-2019-07]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Statements Made in a Recent Filing In Regards to the Six-Month Lookback Period for New Issues Added to the Penny Pilot on a Quarterly Basis

March 26, 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 March 22, 2019, NYSE American LLC ("NYSE American" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to clarify statements made in a recent filing in regards to the six-month lookback period for new issues added to the Penny Pilot on a quarterly basis. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and

¹⁹ 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. 85088 (February 11, 2019), 84 FR 4573.

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 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to clarify statements made in a recent filing in regards to the six-month lookback period for new issues added to the Pilot on a quarterly basis.

The Exchange recently filed to amend Commentary .02 to Rule 960NY, regarding the Pilot, to specify that replacement issues may be added to the Pilot on a quarterly basis (the "Quarterly Replacement Filing").⁴ In that filing, the Exchange noted that, as is the case today, the Exchange will determine replacement issues based on trading activity in the previous six months (the "six-month lookback"), but will not use the month immediately preceding the addition of a replacement to the Pilot. As an illustration of this six-month lookback period for new issues added on the second trading day following April 1, 2019, the Exchange erroneously stated that the trading volume considered would begin August 1, 2018 through February 28, 2019, when in fact the correct time period would be from September 1, 2018 through February 28, 2019 (as the time frame set forth in the Quarterly Replacement Filing covers seven months, not six).⁵ The Exchange believes this filing would correct the inaccuracy in the Quarterly Replacement Filing with the correct six-month lookback dates, which should alleviate any potential confusion for regulators and market participants.

⁴ See Securities Exchange Act Release No. 85348 (March 18, 2019), 84 FR 10860 (March 22, 2019) (SR-NYSEAMER-2019-05).

⁵ See *id.* The Rule continues to obligate the Exchange to announce the replacement issues by Trader Update. See Commentary .02 to Rule 960NY.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)⁶ of the Act, in general, and furthers the objectives of Section 6(b)(5),⁷ 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 mechanisms of a free and open market and a national market system.

The Exchange believes the proposal to clarify the six-month lookback for issues added in April 2019 would be based on trading volume beginning September 1, 2018 (as opposed to August 1st) through February 28, 2019 would promote just and equitable principles of trade as it would correct the inaccuracy in the Quarterly Replacement Filing with the correct six-month lookback dates, which should alleviate any potential confusion for regulators and market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, this proposal is designed to correct an inaccuracy in the Quarterly Replacement Filing, which should alleviate any potential confusion for regulators and 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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹ Because the proposed rule change does not: (i)

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement so that the Exchange may correct the inaccuracy in the Quarterly Replacement Filing without delay.

Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)¹⁰ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹¹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The change will correct erroneous information contained in the Quarterly Replacement Filing¹² regarding six-month lookback the Exchange will use to determine which issues will be added in April 2019.¹³

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)¹⁴ 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:

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² See *supra* note 4.

¹³ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78s(b)(2)(B).

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–2019–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2019–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2019–07 and should be submitted on or before April 22, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–06182 Filed 3–29–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85420; File No. SR–FINRA–2019–003]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Allow the Publication or Distribution of Aggregated Transaction Information and Statistics on Certain Non-Disseminated TRACE-Eligible Securities

March 26, 2019.

I. Introduction

On January 29, 2019, the Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 FINRA Rule 6750 to allow the publication or distribution of aggregated transaction information and statistics on certain non-disseminated TRACE-Eligible Securities at no charge. The proposed rule change was published for comment in the **Federal Register** on February 13, 2019.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

FINRA Rule 6750(a) provides that FINRA will publicly disseminate information on all transactions in TRACE-Eligible Securities ⁴ immediately upon receipt of a transaction report unless an exception applies. FINRA Rule 6750(c) sets out those exceptions.⁵ In addition, FINRA offers a number of real-time and historic TRACE data products on disseminated transactions for a fee,⁶ and also publishes and distributes aggregated transaction information and statistics on disseminated transactions at no charge.⁷

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 85073 (February 7, 2019), 84 FR 3842 (February 13, 2019) (“Notice”).

⁴ See FINRA Rule 6710(a) (defining “TRACE-Eligible Security”).

⁵ See FINRA Rule 6750(c). FINRA currently will not disseminate information for non-member affiliate transactions, certain transfers of proprietary interests, List or Fixed Offering Price or Takedown Transactions, and transactions in U.S. Treasury Securities and certain Securitized Products.

⁶ See FINRA Rule 7730.

⁷ See Notice, 84 FR at 3842.

FINRA has proposed to add Supplementary Material .01 to FINRA Rule 6750 to provide that, notwithstanding FINRA Rule 6750(c), FINRA may, in its discretion, publish or distribute aggregated transaction information and statistics on certain non-disseminated TRACE-Eligible Securities at no charge—unless FINRA submits a rule filing to the Commission imposing a fee for such data. FINRA stated in the Notice that it will not identify individual market participants or transactions or publish aggregated transaction information and statistics by individual securities. In addition, the proposed rule change will not apply to U.S. Treasury Securities. FINRA has stated that the proposed rule change will become effective the date of Commission approval.⁸

III. Discussion and Commission Findings

After careful consideration, 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 association.⁹ In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹⁰ which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposal will promote some degree of public transparency, at no cost, for certain classes of TRACE-Eligible Securities for which individual transactions are not publicly disseminated. Moreover, the Commission believes that the proposal is reasonably designed to preserve the confidentiality of counterparty identities, consistent with the protection of investors and the public interest.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR–FINRA–2019–003) is approved.

⁸ See *id.* at 3843.

⁹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78o–3(b)(6).

¹¹ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-06176 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85426; File No. SR-NYSEARCA-2019-17]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Statements Made in a Recent Filing in Regards to the Six-Month Lookback Period for New Issues Added to the Penny Pilot on a Quarterly Basis

March 26, 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 March 22, 2019, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to clarify statements made in a recent filing in regards to the six-month lookback period for new issues added to the Penny Pilot (“Pilot”) on a quarterly basis. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at

the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to clarify statements made in a recent filing in regards to the six-month lookback period for new issues added to the Pilot on a quarterly basis.

The Exchange recently filed to amend Commentary .02 to Rule 6.72-O, regarding the Pilot, to specify that replacement issues may be added to the Pilot on a quarterly basis (the “Quarterly Replacement Filing”).⁴ In that filing, the Exchange noted that, as is the case today, the Exchange will determine replacement issues based on trading activity in the previous six months (the “six-month lookback”), but will not use the month immediately preceding the addition of a replacement to the Pilot. As an illustration of this six-month lookback period for new issues added on the second trading day following April 1, 2019, the Exchange erroneously stated that the trading volume considered would begin August 1, 2018 through February 28, 2019, when in fact the correct time period would be from September 1, 2018 through February 28, 2019 (as the time frame set forth in the Quarterly Replacement Filing covers seven months, not six).⁵ The Exchange believes this filing would correct the inaccuracy in the Quarterly Replacement Filing with the correct six-month lookback dates, which should alleviate any potential confusion for regulators and market participants.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)⁶ of the Act, in general, and furthers the objectives of Section 6(b)(5),⁷ 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 mechanisms of a free and

open market and a national market system.

The Exchange believes the proposal to clarify the six-month lookback for issues added in April 2019 would be based on trading volume beginning September 1, 2018 (as opposed to August 1st) through February 28, 2019 would promote just and equitable principles of trade as it would correct the inaccuracy in the Quarterly Replacement Filing with the correct six-month lookback dates, which should alleviate any potential confusion for regulators and market participants.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, this proposal is designed to correct an inaccuracy in the Quarterly Replacement Filing, which should alleviate any potential confusion for regulators and 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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement so that the Exchange may correct the inaccuracy in the Quarterly Replacement Filing without delay.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 85363 (March 19, 2019) (SR-NYSEArca-2019-13).

⁵ See *id.* The Rule continues to obligate the Exchange to announce the replacement issues by Trader Update. See Commentary .02 to Rule 6.72-O.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

A proposed rule change filed under Rule 19b-4(f)(6)¹⁰ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),¹¹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The change will correct erroneous information contained in the Quarterly Replacement Filing¹² regarding six-month lookback the Exchange will use to determine which issues will added in April 2019.¹³

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)¹⁴ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEARCA-2019-17 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2019-17. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2019-17 and should be submitted on or before April 22, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-06181 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Release No. 34-85419; File No. SR-CBOE-2019-016]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Cboe Options Rule 6.2

March 26, 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 March 14, 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 and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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 Cboe Options Rule 6.2. 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 update Interpretation and Policy .06 of Rule 6.2 (Hybrid Opening (and Sometimes Closing) System (“HOSS”)). By way of background, Interpretation and Policy .06(a) of Rule 6.2 provides that on the last business day of each month, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² See *supra* note 4.

¹³ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ 17 CFR 200.30-3(a)(12).

Exchange will conduct special end-of-month non-trading rotations for each series of SPX options in order to determine the theoretical “fair value” of such series as of [sic] SPX as of the time of close of trading in the underlying cash market.⁵ Rule 6.2(.06)(a) also provides during such special non-trading closing rotation (“closing rotation”), a Lead Market-Maker (“LMM”) in the SPX options designated by the Exchange in each series of SPX options will provide bid and offer quotations. The Exchange notes that in connection with recently retiring the Hybrid 3.0 platform and transitioning trading of SPX options onto the Hybrid trading platform, the Exchange determined to no longer appoint LMMs in SPX.⁶ In lieu of LMMs, the Exchange established a financial incentive program for SPX Select Market-Makers (“SMMs”), which provides that any appointed SPX SMM will receive a monthly waiver of the cost of one Market-Maker Trading Permit and one SPX Tier Appointment provided that the SMM satisfies the standard set forth in Footnote 49 of the Exchange’s Fees Schedule. While SMMs must still comply with continuous quoting obligations of Market-Makers, they are not otherwise obligated from a regulatory standpoint to satisfy any heightened quoting standard or meet additional obligations. Rather, SPX SMMs only receive a financial benefit (*i.e.*, waiver of fees otherwise assessed for one Market-Maker Trading Permit and one SPX Tier Appointment) if they satisfy the standard set forth in Footnote 49. Accordingly, the Exchange proposes to add references to SMMs in Rule 6.2(.06)(a).

Additionally, the Exchange proposes to clarify that SMMs (and LMMs)⁷ “may”, and not “must”, participate in the closing rotation. Indeed, the Exchange notes that it recently submitted a rule change to amend the Fees Schedule to no longer require SMMs to meet the fourth prong of the standard set forth in Footnote 49 which provided that a designated SMM must provide quotes for the closing rotation on a rotating basis in order for SMMs to

satisfy the fourth prong.⁸ In its place, the Exchange now requires that within 30 minutes from the initiation of the closing rotation, the Exchange must disseminate end-of-month closing quotations pursuant to Cboe Options Rule 6.2(.06)(a). The Exchange proposed the amendment to encourage all SMMs to provide end-of-month non-trading settlement pricing quotations in SPX and SPXW, which would increase the probability that the Exchange would be able to disseminate fair value quotes pursuant to Rule 6.2(.06)(a).⁹ The Exchange believes the proposed changes to Rule 6.2(.06)(a) will make the rule text consistent with the current standard set forth in Footnote 49 of the Fees Schedule. The Exchange lastly notes that although it currently does not appoint LMMs in SPX, it proposes to leave references to LMMs in Rule 6.2(.06)(a) in the event it determines to appoint LMMs in the future.

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.¹⁰ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹¹ 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.

The Exchange believes updating Rule 6.2(.06)(a) with respect to references to SMMs and eliminating the language which provides the Exchange will designate a particular LMM each month, alleviates potential confusion as it more accurately describes the Exchange’s current end-of-month fair value closing rotation procedures. The proposed changes also make Rule 6.2(.06)(a) consistent with Footnote 49 of the Fees Schedule, which as described above, governs the financial incentive program relating to SMMs. The alleviation of

potential confusion removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest.

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 merely updates outdated rule text and applies to all SPX SMMs (and potential 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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

At any time within 60 days of the filing of the proposed rule change, the

⁵ See Cboe Options Rule 6.2, Interpretation and Policy .06.(a) [sic]

⁶ See Securities and Exchange Act Release No. 83089 (April 23, 2018), 83 FR 18605 (April 27, 2018) (SR-CBOE-2018-029).

⁷ As noted above, as there are no LMMs currently appointed in SPX during Regular Trading Hours, there is no requirement for LMMs to participate in the closing rotation. To the extent the Exchange determines to appoint LMMs in the future, it notes that LMMs would no longer be obligated to participate in the closing rotation.

⁸ See Securities and Exchange Act Release No. 85018 (January 31, 2019), 84 FR 1810 (February 5, 2019) (SR-CBOE-2018-075).

⁹ *Id.*

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CBOE-2019-016 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-2019-016. 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-CBOE-2019-016, and should be submitted on or before April 16, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019-06177 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85422; File No. SR-NYSEArca-2018-43]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of a Proposed Rule Change, as Modified by Amendment No. 1, Regarding Investments of the First Trust TCW Unconstrained Plus Bond ETF

March 26, 2019.

On July 11, 2018, NYSE Arca, Inc. ("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 First Trust TCW Unconstrained Plus Bond ETF, the shares of which are currently listed and traded on the Exchange pursuant to NYSE Arca Rule 8.600-E.

The proposed rule change was published for comment in the **Federal Register** on August 1, 2018.³ On September 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 October 30, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁶ On January 25, 2019, the Commission designated a longer period for Commission action on the proposed rule

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 83720 (July 26, 2018), 83 FR 37560.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 84123, 83 FR 47654 (September 20, 2018).

⁶ See Securities Exchange Act Release No. 84504, 83 FR 55439 (November 5, 2018).

change.⁷ On January 29, 2019, the Exchange filed Amendment No. 1 to the proposed rule change.

On March 22, 2019, the Exchange withdrew the proposed rule change (SR-NYSEArca-2018-43), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019-06175 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11:30 a.m. on Wednesday, April 3, 2019.

PLACE: The meeting will be held at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Jackson, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matters of the closed meeting will be:

Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings; and Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

CONTACT PERSON FOR MORE INFORMATION:

For further information and to ascertain what, if any, matters have been added, deleted or postponed; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

⁷ See Securities Exchange Act Release No. 84990, 84 FR 868 (January 31, 2019).

⁸ 17 CFR 200.30-3(a)(12).

Dated: March 27, 2019.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-06307 Filed 3-28-19; 11:15 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85413; File No. SR-FINRA-2019-006]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Capital Acquisition Broker (“CAB”) Rules Governing Qualification, Registration and Continuing Education of Associated Persons of CABs

March 26, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 12, 2019, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,³ which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Capital Acquisition Broker (“CAB”) Rules governing qualification, registration and continuing education of associated persons of CABs (CAB Rules 119–125) to reflect new consolidated FINRA qualification and registration rules and changes to its continuing education requirements which took effect on October 1, 2018 (collectively, the “Consolidated Rules”). Specifically, the proposed rule change would amend CAB Rules 119 (Foreign Members and Associates), 121 (Registration Requirements), 123 (Categories of Registration), 124 (Persons Exempt from Registration) and 125 (Continuing Education Requirements) to cross-

reference the new FINRA rules governing these areas, and would delete CAB Rule 122 (Qualification Examinations) since this area is covered by other Consolidated Rules.

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

A. Background

FINRA Capital Acquisition Broker Rules

On August 18, 2016, the SEC approved⁴ a separate set of FINRA rules for firms that meet the definition of a “capital acquisition broker” and that elect to be governed under this rule set. CABs are member firms that engage in a limited range of activities, essentially advising companies and private equity funds on capital raising and corporate restructuring, and acting as placement agents for sales of unregistered securities to institutional investors under limited conditions. Member firms that elect to be governed under the CAB rule set are not permitted, among other things, to carry or maintain customer accounts, handle customers’ funds or securities, accept customers’ trading orders, or engage in proprietary trading or market-making.

The CAB Rules became effective on April 14, 2017.⁵ In order to provide new CAB applicants with lead time to apply for FINRA membership and obtain the necessary qualifications and registrations, CAB Rules 101–125 became effective on January 3, 2017.⁶

⁴ See Securities Exchange Act Release No. 78617 (August 18, 2016), 81 FR 57948 (August 24, 2016) (Order Approving File No. SR-FINRA-2015-054).

⁵ See *Regulatory Notice* 16-37 (October 2016).

⁶ On September 29, 2017 the SEC approved CAB Rule 203 (Engaging in Distribution and Solicitation

FINRA Qualification, Registration and Continuing Education Rules

In July 2017 the SEC approved a proposed rule change to: (1) Adopt consolidated FINRA registration rules; (2) restructure the representative-level qualification examinations by creating an examination called the Securities Industry Essentials (SIE) to test knowledge regarding fundamental securities-related topics and transforming the representative-level examinations into specialized knowledge examinations; and (3) amend the Continuing Education (CE) requirements.⁷

The proposed rule change consolidated the NASD and Incorporated NYSE registration rules as FINRA Rules, which streamlined and brought consistency and uniformity to FINRA’s qualification and registration requirements. The Consolidated Rules, among other things, allow a member to permissively register, or maintain the registration(s) as a representative or principal of, any associated person of the firm, establish a waiver program for individuals working for a financial services industry affiliate of a member, and require firms to designate a Principal Financial Officer and a Principal Operations Officer. The rule change also establishes new registration categories. These new requirements are discussed in more detail below.

In conjunction with these changes, FINRA also restructured the representative-level qualification examination program into a more efficient format whereby all representative-level applicants take the SIE examination, and a tailored, specialized knowledge examination (a revised representative-level qualification examination) for their particular registered role. Individuals who are not associated persons of firms,

(Activities with Government Entities) and CAB Rule 458 (Books and Records Requirements for Government Distribution and Solicitation Activities), which applied established “pay-to-play” and related recordkeeping rules to the activities of CABs. See Securities Exchange Act Release No. 81781 (September 29, 2017), 82 FR 46559 (October 5, 2017) (Order Approving File No. SR-FINRA-2017-027). CAB Rules 203 and 458 became effective on December 6, 2017. On September 20, 2018 FINRA filed for immediate effectiveness changes to CAB Rule 331 (Anti-Money Laundering Compliance Program) to reflect the Financial Crimes Enforcement Network’s adoption of a final rule on Customer Due Diligence Requirements for Financial Institutions. See Securities Exchange Act Release No. 84363 (October 4, 2018), 83 FR 51532 (October 11, 2018) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2018-035).

⁷ See Securities Exchange Act Release No. 81098 (July 7, 2017), 82 FR 32419 (July 13, 2017) (Order Approving File No. SR-FINRA-2017-007) (“Consolidated Rule Filing”).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

such as members of the general public, are also eligible to take the SIE examination. The restructured program, among other things, eliminated duplicative testing of fundamental securities knowledge on representative-level examinations and eliminated several representative-level registration categories that had become outdated or had limited utility. In addition, FINRA made corresponding and clarifying changes to the CE requirements.

In October 2017 FINRA published *Regulatory Notice* 17–30, which announced SEC approval of the consolidated FINRA registration rules, restructured representative-level qualification examinations, and changes to the continuing education requirements.⁸

B. CAB Qualification, Registration and Continuing Education Rules

CAB Rules 119(b) and 121–125 govern the qualification, registration and continuing education of associated persons of CABs. Each of these rule provisions subjects CABs to a corresponding NASD or FINRA rule governing that area. For example, CABs are subject to NASD IM–1000–2 with respect to their associated persons who are serving in the United States Armed Forces. Similarly, CABs are subject to NASD Rules 1021 and 1031 with respect to the registration requirements for CABs' principals and representatives. Additionally, associated persons of CABs are subject to the continuing education requirements of FINRA Rule 1250.

The purpose of these rules is to ensure that associated persons of CABs are subject to the same rules governing qualification, registration and continuing education as associated persons of member firms that have not elected CAB status. Thus, CAB principals and representatives must pass the same qualification examinations and are subject to the same registration requirements as principals and representatives that engage in the same activities through a non-CAB firm.

Maintaining consistent qualification, registration and continuing education requirements for associated persons of both CAB and non-CAB firms is also important since some non-CAB firms elect CAB status after the date their associated persons' registrations becomes effective. Additionally, it is possible that associated persons of non-CAB firms may leave their firms and become associated with CABs, and that associated persons of CABs also may

leave their firms and become associated with non-CAB firms. Thus FINRA believes, as a matter of investor protection and regulatory consistency, that its rules should impose substantially similar qualification, registration and continuing education requirements on associated persons of both CABs and non-CAB member firms.

The current CAB qualification, registration and continuing education rules now cross-reference FINRA and NASD Rules that either have been eliminated, or have been moved and renumbered. Thus, to further the goals of maintaining regulatory consistency, as well as having rules that function as intended, FINRA must update its CAB qualification, registration and continuing education rules to correctly cite the appropriate Consolidated Rules.

C. Updating of Cross-References to FINRA Rules

In order to maintain consistent qualification, registration and continuing education rules for both CAB and non-CAB firms, FINRA is proposing to update the cross-references to FINRA Rules in CAB Rules 119–125. This section also discusses particular aspects of the Consolidated Rules that may impact CABs and their associated persons.

CAB Rule 119

Currently CAB Rule 119 (Foreign Members and Associates) subjects CABs to NASD Rule 1090 (Foreign Members) and NASD Rule 1100 (Foreign Associates). The Consolidated Rule Filing deleted NASD Rule 1100 and eliminated the Foreign Associate registration category as of October 1, 2018. Accordingly, FINRA is proposing to amend CAB 119 to delete the provisions subjecting CABs to NASD Rule 1100.⁹

CAB Rule 121

CAB Rule 121 (Registration Requirements) subjects CABs to NASD IM–1000–2 (Status of Persons Serving in the Armed Forces of the United States), NASD IM–1000–3 (Failure to Register Personnel), NASD Rule 1021 (Registration Requirements—Principals), and NASD Rule 1031 (Registration Requirements—Representatives). The Consolidated Rule Filing deleted each of these NASD rules as of October 1, 2018. Accordingly, FINRA proposes to amend CAB Rule 121 by eliminating the references to

NASD IMs 1000–2 and 1000–3 and NASD Rules 1021 and 1031, and providing that all CABs are subject to FINRA Rule 1210 (Registration Requirements).

As of October 1, 2018 FINRA Rule 1210.10 governs the status of persons serving in the U.S. Armed Forces. Rule 1210.10 is substantially similar to NASD IM–1000–2, except that it requires a member to notify FINRA promptly of such a person's return to employment with the member.

FINRA did not adopt a new FINRA Rule to replace NASD IM–1000–3, which provided that the failure of any member to register an employee, who should be so registered, as a Registered Representative may be deemed to be conduct inconsistent with just and equitable principles of trade. FINRA noted that NASD IM–1000–3 was superfluous, since the failure to register a representative was in fact a violation of other FINRA Rules.¹⁰ Accordingly, FINRA likewise does not propose to adopt a new CAB Rule to replace NASD IM–1000–3.

FINRA Rule 1210 (Registration Requirements) consolidated and streamlined NASD Rules 1021(a) and 1031(a) with regard to the registration requirements for principals and representatives, subject to a number of changes.

FINRA Rule 1210 provides that each person engaged in the investment banking or securities business must register with FINRA as a representative or principal in each category of registration appropriate to his or her functions and responsibilities as specified in FINRA Rule 1220 (Registration Categories), unless exempt from registration pursuant to FINRA Rule 1230 (Associated Persons Exempt from Registration). Rule 1230 also provides that such a person is not qualified to function in any registered capacity other than that for which the person is registered. This latter provision consolidated similar provisions in the registration categories under the NASD rules.¹¹

FINRA Rule 1210 also includes multiple Supplementary Materials that address many of the topics previously addressed in NASD qualification and registration rules, subject to changes intended to modernize and streamline these rules. These topics include:

¹⁰ See Securities Exchange Act Release No. 80371 (April 4, 2017), 82 FR 17336, 17337 (April 10, 2017) (Notice of Filing of File No. SR–FINRA–2017–007).

¹¹ See NASD Rules 1022(a)(6), (b)(3), (c)(4), (d)(2), (e)(3) and (f)(4), and NASD Rules 1032 (b)(2), (c)(2), (d)(3), (e)(2), (f)(3), (g)(2), (h)(3) and (i)(4).

⁸ See *Regulatory Notice* 17–30 (October 2017).

⁹ Because the Consolidated Rule Filing did not delete NASD Rule 1090 (Foreign Members), CAB Rule 119 will continue to subject CABs to that rule. However, the title of CAB Rule 119 will be shortened to "Foreign Members."

- Minimum Number of Registered Persons;¹²
- Permissive Registrations;¹³
- Qualification Examinations and Waivers of Examinations;¹⁴
- Requirements for Registered Persons Functioning as Principals for a Limited Period;¹⁵
- Rules of Conduct for Taking Examinations and Confidentiality of Examinations;¹⁶
- Waiting Periods for Retaking a Failed Examination;¹⁷
- Satisfaction of the Regulatory Element of Continuing Education;¹⁸
- Lapse of Registration and Expiration of the Securities Industry Essentials Qualification Examination;¹⁹
- Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Member;²⁰
- Status of Persons Serving in the Armed Forces of the United States;²¹ and
- Impermissible Registrations.²²

A more detailed discussion of these provisions can be found in *Regulatory Notice* 17–30 (October 2017).²³

CAB Rules 122 and 123

CAB Rule 122 (Qualification Examinations) currently subjects CABs to NASD Rule 1070 (Qualification Examinations and Waiver of Requirements) and NASD Rule 1080 (Confidentiality of Examinations). CAB Rule 123 (Categories of Registration) subjects CABs to NASD Rule 1022 (Categories of Principal Registration), NASD Rule 1032 (Categories of Representative Registration), and paragraph (b)(6) (Operations Professional) of FINRA Rule 1230 (Registration Categories). The Consolidated Rule Filing deleted NASD Rules 1022 and 1032 and paragraph (b)(6) of FINRA Rule 1230 as of October 1, 2018.

As of October 1, 2018 FINRA Rule 1220 (Registration Categories) largely governs the substance of these rules, subject to a number of changes.

Accordingly, FINRA proposes to eliminate the references to these NASD Rules and FINRA Rule 1230(b)(6) in CAB Rules 122 and 123, and to combine current CAB Rules 122 and 123 into a single CAB Rule 122 (Registration Categories), which will provide that all CABs are subject to FINRA Rule 1220.

FINRA Rule 1220 integrates the various registration categories under the NASD rules into a single rule, subject to a number of changes. Rule 1220 sets forth the definitions of “principal” and “representative,” as well as the qualification and registration requirements for principals and representatives. The rule also addresses:

- Foreign Registrations;²⁴
- Additional Qualification Requirements for Persons Engaged in Securities Futures Activities;²⁵
- Members with One Registered Options Principal;²⁶
- Scope of General Securities Sales Supervisor Registration Category;²⁷
- Scope of Operations Professional Requirement;²⁸ and
- Eliminated Registration Categories.²⁹

A more detailed discussion of these provisions can be found in *Regulatory Notice* 17–30.³⁰

FINRA Rule 1220 includes grandfathering provisions that provide that, subject to the lapse of registration provisions in FINRA Rule 1210.08, individuals who are registered with FINRA in specified registration categories on October 1, 2018 and individuals who had been registered in such categories in the past two years prior to October 1, 2018 are qualified to register in the corresponding registration categories without having to take any additional examinations.³¹ These registration categories include many categories that associated persons of CABs may hold as of October 1, 2018 such as General Securities Principal (Series 24), General Securities Representative (Series 7), Operations Professional (Series 99), Investment Banking Representative (Series 79), Direct Participations Programs Representative (Series 22), and Private Securities Offerings Representative (Series 82).

²⁴ See FINRA Rule 1220.01.

²⁵ See FINRA Rule 1220.02.

²⁶ See FINRA Rule 1220.03.

²⁷ See FINRA Rule 1220.04.

²⁸ See Supplementary Material 1220.05.

²⁹ See Supplementary Material 1220.06.

³⁰ See also Securities Exchange Act Releases No. 80371 and 81098, *supra* note 23.

³¹ See FINRA Rules 1220 (a)(2), (a)(3), (a)(5), (a)(6), (a)(8), (a)(9), (a)(13), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), (b)(8), and (b)(9).

FINRA Rule 1220 eliminated a number of registration categories, including the Corporate Securities Representative category (Series 62), which some CAB associated persons may possess. However, under FINRA Rule 1220.06, any person registered in one of these eliminated categories on October 1, 2018 and any person who was registered with FINRA in such categories within two years prior to October 1, 2018 is eligible to maintain such registrations with FINRA. If such a person subsequently terminates his or her registration with FINRA and the registration remains terminated for two or more years, he or she will not be eligible to re-register in such categories.

Principal Financial Officer and Principal Operations Officer Categories

Among other changes, as of October 1, 2018 all firms are required to designate: (1) A Principal Financial Officer (“PFO”) with primary responsibility for financial filings and the related books and records; and (2) a Principal Operations Officer (“POO”) with primary responsibility for the day-to-day operations of the business.³² This requirement, among other things, replaced the requirement that FINRA members designate a Chief Financial Officer. The requirement to designate such individuals applies to all firms. Firms, such as CABs, that neither self-clear nor provide clearing services may designate the same person as the PFO, POO, FinOp or Introducing FinOp.

New Registration Categories

FINRA Rule 1220 establishes three new principal registration categories: Compliance Officer, Investment Banking Principal and Private Securities Offering Principal. Of particular importance to CABs are the latter two principal registration categories, since they apply in part to the permissible activities of CABs.

Compliance Officer Requirement

Beginning on October 1, 2018 and subject to an exception discussed below, each person designated as a Chief Compliance Officer (“CCO”) on Schedule A of Form BD is required to register with FINRA as a Compliance Officer. Individuals can qualify as Compliance Officers in several ways. An individual who is designated as CCO on Schedule A of Form BD of a member and who was registered with FINRA as an General Securities Representative (Series 7) and a General Securities Principal (Series 4) prior to October 1, 2018 and who continued to maintain

³² See FINRA Rule 1220(a)(4)(B).

¹² See FINRA Rule 1210.01.

¹³ See FINRA Rule 1210.02.

¹⁴ See FINRA Rule 1210.03.

¹⁵ See FINRA Rule 1210.04.

¹⁶ See FINRA Rule 1210.05.

¹⁷ See FINRA Rule 1210.06.

¹⁸ See FINRA Rule 1210.07.

¹⁹ See FINRA Rule 1210.08.

²⁰ See FINRA Rule 1210.09.

²¹ See FINRA Rule 1210.10.

²² See FINRA Rule 1210.11.

²³ See also Securities Exchange Act Release No. 80371 (April 4, 2017), 82 FR 17336 (April 10, 2017) (Notice of Filing of File No. SR-FINRA-2017-007), and Securities Exchange Act Release No. 81098 (July 7, 2017), 82 FR 32419 (July 13, 2017) (Order Approving File No. SR-FINRA-2017-007).

the CCO designation and Series 7 and Series 24 registrations on October 1, 2018 was automatically granted a Compliance Officer registration on October 1, 2018.

Further, other individuals who were registered with FINRA as a General Securities Representative and a General Securities Principal prior to October 1, 2018 and who continued to maintain those registrations on October 1, 2018 are qualified to register as Compliance Officers without having to take any additional examinations. Similarly, an individual who was registered as a Compliance Official (Series 14) in the CRD system prior to October 1, 2018 and who continued to maintain that registration on or after October 1, 2018 is qualified to register as a Compliance Officer without having to take any additional examinations.

In addition, individuals whose registrations as a General Securities Representative and a General Securities Principal were terminated between October 1, 2016 and September 30, 2018 are qualified to register as Compliance Officers without having to take any additional examinations, provided they register as Compliance Officers within two years from the date of terminating those registrations. An individual designated as a CCO on Schedule A of Form BD of a member that is engaged in limited investment banking or securities business may be registered in a principal category under FINRA Rule 1220 that corresponds to the limited scope of the member's business, rather than registering as a Compliance Officer. All other individuals registering as Compliance Officers on or after October 1, 2018 are required to: (1) Satisfy the General Securities Representative prerequisite registration, including passing the SIE, and passing the General Securities Principal qualification examination; or (2) pass the Compliance Official qualification examination.

Investment Banking Principal

Effective October 1, 2018 principals responsible for supervising specified investment banking activities are required to register as Investment Banking Principals.³³ These activities include:

(i) Advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings; or

(ii) advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.³⁴

Because CABs may engage in many of these activities (subject to the conditions described in CAB Rule 016(c)), if approved, CAB Rule 122 will require CABs that engage in these activities to have an Investment Banking Principal. Individuals who were registered with FINRA as an Investment Banking Representative (Series 79) and a General Securities Principal (Series 24) prior to October 1, 2018 and who continued to maintain those registrations on October 1, 2018 were automatically granted an Investment Banking Principal registration on October 1, 2018.

Further, an individual whose registrations as an Investment Banking Representative and a General Securities Principal were terminated between October 1, 2016 and September 30, 2018 is qualified to register as an Investment Banking Principal without having to take any additional examinations, provided he or she registers as an Investment Banking Principal within two years from the date of terminating those registrations. All other individuals registering as Investment Banking Principals on or after October 1, 2018 are required to satisfy the Investment Banking Representative prerequisite registration, including passing the SIE, and passing the General Securities Principal qualification examination.

Private Securities Offering Principal

Also effective October 1, 2018 principals solely responsible for supervising specified activities related to private securities offerings may register as Private Securities Offerings Principals, instead of registering as a General Securities Principal.³⁵ These activities are limited to effecting sales as part of a primary offering of securities not involving a public offering, pursuant to Sections 3(b), (4)(2) or 4(6) of the Securities Act of 1933 and the Securities Act rules and regulations, provided that such person shall not effect sales of municipal or government securities, or equity interests in or the debt of direct participation programs.³⁶

Individuals can qualify for registration as a Private Securities Offerings Principal in several ways. An

individual who was registered as a Private Securities Offerings Representative (Series 82) and a General Securities Principal prior to October 1, 2018 and who continued to maintain those registrations on October 1, 2018 was automatically granted a Private Securities Offerings Principal registration on October 1, 2018.

Further, an individual whose registrations as a Private Securities Offerings Representative and a General Securities Principal were terminated between October 1, 2016 and September 30, 2018 is qualified to register as a Private Securities Offerings Principal without having to take any additional examinations, provided he or she registers as a Private Securities Offerings Principal within two years from the date of terminating those registrations. All other individuals registering as Private Securities Offerings Principals on or after October 1, 2018 are required to satisfy the Private Securities Offerings Representative prerequisite registration, including passing the SIE, and passing the General Securities Principal qualification examination.

Because CABs may engage in these activities (subject to the conditions described in CAB Rule 016(c)), if approved, CAB Rule 122 may require CABs that engage in these activities to have a Private Securities Offerings Principal as described above.

CAB Rule 124

CAB Rule 124 provides that all CABs are subject to NASD Rule 1060 (Persons Exempt from Registration). As of October 1, 2018 the Consolidated Rule Filing deleted NASD Rule 1060, and adopted in its place FINRA Rule 1230 (Associated Persons Exempt from Registration). New FINRA Rule 1230 modified the provisions of NASD 1060 in certain respects. For example, NASD Rule 1060(a) exempted from registration those associated persons who are not actively engaged in the investment banking and securities business, and persons whose activities are related solely and exclusively to a member's need for corporate officers or for capital participation. FINRA believes that the determination of whether an associated person is required to register must be based on an analysis of the person's activities and functions in the context of the various registration categories. The exemptions for persons who are not "actively engaged" in the securities business or whose functions are related solely to the need for corporate officers, are not consistent with this analytical framework. Therefore, FINRA has deleted these exemptions.

³⁴ See FINRA Rule 1220(b)(5)(A).

³⁵ See FINRA Rule 1220(a)(13) (Private Securities Offerings Principal).

³⁶ See FINRA Rule 1220(b)(9)(A).

³³ See FINRA Rule 1220(a)(5).

Accordingly, FINRA proposes to eliminate the reference to NASD Rule 1060 and to provide that all CABs are subject to FINRA Rule 1230. In addition, because FINRA proposes to combine current CAB Rules 122 and 123 as new CAB Rule 122, and because the rule subjects CABs to FINRA Rule 1230, FINRA proposes to renumber CAB Rule 124 as CAB Rule 123. FINRA also proposes to name CAB Rule 123 “Associated Persons Exempt from Registration.”

CAB Rule 125

CAB Rule 125 provides that all CABs are subject to FINRA Rule 1250 (Continuing Education Requirements). The Consolidated Rule Filing made amendments to FINRA Rule 1250 and renumbered the revised rule as FINRA Rule 1240. Accordingly, FINRA proposes to amend CAB Rule 125 to provide that all CABs are subject to FINRA Rule 1240. Because the rule subjects CABs to FINRA Rule 1240, FINRA proposes to renumber CAB Rule 125 as CAB Rule 124.

D. Rulemaking Process

FINRA undertook an extensive and comprehensive rulemaking process in eliminating the NASD Rules governing qualification and registration requirements and adopting new revised FINRA Rules governing these areas. As part of the process of developing the Consolidated Rules, FINRA published *Regulatory Notice* 09–70 (December 2009), seeking comment on a set of proposed consolidated registration rules. Commenters on this *Notice* were concerned with the complexity and operational and cost burden of the proposal, and FINRA staff engaged in discussions with SEC staff regarding the impact of the proposal.

As a result, FINRA substantially revised the proposal as published in *Regulatory Notice* 09–70. In addition, in May 2015 FINRA published *Regulatory Notice* 15–20, seeking comment on a proposal to restructure the representative-level qualification examinations. FINRA filed a revised version of the proposal (SR–FINRA–2017–007) with the SEC in March 2017 which included the restructuring proposal. The SEC published the revised proposal for comment in April 2017³⁷ and received 18 comment letters in response to the proposal. FINRA revised the proposal further in response to these comment letters, and the SEC

approved the proposal in July 2017.³⁸ Further, the Consolidated Rules apply to associated persons of all FINRA members and ensure that such individuals attain and maintain specified levels of competence and knowledge pertinent to their function. FINRA did not exclude any specific category of FINRA members, such as CABs, from the proposal.

Accordingly, FINRA believes that all members, including CABs, have had opportunities to comment on the Consolidated Rules. Additionally, as discussed above, FINRA believes that associated persons of CABs should be subject to the same qualification and registration requirements as associated persons of non-CAB members.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of filing, so FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,³⁹ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and section 15A(g)(3) of the Act,⁴⁰ which authorizes FINRA to prescribe standards of training, experience and competence for persons associated with FINRA members.

As discussed above, the Consolidated Rule Filing either deleted, or revised and renumbered, the former FINRA qualification, registration, and continuing education rules. Thus, the current CAB qualification, registration and continuing education rules largely cross-reference former FINRA rules that no longer exist. In order to implement the current CAB rules’ purpose, the references to former FINRA rules suggest that they are intended to now refer to the relevant Consolidated Rules, since any other interpretation would defeat the rules’ purposes. FINRA believes that the proposal will confirm that the qualification, registration and continuing education rules that apply to CABs are the same as the rules that

apply to firms that have not elected CAB status.

B. Self-Regulatory Organization’s Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change will align the qualification, registration and continuing education rules that apply to CABs with the rules that apply industry-wide and to firms that have not elected CAB status. FINRA notes that CABs have unique features that could render certain provisions of the new registration rules more relevant to them than other provisions.⁴¹ For example, the Investment Banking Principal and Private Securities Offering Principal registration categories are relevant to the activities of CABs, and, as a result, economic impacts associated with these registration categories would be directly applicable to CABs.

When conducting the Economic Impact Assessment (EIA) for the Consolidated Rules,⁴² FINRA evaluated and discussed the economic impact to all firms, including CABs. Thus, FINRA believes that interested parties can look to the EIA as presented in the Consolidated Rule Filing as representing fairly the economic impact that CABs would experience under the proposed rule. While CABs have unique features and are subject to a separate rule set, CABs have been and will continue to be subject to registration, qualification and continuing education requirements that mirror those that apply to members that have not elected CAB status.

⁴¹ FINRA examined the registration history of individuals associated with both CABs and non-CAB firms during the period January–November 2018. Based on this analysis, FINRA determined that there were 839 registration series held by persons associated with CAB firms, versus 1,000,220 registration series held by persons associated with non-CAB firms. Thus, the number of series held by persons associated with CAB firms reflects less than 0.1% of those held by persons associated with non-CAB firms. However, compared to the non-CAB associated persons’ registration series, there was an over representation of Series 79 registrations (10 times more for the CAB population), and an under representation of Series 6 registrations (20 times less) held by CABs’ associated persons. Moreover, CABs’ associated persons, held no Series 11, 17, 37, 38, 42, 57, and 72 registrations.

⁴² See Securities Exchange Act Release No. 81098, *supra* note 7. Although the Consolidated Rule Filing did not specifically reference CABs in its Economic Impact Assessment, the data used in the analysis encompassed both CABs and non-CAB firms.

³⁷ See Securities Exchange Act Release No. 80371, *supra* note 10.

³⁸ See Securities Exchange Act Release No. 81098, *supra* note 7.

³⁹ 15 U.S.C. 78o–3(b)(6).

⁴⁰ 15 U.S.C. 78o–3(g)(3).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁴³ and Rule 19b-4(f)(6) thereunder.⁴⁴

A proposed rule change filed under Rule 19b-4(f)(6)⁹ normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. FINRA states that such waiver will help align the qualification, registration, and continuing education rules that apply to CABs, with the rules that apply industry-wide, and to firms that have not elected CAB status. Additionally, by cross referencing rules that are currently in effect, rather than rules that have been eliminated, moved, or renumbered, FINRA states the proposed rule change will further the goal of maintaining regulatory consistency and having rules that function as intended. Because the proposed rule change corrects cross-references that became inaccurate, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and, therefore, the Commission designates the proposed

rule change to be operative upon filing.⁴⁵

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-FINRA-2019-006 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-FINRA-2019-006. 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

⁴⁵ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2019-006 and should be submitted on or before April 22, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁶

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019-06180 Filed 3-29-19; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15894 and #15895; California Disaster Number CA-00298]

Administrative Declaration of a Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of California dated 03/21/2019.

Incident: Winter Storms and Flooding.

Incident Period: 02/25/2019 and continuing.

DATES: Issued on 03/21/2019.

Physical Loan Application Deadline Date: 05/20/2019.

Economic Injury (EIDL) Loan Application Deadline Date: 12/23/2019.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations. The following areas have been determined to be adversely affected by the disaster:

⁴⁶ 17 CFR 200.30-3(a)(12).

⁴³ 15 U.S.C. 78s(b)(3)(A).

⁴⁴ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires FINRA to give the Commission written notice of FINRA's intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

⁹ 17 CFR 240.19b-4(f)(6).

¹⁰ 17 CFR 240.19b-4(f)(6)(iii).

Primary Counties: Sonoma.
Contiguous Counties: California: Lake, Mendocino, Solano, Marin, Napa.
 The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Homeowners with Credit Available Elsewhere	4.125
Homeowners without Credit Available Elsewhere	2.063
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere ...	2.750
Non-Profit Organizations without Credit Available Elsewhere	2.750
<i>For Economic Injury:</i>	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 15894 6 and for economic injury is 15895 0.

The State which received an EIDL Declaration # is California.

(Catalog of Federal Domestic Assistance Number 59008)

Dated: March 21, 2019.

Linda E. McMahon,
 Administrator.

[FR Doc. 2019-06262 Filed 3-29-19; 8:45 am]

BILLING CODE 8025-01-P

TENNESSEE VALLEY AUTHORITY

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: 60-Day notice of submission of information collection approval and request for comments.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. The Tennessee Valley Authority is soliciting public comments on this proposed collection.

DATES: Comments should be sent to the Senior Privacy Program Manager no later than May 31, 2019.

ADDRESSES: Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Senior Privacy Program Manager:

Christopher A. Marsalis, Tennessee Valley Authority, 400 W Summit Hill Dr. (WT 5D), Knoxville, Tennessee 37902-1401; telephone (865) 632-2467 or by email at camarsalis@tva.gov.

SUPPLEMENTARY INFORMATION:

Type of Request: Reinstatement of a previously approved collection for which approval has expired.

Title of Information Collection: Land Use Survey Questionnaire—Vicinity of Nuclear Power Plants.

OMB Approval Number: 3316-0016.

Frequency of Use: Annual.

Type of Affected Public: Individuals or households, farms and business and other for-profit.

Small Businesses or Organizations

Affected: Yes.

Federal Budget Functional Category Code: 271.

Estimated Number of Annual

Responses: 150.

Estimated Total Annual Burden

Hours: 75.

Estimated Average Burden Hours per Response: .5.

Need For and Use of Information:

This survey is used to locate, for monitoring purposes, rural residents, home gardens, and milk animals within a five mile radius of a nuclear power plant. The monitoring program is a mandatory requirement of the Nuclear Regulatory Commission set out in the technical specifications when the plants were licensed.

Andrea S. Brackett,

Director, TVA Cybersecurity.

[FR Doc. 2019-06205 Filed 3-29-19; 8:45 am]

BILLING CODE 8120-08-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2019-0028]

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 nine 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 May 1, 2019.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA-2019-0028 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-2019-0028), 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–2019–0028, 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–2019–0028, 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 nine 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

Darcy D. Baker

Mr. Baker is a 47-year-old driver in Ohio. He has a history of a seizure disorder and has been seizure free since October 2007. He takes anti-seizure medication with the dosage and frequency remaining the same since May 2008. His physician states that he is supportive of Mr. Baker receiving an exemption.

Kenneth R. Boglia

Mr. Boglia is a 40-year-old class C driver in North Carolina. He has a history of partial seizures and has been seizure free since 2010. He takes anti-

¹ See http://www.ecfr.gov/cgi-bin/text-idx?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=p149.5.391&rgn=div5#ap49.5.391_171.a and <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

seizure medication with the dosage and frequency remaining the same since August 2010. His physician states that he is supportive of Mr. Boglia receiving an exemption.

David Consiglio

Mr. Consiglio is a 30-year-old class D CDL holder in New York. He has a history of epilepsy and has been seizure free since 2009. He takes anti-seizure medication with the dosage and frequency remaining the same since August 2011. His physician states that he is supportive of Mr. Consiglio receiving an exemption.

Gary Cox

Mr. Cox is a 45-year-old class A CDL holder in Oregon. He has a history of seizure disorder and has been seizure free since 1999. He takes anti-seizure medication with the dosage and frequency remaining the same since 1999. His physician states that he is supportive of Mr. Cox receiving an exemption.

Jim A. Hughes

Mr. Hughes is a 49-year-old driver in Washington. He has a history of a seizure disorder and has been seizure free since 1999. He takes anti-seizure medication with the dosage and frequency remaining the same since 1990. His physician states that he is supportive of Mr. Hughes receiving an exemption.

Brent L. Mapes

Mr. Mapes is a 53-year-old class AM CDL holder in Illinois. He has a history of epilepsy and has been seizure free since 1999. He takes anti-seizure medication with the dosage and frequency remaining the same since 1999. His physician states that he is supportive of Mr. Mapes receiving an exemption.

Enrico G. Mucci

Mr. Mucci is a 21-year-old driver in Pennsylvania. He has a history of a seizure disorder and has been seizure free since December 2010. He takes anti-seizure medication with the dosage and frequency remaining the same since December 2010. His physician states that he is supportive of Mr. Mucci receiving an exemption.

Charles R. Skelton

Mr. Skelton is a 52-year-old class DM driver in Alabama. He has a history of complex partial seizures and has been seizure free since 2006. He takes anti-seizure medication with the dosage and frequency remaining the same since 2016. His physician states that he is

supportive of Mr. Skelton receiving an exemption.

Rick E. Stookey

Mr. Stookey is a 68-year-old driver in Colorado. He has a history of complex partial seizures and has been seizure free since 1979. He takes anti-seizure medication with the dosage and frequency remaining the same since 1980. His physician states that she is supportive of Mr. Stookey 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: March 22, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-06245 Filed 3-29-19; 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 final disposition.

SUMMARY: FMCSA announces its decision to exempt 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 operate CMVs in interstate commerce.

DATES: The exemptions were applicable on March 15, 2019. The exemptions expire on March 15, 2021.

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-2018-0058, 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.

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 February 6, 2019, FMCSA published a notice announcing receipt of applications from three individuals requesting an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) and requested comments from the public (84 FR 2319). The public comment period ended on March 8, 2019, and no 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)(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 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 no comments in this proceeding.

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 discussed in the February 6, 2019 **Federal Register** notice (84 FR 2319) and will not be repeated in this notice.

These three applicants have been seizure-free over a range of 13 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 three 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: Christopher M. Dowling (IN); Robert Drake (AZ); Daniel H. Threatt (NC).

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: March 22, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019-06243 Filed 3-29-19; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2010-0203; FMCSA-2016-0011; FMCSA-2016-0313]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

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 nine 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 February 3, 2019. The exemptions expire on February 3, 2021. Comments must be received on or before May 1, 2019.

¹ See http://www.ecfr.gov/cgi-bin/text-idx?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391_171.a and <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2010–0203; FMCSA–2016–0011; FMCSA–2016–0313 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–2010–0203; FMCSA–2016–0011; FMCSA–2016–0313), 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 numbers, FMCSA–2010–0203; FMCSA–2016–0011; FMCSA–2016–0313, 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–2010–0203; FMCSA–2016–0011; FMCSA–2016–0313, 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 up to five years 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 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.]

The nine individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8), 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

In accordance with 49 U.S.C. 31136(e) and 31315, each of the nine applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The nine drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous two-year exemption period. In addition, for Commercial Driver’s License (CDL) holders, the Commercial Driver’s License Information System (CDLIS) and the Motor Carrier Management Information System (MCMIS) are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver’s Licensing Agency (SDLA). These factors provide an adequate basis for predicting each driver’s ability to continue to safely operate a CMV 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.

As of February 3, 2019, 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 epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Ryan Babler (WI)
James Connelly (NJ)
Ricky Conway, Jr. (MO)
Bradley Hollister (PA)
Henrietta Ketcham (NY)
Michael Merial (NY)
Elvin P. Morgan (CA)
Larry Nicholson (NC)
Daniel Zielinski (OR)

The drivers were included in docket numbers FMCSA–2010–0203; FMCSA–2016–0011; FMCSA–2016–0313. Their exemptions are applicable as of February 3, 2019 and will expire on February 3, 2021.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (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. 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.

VII. Conclusion

Based on its evaluation of the nine exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). 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: March 22, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019–06244 Filed 3–29–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. DOT–NHTSA–2018–0001]

Reports, Forms, and Record Keeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on April 11, 2018. No comments were received.

DATES: Comments must be submitted on or before May 1, 2019.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: LeErnest Wells, Program Support Division, Office of Defect Investigation (NEF–110), (202) 366–9717, National Highway Traffic Safety Administration, Department of Transportation, 1200 New Jersey Avenue SE, W43–481, Washington, DC 20590. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION:

Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to

OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation at 5 CFR 1320.8(d), an agency must ask for public comment on the following:

(i) 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;

(ii) 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;

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

Title of Collection: Record Retention.

OMB Control Number: 2127–0042.

Type of Request: Renewal of a currently approved information collection.

Abstract: Under 49 U.S.C. 30166(e), NHTSA “reasonably may require a manufacturer of a motor vehicle or motor vehicle equipment to keep records, and a manufacturer, distributor or dealer to make reports, to enable NHTSA to decide whether the manufacturer, distributor, or dealer has complied or is complying with this chapter or a regulation prescribed under this chapter.” To ensure that NHTSA will have access to this type of information, the agency exercised the authority granted in 49 U.S.C. 30166(e) and promulgated 49 CFR part 576 Record Retention, initially published on August 20, 1974 and most recently amended on July 10, 2002 (67 FR 45873), requiring manufacturers to retain one copy of all records that contain information concerning malfunctions that may be related to motor vehicle safety for a period of five calendar years after the record is generated or acquired by the manufacturer. Manufacturers are also required to retain for ten years (five

years for manufacturers of child seats and tires) the underlying records related to early warning reporting (EWR) information submitted under 49 CFR part 579. The information collected supports NHTSA's goal of improving highway safety.

The total burden hours for this estimate consist of:

(1) Approximately 1,000 manufacturers of vehicles and equipment (including tires, child restraint systems and trailers) are required to maintain records.

(2) We estimate their burden at 40 hours each for a subtotal of 40,000 hours (1,000 respondents × 40 hours).

(3) In addition, we estimate that an additional 20 equipment manufacturers have record retention requirements imposed by Part 576, limited to the submission of death reports. Based on recent year's counts of death reports received by NHTSA, we estimate that it will take one hour each to maintain the necessary records for a subtotal burden of 20 hours (20 respondents × one hour).

Accordingly, the estimate of total annual burden hours is 40,020 hours (1,000 respondents × 40 hours + 20 respondents × 1 hour).

NHTSA estimates that the hourly cost associated with the burden hours of 40,020 is approximately \$20 per hour, consisting of both computer time and clerical time. Accordingly, the agency estimates that the total annual costs associated with the burden hours is \$800,400 (40,020 annual burden hours × \$20 per hour).

Affected Public: Manufacturers.

Estimated Number of Respondents: 1,020.

Frequency: As needed.

Number of Responses: 1,020.

Estimated Total Annual Burden Hours: 40,020.

Estimated Total Annual Burden Cost: \$800,400.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, *as amended*; and 49 CFR 1.48.

Stephen A. Ridella,

Director, Office of Defects Investigation.

[FR Doc. 2019-06271 Filed 3-29-19; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

Department of Transportation Advisory Committee on Human Trafficking; Notice of Public Meeting

AGENCY: Office of the Secretary of Transportation, Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the Department of Transportation Advisory Committee on Human Trafficking.

DATES: The meeting will be held on May 16, 2019, from 10:00 a.m. to 4:45 p.m. EDT.

ADDRESSES: The meeting will be held at the U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Individuals wishing for audio participation and any person requiring accessibility accommodations should contact the Official listed in the next section.

FOR FURTHER INFORMATION CONTACT: Nicole L. Bambas, Senior Advisor, Office of International Transportation and Trade, U.S. Department of Transportation, at trafficking@dot.gov or (202) 366-5058. Also visit the ACHT internet website at <https://www.transportation.gov/stophumantrafficking/acht>.

SUPPLEMENTARY INFORMATION:

I. Background

The Advisory Committee on Human Trafficking (ACHT) was created in accordance with Section 5 of the *Combating Human Trafficking in Commercial Vehicles Act* (Pub. L. 115-99) to make recommendations to the Secretary of Transportation on actions the Department can take to help combat human trafficking, and to develop recommended best practices for States and State and local transportation stakeholders in combatting human trafficking.

II. Agenda

At the May 16, 2019, meeting, the agenda will cover the following topics:

- Welcome

- Final Report Draft Review
- Public Participation
- Next Steps and Closing

A final agenda will be posted on the ACHT internet website at <https://www.transportation.gov/stophumantrafficking/acht> at least one week in advance of the meeting.

III. Public Participation

The meeting will be open to the public on a first-come, first served basis, as space is limited. Members of the public who wish to attend in-person are asked to register via email by submitting their name and affiliation to trafficking@dot.gov by May 2, 2019. Individuals requesting accessibility accommodations, such as sign language, interpretation, or other ancillary aids, may do so via email at: trafficking@dot.gov by May 2, 2019.

There will be 30 minutes allotted for oral comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the Office of the Secretary may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks by 5:00 p.m. EDT on May 2, 2019, for inclusion in the meeting records and for circulation to ACHT members. All prepared remarks submitted on time will be accepted and considered as part of the record.

Persons who wish to submit written comments for consideration by ACHT during the meeting must submit them no later than 5:00 p.m. EDT on May 2, 2019, to ensure transmission to ACHT members prior to the meeting. Comments received after that date and time will be distributed to the members but may not be reviewed prior to the meeting.

Copies of the meeting minutes will be available on the ACHT internet website at <https://www.transportation.gov/stophumantrafficking/acht>.

* * * * *

Dated: March 19, 2019.

Joel Szabat,

Assistant Secretary, Aviation and International Affairs.

[FR Doc. 2019-06242 Filed 3-29-19; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF THE TREASURY**Office of the Comptroller of the Currency****Agency Information Collection Activities: Information Collection Revision; Comment Request; Municipal Securities Dealers and Government Securities Brokers and Dealers—Registration and Withdrawal**

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a revised information collection, as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning the revision of its information collection titled, “Municipal Securities Dealers and Government Securities Brokers and Dealers—Registration and Withdrawal.”

DATES: You should submit written comments by May 31, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* prainfo@occ.treas.gov.
- *Mail:* Chief Counsel’s Office, Office of the Comptroller of the Currency, Attention: 1557–0184, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include “OCC” as the agency name and 1557–0184, in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider

confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection¹ by any of the following methods:

- *Viewing Comments Electronically:* Go to www.reginfo.gov. Click on the “Information Collection Review” tab. Underneath the “Currently under Review” section heading, from the drop-down menu select “Department of Treasury” and then click “submit.” This information collection can be located by searching by OMB control number 1557–0184, or “Municipal Securities Dealers and Government Securities Brokers and Dealers—Registration and Withdrawal.” Upon finding the appropriate information collection, click on the related “ICR Reference Number.” On the next screen, select “View Supporting Statement and Other Documents” and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482–7340.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel’s Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA, federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency of information by means of identical questions posed to, or identical reporting, recordkeeping, or

¹ Following the close of the 60-day comment period for this notice, the OCC will publish a notice for 30 days of comment for this collection.

disclosure requirements imposed on, ten or more persons. Section 3506(c)(2)(A) of title 44 requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or revision of an existing collection of information, before submitting the collection to OMB for approval. In compliance with the PRA, the OCC is publishing notice of the proposed revision of the collection of information set forth in this document.

Title: Municipal Securities Dealers and Government Securities Brokers and Dealers—Registration and Withdrawal.

OMB Control No.: 1557–0184.

Form Numbers: MSD, MSDW,² MSD–4, MSD–5, G–FIN, G–FINW, GFIN–4 and GFIN–5.³

Abstract: This information collection is required to satisfy the requirements of section 15B⁴ and section 15C⁵ of the Securities Exchange Act of 1934, which require, in part, any national bank or federal savings association that acts as a government securities broker/dealer or a municipal securities dealer to file the appropriate form with the OCC to inform the agency of its broker/dealer activities. The OCC uses this information to determine which national banks and federal savings associations are acting as government securities broker/dealers and municipal securities dealers and to monitor entry into and exit from these activities by institutions and registered persons. The OCC also uses the information in planning national bank and federal savings association examinations.

The OCC proposes to revise Form MSD–4 and Form MSD–5 to: (1) Remove the date of birth and place of birth items from the “Personal History of the Applicant” section of the Form MSD–4 report form and instructions; and (2) include the OCC’s Privacy Act notice on the respective Form MSD–4 and Form MSD–5. The proposed revisions would be effective June 1, 2019.

The date of birth and place of birth data fields are considered personally identifiable information (PII), and the OCC generally does not need these fields in order to perform their

² The Securities and Exchange Commission (SEC) maintains collections for the MSD and MSDW under OMB Control Nos. 3235–0083 and 3235–0087; however, there is a requirement that these be filed with the OCC, which is covered by OMB Control No. 1557–0184.

³ The Department of the Treasury maintains collections for the G–FIN–4 and G–FIN–5 under OMB Control No. 1535–0089; however, there is a requirement that the forms be filed with the OCC, which is covered by OMB Control No. 1557–0184.

⁴ 15 U.S.C. 78o–4.

⁵ 15 U.S.C. 78o–5.

supervisory responsibilities regarding applications to become municipal securities principals or representatives but could obtain this information on a case-by-case basis when needed. The OCC is making an effort to remove PII from its supervisory reports if that PII is not critical to fulfilling its supervisory responsibilities.

The OCC also proposes to include its Privacy Act notice on the forms. The Privacy Act governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies. A system of records is a group of records under the control of the agency from which information about individuals is retrieved by name of the individual or some identifier assigned to the individual. Under the Privacy Act, an agency that maintains a system of records must provide notice to individuals, at the point of collection of information maintained in the system of records, of: (1) The authority which authorizes the collection and whether the collection is mandatory or voluntary; (2) the purpose of the collection; (3) the routine uses which may be made of the information; and (4) the effects of not disclosing the information.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit; individuals. *Estimated Number of Respondents:* 17 (6 government securities dealers and 11 municipal and government securities dealers).

Estimated Number of Responses: 672.

Frequency of Response: On occasion.

Estimated Annual Burden: 587 burden hours.

Comments submitted in response to this notice will be summarized, included in the request for OMB approval, and become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Dated: March 25, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019-06155 Filed 3-29-19; 8:45 am]

BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Funding and Liquidity Risk Management

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning renewal of its information collection titled "Funding and Liquidity Risk Management." The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by May 1, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* prainfo@occ.treas.gov.
- *Mail:* Chief Counsel's Office, Office of the Comptroller of the Currency, Attention: 1557-0244, 400 7th Street SW, Suite 3E-218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E-218, Washington, DC 20219.
- *Fax:* (571) 465-4326.

Instructions: You must include "OCC" as the agency name and "1557-0244" in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal

information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557-0244, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to oir_submission@omb.eop.gov.

You may review comments and other related materials that pertain to this information collection¹ following the close of the 30-day comment period for this notice by any of the following methods:

- *Viewing Comments Electronically:* Go to www.reginfo.gov. Click on the "Information Collection Review" tab. Underneath the "Currently under Review" section heading, from the drop-down menu select "Department of Treasury" and then click "submit." This information collection can be located by searching by OMB control number "1557-0244" or "Funding and Liquidity Risk Management." Upon finding the appropriate information collection, click on the related "ICR Reference Number." On the next screen, select "View Supporting Statement and Other Documents" and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482-7340.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649-5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400

¹ On December 4, 2018, the OCC published a 60-day notice for this information collection, 83 FR 62671.

7th Street SW, suite 3E-218,
Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3520), federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks that OMB extend its approval of this collection.

Title: Funding and Liquidity Risk Management.

OMB Control No.: 1557-0244.

Description: The Interagency Policy Statement on Funding and Liquidity Risk Management² (Policy Statement) summarizes the principles of sound liquidity risk management that the federal banking agencies have issued in the past³ and, where appropriate, harmonizes these principles with the international statement issued by the Basel Committee on Banking Supervision titled "Principles for Sound Liquidity Risk Management and Supervision."⁴ The Policy Statement describes supervisory expectations for all depository institutions including banks, savings associations, and credit unions.

Section 14 of the Policy Statement provides that financial institutions should consider liquidity costs, benefits, and risks in strategic planning and budgeting processes. Significant business activities should be evaluated for liquidity risk exposure as well as profitability. More complex and sophisticated financial institutions should incorporate liquidity costs, benefits, and risks in the internal product pricing, performance measurement, and new product approval process for all material business lines, products, and activities.

² 75 FR 13656 (Mar. 22, 2010).

³ For national banks and federal savings associations, see the *Comptroller's Handbook on Liquidity*. For state member banks and bank holding companies, see the Federal Reserve's *Commercial Bank Examination Manual* (section 4020), *Bank Holding Company Supervision Manual* (section 4010), and *Trading and Capital Markets Activities Manual* (section 2030). For state non-member banks, see the FDIC's *Revised Examination Guidance for Liquidity and Funds Management* (Trans. No. 2002-01) (Nov. 19, 2001), and Financial Institution Letter 84-2008, *Liquidity Risk Management* (August 2008). For federally insured credit unions, see Letter to Credit Unions No. 02-CU-05, Examination Program Liquidity Questionnaire (March 2002).

⁴ Basel Committee on Banking Supervision, "Principles for Sound Liquidity Risk Management and Supervision," September 2008. See www.bis.org/publ/bcbis144.htm. Federally insured credit unions are not directly referenced in the principles issued by the Basel Committee.

Incorporating the cost of liquidity into these functions should align the risk-taking incentives of individual business lines with the liquidity risk exposure their activities create for the institution as a whole. The quantification and attribution of liquidity risks should be explicit and transparent at the line management level and should include consideration of how liquidity would be affected under stressed conditions.

Section 20 of the Policy Statement states that liquidity risk reports should provide aggregate information with sufficient supporting detail to enable management to assess the sensitivity of the institution to changes in market conditions, its own financial performance, and other important risk factors. Institutions also should report on the use and availability of government support, such as lending and guarantee programs, and implications on liquidity positions, particularly since these programs are generally temporary or reserved as a source for contingent funding.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 1,171.

Frequency of Response: On occasion.

Estimated Total Burden Hours: 84,464 hours.

Comments: On December 4, 2018, the OCC issued a notice for 60 days of comment concerning this collection, 83 FR 62671. No comments were received. Comments continue to be solicited on:

(a) Whether the information collections are necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of the services necessary to provide the required information.

Dated: March 25, 2019.

Theodore J. Dowd,
*Deputy Chief Counsel, Office of the
Comptroller of the Currency.*

[FR Doc. 2019-06154 Filed 3-29-19; 8:45 am]

BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Leveraged Lending

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning the renewal of its information collection titled "Leveraged Lending." The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by May 1, 2019.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* prainfo@occ.treas.gov.
- *Mail:* Chief Counsel's Office, Office of the Comptroller of the Currency, Attention: 1557-0315, 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

• *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

• *Fax:* (571) 465-4326.

Instructions: You must include "OCC" as the agency name and "1557-0315" in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557-0315, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to oir_submission@omb.eop.gov.

You may review comments and other related materials that pertain to this information collection¹ following the close of the 30-day comment period for this notice by any of the following methods:

- **Viewing Comments Electronically:** Go to www.reginfo.gov. Click on the "Information Collection Review" tab. Underneath the "Currently under Review" section heading, from the drop-down menu, select "Department of Treasury" and then click "submit." This information collection can be located by searching by OMB control number "1557-0315" or "Leveraged Lending." Upon finding the appropriate information collection, click on the related "ICR Reference Number." On the next screen, select "View Supporting Statement and Other Documents" and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482-7340.

- **Viewing Comments Personally:** You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649-5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

¹ On November 13, 2018, the OCC published a 60-day notice for this information collection.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3520), federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency recommendations, requests, or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks OMB to extend its approval of this collection.

Title: Leveraged Lending.
OMB Control No.: 1557-0315.
Description: On March 22, 2013, the agencies² issued guidance to the financial institutions they supervise³ on how to evaluate and monitor credit risks in leveraged loans, understand the effect of changes in borrowers' enterprise values on credit portfolio quality, and assess the sensitivity of future credit losses to these changes in enterprise values.⁴ In regard to the underwriting of such credits, the guidance provides information for financial institutions to consider in assessing whether borrowers have the ability to repay credits when due and whether borrowers have sustainable capital structures, including bank borrowings and other debt, to support their continued operations through economic cycles. The guidance also provides information to financial institutions on the risks and potential impact of stressful events and circumstances on a borrower's financial condition.

The guidance recommends that financial institutions consider developing: (i) Underwriting policies for leveraged lending, including stress-testing procedures for leveraged credits; (ii) risk management policies, including stress-testing procedures for pipeline exposures; and (iii) policies and procedures for incorporating the results of leveraged credit and pipeline stress tests into the firm's overall stress-testing

² OCC, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation.

³ For the OCC, the term "financial institution" or "institution" includes national banks, federal savings associations, and federal branches and agencies supervised by the OCC.

⁴ 78 FR 17766 (March 22, 2013).

framework. While not requirements, these recommended policies qualify as "collections of information" as defined in the PRA.

Respondents are financial institutions with leveraged lending activities as defined in the guidance that may develop policies recommended in the guidance.

Title: Guidance on Leveraged Lending.

OMB Control No.: 1557-0315.

Frequency of Response: Annual.

Affected Public: Financial institutions with leveraged lending.

Burden Estimates:

Estimated number of respondents: 29.

Estimated total annual burden: 39,162 hours to build; 49,462 hours for ongoing use.

Total estimated annual burden: 88,624 hours.

The OCC issued a notice regarding this collection for 60 days of comment on November 13, 2018, 83 FR 56399. No comments were received. Comments continue to be invited on:

(a) Whether the information collections are necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: March 25, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019-06151 Filed 3-29-19; 8:45 am]

BILLING CODE 4810-33-P



FEDERAL REGISTER

Vol. 84

Monday,

No. 62

April 1, 2019

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska; Proposed Rule

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 217**

[Docket No. 190214112–9112–01]

RIN 0648–BI62

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from Hilcorp Alaska LLC (Hilcorp) for authorization to take marine mammals incidental to oil and gas activities in Cook Inlet, Alaska, over the course of five years (2019–2024). As required by the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take, and requests comments on the proposed regulations. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization, and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than May 1, 2019.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2019–0026, by any of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal, Go to www.regulations.gov/ #!docketDetail;D=NOAA-NMFS-2019-0026, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- *Mail:* Submit comments to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or

otherwise sensitive information submitted voluntarily by the sender may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Sara Young, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-oil-and-gas>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:**Purpose and Need for Regulatory Action**

This proposed rule would establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to Hilcorp’s oil and gas activities in Cook Inlet, Alaska.

We received an application from Hilcorp requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level A and Level B harassment incidental to a variety of sources including: 2D and 3D seismic surveys, geohazard surveys, vibratory sheet pile driving, and drilling of exploratory wells. Please see “Background” below for definitions of harassment.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the least practicable adverse impact on the affected species or stocks and their habitat (see the discussion below in the “Proposed Mitigation” section), as well as monitoring and reporting requirements. Section

101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing five-year regulations, and for any subsequent letters of authorization (LOAs). As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Proposed Rule

Following is a summary of the major provisions of this proposed rule regarding Hilcorp’s activities. These measures include:

- Required monitoring of the ensounded areas to detect the presence of marine mammals before beginning activities;
- Shutdown of activities under certain circumstances to minimize injury of marine mammals;
- Ramp up at the beginning of seismic surveying to allow marine mammals the opportunity to leave the area prior to beginning the survey at full power, as well as power downs, and vessel strike avoidance;
- Ramp up of impact hammering of the drive pipe for the conductor pipe driven from the drill rig; and
- Ceasing noise producing activities within 10 miles (16 km) of the mean higher high water (MHHW) line of the Susitna Delta (Beluga River to the Little Susitna River) between April 15 and October 15.

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on the

affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal. Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

Accordingly, NMFS is preparing an Environmental Assessment (EA) to consider the environmental impacts associated with the issuance of the proposed rule. NMFS’ EA will be made available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-oil-and-gas> on the date of publication of the proposed rule.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the rulemaking request.

Summary of Request

On April 17, 2018, NMFS received an application from Hilcorp requesting authorization to incidentally take marine mammals, by Level A and Level B harassment, incidental to noise exposure resulting from oil and gas activities in Cook Inlet, Alaska, from May 2019 to April 2024. These

regulations would be valid for a period of five years. On October 8, 2018, NMFS deemed the application adequate and complete.

The use of sound sources such as those described in the application (*e.g.*, seismic airguns) may result in the take of marine mammals through disruption of behavioral patterns or may cause auditory injury of marine mammals. Therefore, incidental take authorization under the MMPA is warranted.

Description of Proposed Activity

Overview

The scope of Hilcorp’s Petition includes four stages of activity, including exploration, development, production, and decommissioning activities within the Applicant’s area of operations in and adjacent to Cook Inlet within the Petition’s geographic area (Figures 3 and 8 in the application). Table 1 summarizes the planned activities within the geographic scope of this Petition, and the following text describes these activities in more detail. This section is organized into two primary areas within Cook Inlet: lower Cook Inlet (south of the Forelands to Homer) and middle Cook Inlet (north of the Forelands to Susitna/Point Possession).

TABLE 1—SUMMARY OF PLANNED ACTIVITIES INCLUDED IN INCIDENTAL TAKE REGULATIONS (ITR) PETITION

Project name	Cook Inlet region	Year(s) planned	Seasonal timing	Anticipated duration	Anticipated noise sources
Anchor Point 2D seismic survey.	Lower Cook Inlet, Anchor Point to Kasilof.	2021 or 2022 ..	April–October	30 days	Marine: 1 source vessel with airgun, 1 node vessel Onshore/Intertidal: Shot holes, tracked vehicles, helicopters.
Outer Continental Shelf (OCS) 3D seismic survey.	Lower Cook Inlet OCS	2019	April–June	45–60 days	1 source vessel with airguns, 2 support vessels, 1 mitigation vessel potentially.
OCS geohazard survey	Lower Cook Inlet OCS	2019 or 2020 ..	Fall 2019 or spring 2020.	30 days	1 vessel with chosounders and/or sub-bottom profilers.
OCS exploratory wells	Lower Cook Inlet OCS	2020–2022	April–October	40–60 days per well, 2–4 wells per year.	1 jack-up rig, drive pipe installation, vertical seismic profiling, 2–3 tugs for towing rig, support vessels, helicopters.
Iniskin Peninsula exploration and development.	Lower Cook Inlet, west side.	2019–2020	April–October	180 days	Construction of causeway, vibratory sheet pile driving, dredging, vessels.
Platform & pipeline maintenance.	Middle Cook Inlet	2019–2024	April–October	180 days	Vessels, water jets, hydraulic grinders, pingers, helicopters, and/or sub-bottom profilers.
North Cook Inlet Unit subseawell geohazard survey.	Middle Cook Inlet	2020	May	14 days	1 vessel with echosounders and/or sub-bottom profilers.
North Cook Inlet Unit well abandonment activity.	Middle Cook Inlet	2020	May–July	90 days	1 jack-up rig, tugs towing rig, support vessel, helicopters.
Trading Bay area geohazard survey.	Middle Cook Inlet	2020	May	30 days	1 vessel with echosounders and/or sub-bottom profilers.
Trading Bay area exploratory wells.	Middle Cook Inlet	2020	May–October	120–150 days	1 jack-up rig, drive pipe installation, vertical seismic profiling, tugs towing rig, support vessel, helicopters.
Drift River terminal decommissioning.	Lower Cook Inlet, west side.	2023	April–October	120 days	Vessels.

Dates and Duration

The scope of the Petition includes exploration, development, production, and decommissioning activities within the Applicant's area of operations in and adjacent to Cook Inlet within the Petition's geographic area (Figures 3 and 8 in the application) for the period of five years beginning May 1, 2019, extending through April 30, 2024.

Specific Geographic Region

The geographic area of activity covers a total of approximately 2.7 million acres (10,926 km²) in Cook Inlet. It includes land and adjacent waters in Cook Inlet including both State of Alaska and Federal OCS waters (Figure 3 and 8 in the application). The area extends from the north at the Susitna Delta on the west side (61°10' 48 N, 151°0' 55 W) and Point Possession on the east side (61°2' 11 N, 150°23' 30 W) to the south at Ursus Cove on the west side (59°26' 20 N, 153°45' 5 W) and Nanwalek on the east side (59°24' 5 N, 151°56' 30 W). The area is depicted in Figures 3 and 8 of the application.

Detailed Description of Specific Activity

Activities in Lower Cook Inlet

Based on potential future lease sales in both State and Federal waters, operators collect two-dimensional (2D) seismic data to determine the location of possible oil and gas prospects.

Generally, 2D survey lines are spaced farther apart than three-dimensional (3D) surveys and are conducted in a regional pattern that provides less detailed geological information. 2D surveys are used to cover wider areas to map geologic structures on a regional scale. Airgun array sizes used during 2D surveys are similar to those used during 3D surveys.

Activities in Middle Cook Inlet

2D Seismic Survey

During the timeframe of this Petition, the region of interest for the 2D survey is the marine, intertidal, and onshore area on the eastern side of Cook Inlet from Anchor Point to Kasilof. The area of interest is approximately 8 km (5 miles) offshore of the coastline. The anticipated timing of the planned 2D survey is in the open water season (April through October) in either 2020 or 2021. The actual survey duration is approximately 30 days in either year.

The 2D seismic data are acquired using airguns in the marine zone, airguns in the intertidal zone when the tide is high and drilled shot holes in the intertidal zone when the tide is low and drilled shot holes in the land zone. The data are recorded using an autonomous

nodal system (*i.e.*, no cables) that are deployed in the marine, intertidal, and land zones. The planned source lines (airgun and shot holes) are approximately 16 km (10 mi) in length running perpendicular to the coastline (see Figure 1 in application). The source lines are spaced every 8 km (5 mi) in between Anchor Point and Kasilof, with approximately 9–10 lines over the area of interest.

In the marine and high tide intertidal zones, data will be acquired using a shallow water airgun towed behind one source vessel. Although the precise volume of the airgun array is unknown at this time, Hilcorp will use an airgun array similar to what has been used for surveys in Cook Inlet by Apache (2011–2013) and SAExploration (2015): Either a 2,400 cubic inch (cui) or 1,760 cui array. A 2,400 cui airgun was assumed for analysis in this proposed rule to be conservative in take estimation. In addition, the source vessel will be equipped with a 440 cui shallow water source which it can deploy at high tide in the intertidal area in less than 1.8 meter (6 feet) of water. Source lines are oriented along the node line. A single vessel is capable of acquiring a source line in approximately 1–2 hours (hrs). In general, only one source line will be collected in one day to allow for all the node deployments and retrievals, and intertidal and land zone shot holes drilling. There are up to 10 source lines, so if all operations run smoothly, there will only be 2 hr per day over 10 days of airgun activity. Hilcorp anticipates the entire operation to take approximately 30 days to complete to account for weather and equipment contingencies.

The recording system that will be employed is an autonomous system "nodal" (*i.e.*, no cables), which is expected to be made up of at least two types of nodes; one for the land and one for the intertidal and marine environment. For the intertidal and marine zone, this will be a submersible multi-component system made up of three velocity sensors and a hydrophone. These systems have the ability to record continuous data. Inline receiver intervals for the node systems are approximately 50 m (165 ft). For 2D seismic surveys, the nodes are deployed along the same line as the seismic source. The deployment length is restricted by battery duration and data storage capacity. The marine nodes will be placed using one node vessel. The vessels required for the 2D seismic survey include just a source vessel and a node vessel that is conducting only passive recording.

In the marine environment, once the nodes are placed on the seafloor, the exact position of each node is required. In very shallow water, the node positions are either surveyed by a land surveyor when the tide is low, or the position is accepted based on the position at which the navigator has laid the unit. In deeper water, a hull or pole mounted pinger to send a signal to the transponder which is attached to each node will be used. The transponders are coded and the crew knows which transponder goes with which node prior to the layout. The transponders response (once pinged) is added together with several other responses to create a suite of range and bearing between the pinger boat and the node. Those data are then calculated to precisely position the node. In good conditions, the nodes can be interrogated as they are laid out. It is also common for the nodes to be pinged after they have been laid out. Onshore and intertidal locating of source and receivers will be accomplished with Differential Global Positioning System/roving units (DGPS/RTK) equipped with telemetry radios which will be linked to a base station established on the source vessel. Survey crews will have both helicopter and light tracked vehicle support. Offshore source and receivers will be positioned with an integrated navigation system (INS) utilizing DGPS/RTK link to the land base stations. The integrated navigation system will be capable of many features that are critical to efficient safe operations. The system will include a hazard display system that can be loaded with known obstructions, or exclusion zones. Apache conducted a sound source verification (SSV) for the 440 cui and 2,400 cui arrays in 2012 (Austin and Warner 2012; 81 FR 47239). The location of the SSV was in Beshta Bay on the western side of Cook Inlet (between Granite Point and North Forelands). Water depths ranged from 30–70 m (98–229 ft).

For the 440 cui array, the measured levels for the broadside direction were 217 decibel (dB) re: 1microPa (μPa) peak, 190 dB sound exposure level (SEL), and 201 dB root mean square (rms) at a distance of 50 m. The estimated distance to the 160 dB rms (90th percentile) threshold assuming the empirically measured transmission loss of 20.4 log R (Austin and Warner, 2012) was 2,500 m. Sound level near the source were highest between 30 and 300 hertz (Hz) in the endfire direction and between 20 Hz and 300 Hz in the broadside direction.

For the 2,400 cui array, the measured levels for the endfire direction were 217

dB peak, 185 dB SEL, and 197 dB rms at a distance of 100 m. The estimate distance to the 160 dB rms (90th percentile) thresholds assuming the empirically measured transmission loss of $16.9 \log R$ was 7,770 m. Sound levels near the source were highest between 30 and 150 Hz in the endfire direction and between 50 and 200 Hz in the broadside direction. These measured levels were used to evaluate potential Level A (217 dB peak and 185 dB SEL at 100 m assuming 15 log transmission loss) and Level B (7,330 m distance to 160 dB threshold) harassment isopleths from these sound sources (see Estimated Take section).

3D Seismic Survey

During the timeframe of this Petition, Hilcorp plans to collect 3D seismic data for approximately 45–60 days starting May 1, 2019 over 8 of the 14 OCS lease blocks in lower Cook Inlet. The 3D seismic survey is comprised of an area of approximately 790 km² (305 mi²) through 8 lease blocks (6357, 6405, 6406, 6407, 6455, 6456, 6457, 6458). Hilcorp submitted an application for an Incidental Harassment Authorization (IHA) in late 2017 for a planned survey in 2018 but withdrew the application and now plan for the survey to take place in 2019 and cover several years of surveying and development. The survey program is anticipated to begin May 1, 2019, and last for approximately 45–60 days through June 2019 in compliance with identified Bureau of Ocean Energy Management (BOEM) lease stipulations. The length of the survey will depend on weather, equipment, and marine mammal delays (contingencies of 20 percent weather, 10 percent equipment, 10 percent marine mammal were assumed in this analysis, or a 40 percent increase in expected duration to account for the aforementioned delays).

Polarcus is the intended seismic contractor, and the general seismic survey design is provided below. The 3D seismic data will be acquired using a specially designed marine seismic vessel towing between 8 and 12 ~2,400-m (1.5 mi) recording cables with a dual air gun array. The survey will involve one source vessel, one support vessel, one chase vessel, and potentially one mitigation vessel. The anticipated seismic source to be deployed from the source vessel is a 14-airgun array with a total volume of 1,945 cui. Crew changes are expected to occur every four to six weeks using a helicopter or support vessel from shore bases in lower Cook Inlet. The proposed seismic survey will be active 24 hrs per day. The array will be towed at a speed of approximately 7.41 km/hr (4 knots),

with seismic data collected continuously. Data acquisition will occur for approximately 5 hrs, followed by a 1.5-hr period to turn and reposition the vessel for another pass. The turn radius on the seismic vessel is approximately 3,200 m (2 mi).

The data will be shot parallel to the Cook Inlet shorelines in a north/south direction. This operational direction will keep recording equipment/streamers in line with Cook Inlet currents and tides and keep the equipment away from shallow waters on the east and west sides. The program may be modified if the survey cannot be conducted as a result of noise conditions onsite (*i.e.*, ambient noise). The airguns will typically be turned off during the turns. However, depending on the daylight hours and length of the turn, Hilcorp may use the smallest gun in the array (45 cui) as a mitigation airgun where needed for no longer than 3 hours. The vessel will turn into the tides to ensure the recording cables/streamers remain in line behind the vessel.

Hilcorp plans to use an array that provides for the lowest possible sound source to collect the target data. The proposed array is a Bolt 1900 LLXT dual gun array. The airguns will be configured as two linear arrays or “strings;” each string will have 7 airguns shooting in a “flip-flop” configuration for a total of 14 airguns. The airguns will range in volume from 45 to 290 cui for a total of 1,945 cui. The first and last are spaced approximately 14 m (45.9 ft) apart and the strings are separated by approximately 10 m (32.8 ft). The two airgun strings will be distributed across an approximate area of 30 x 14 m (98.4 x 45.9 ft) behind the source vessel and will be towed 300–400 m (984–1,312 ft) behind the vessel at a depth of 5 m (16.4 ft). The firing pressure of the array is 2,000 pounds per square inch (psi). The airgun will fire every 4.5 to 6 seconds, depending on the exact speed of the vessel. When fired, a brief (25 milliseconds [ms] to 140 ms) pulse of sound is emitted by all airguns nearly simultaneously. Hilcorp proposes to use a single 45 cui airgun, the smallest airgun in the array, for mitigation purposes.

Hilcorp intends to use 8 Sercel-type solid streamers or functionally similar for recording the seismic data (Figure 5 in the application). Each streamer will be approximately 2,400 m (150 mi) in length and will be towed approximately 8–15 m (26.2–49.2 ft) or deeper below the surface of the water. The streamers will be placed approximately 50 m (165 ft) apart to provide a total streamer spread of 400 m (1,148 ft). Hilcorp

recognizes solid streamers as best in class for marine data acquisition because of unmatched reliability, signal to noise ratio, low frequency content, and noise immunity.

The survey will involve one source vessel, one support vessel, one or two chase vessels, and potentially one mitigation vessel. The source vessel tows the airgun array and the streamers. The support vessel provides general support for the source vessel, including supplies, crew changes, etc. The chase vessel monitors the in-water equipment and maintains a security perimeter around the streamers. The mitigation vessel provides a viewing platform to augment the marine mammal monitoring program.

The planned volume of the airgun array is 1,945 cui. Hilcorp and their partners will be conducting detailed modeling of the array output, but a detailed SSV has not been conducted for this array in Cook Inlet. Therefore, for the purposes of estimating acoustic harassment, results from previous seismic surveys in Cook Inlet by Apache and SAExploration, particularly the 2,400 cui array, were used. Apache conducted an SSV for the 440 cui and 2,400 cui arrays in 2012 (Austin and Warner 2012; 81 FR 47239). The location of the SSV was in Beshta Bay on the western side of Cook Inlet (between Granite Point and North Forelands). Water depths ranged from 30–70 m (98–229 ft). For the 2,400 cui array, the measured levels for the endfire direction were 217 dB peak, 185 dB SEL, and 197 dB rms at a distance of 100 m. The estimate distance to the 160 dB rms (90th percentile) thresholds assuming the empirically measured transmission loss of $16.9 \log R$ was 7,770 m. Sound levels near the source were highest between 30 and 150 Hz in the endfire direction and between 50 and 200 Hz in the broadside direction.

These measured levels were used to evaluate potential Level A (217 dB peak and 185 dB SEL at 100 m assuming 15 log transmission loss) and B (7,330 m distance to 160 dB threshold) acoustic harassment of marine mammals in this Petition.

Geohazard and Geotechnical Surveys

Upon completion of the 3D seismic survey over the lower Cook Inlet OCS leases, Hilcorp plans to conduct a geohazard survey on site-specific regions within the area of interest prior to conducting exploratory drilling. The precise location is not known, as it depends on the results of the 3D seismic survey, but the location will be within the lease blocks. The anticipated timing of the activity is in either the fall of 2019

or the spring of 2020. The actual survey duration will take approximately 30 days.

The suite of equipment used during a typical geohazards survey consists of single beam and multi-beam echosounders, which provide water depths and seafloor morphology; a side scan sonar that provides acoustic images of the seafloor; a sub-bottom profiler which provides 20 to 200 m (66 to 656 ft) sub-seafloor penetration with a 6- to 20-centimeter (cm, 2.4–7.9-inch [in]) resolution. Magnetometers, to detect ferrous items, may also be used. Geotechnical surveys are conducted to collect bottom samples to obtain physical and chemical data on surface and near sub-surface sediments. Sediment samples typically are collected using a gravity/piston corer or grab sampler. The surveys are conducted from a single support vessel.

The echosounders and sub-bottom profilers are generally hull-mounted or towed behind a single vessel. The ship travels at 3–4.5 knots (5.6–8.3 km/hr). Surveys are site specific and can cover less than one lease block in a day, but the survey extent is determined by the number of potential drill sites in an area. BOEM guidelines at NTL–A01 require data to be gathered on a 150 by 300 m (492 by 984 ft) grid within 600 m (1,969 ft) of the surface location of the drill site, a 300 by 600 m (984 by 1,969 ft) grid along the wellbore path out to 1,200 m (3,937 ft) beyond the surface projection of the conductor casing, and extending an additional 1,200 m beyond that limit with a 1,200 by 1,200 m grid out to 2,400 m (7,874 ft) from the well site.

The multibeam echosounder, single beam echosounder, and side scan sonar operate at frequencies of greater than 200 kHz. Based on the frequency ranges of these pieces of equipment and the hearing ranges of the marine mammals that have the potential to occur in the action area, the noise produced by the echosounders and side scan sonar are not likely to result in take of marine mammals and are not considered further in this document.

The geophysical surveys include use of a low resolution and high resolution sub-bottom profiler. The proposed high-resolution sub-bottom profiler operates at source level of 210 dB re 1 μ Pa RMS at 1 m. The proposed system emits energy in the frequency bands of 2 to 24 kHz. The beam width is 15 to 24 degrees. Typical pulse rate is between 3 and 10 Hz. The secondary low-resolution sub-bottom profiler will be utilized as necessary to increase sub-bottom profile penetration. The

proposed system emits energy in the frequency bands of 1 to 4 kHz.

Exploratory Drilling

Operators will drill exploratory wells based on mapping of subsurface structures using 2D and 3D seismic data and historical well information. Hilcorp plans to conduct the exploratory drilling program April to October between 2020 and 2022. The exact start date is currently unknown and is dependent on the results of the seismic survey, geohazard survey, and scheduling availability of the drill rig. It is expected that each well will take approximately 40–60 days to drill and test. Beginning in spring 2020, Hilcorp Alaska plans to possibly drill two and as many as four exploratory wells, pending results of the 3D seismic survey in the lower Cook Inlet OCS leases. After testing, the wells may be plugged and abandoned.

Hilcorp Alaska proposes to conduct its exploratory drilling using a rig similar to the Spartan 151 drill rig. The Spartan 151 is a 150 H class independent leg, cantilevered jack-up drill rig with a drilling depth capability of 7,620 m (25,000 ft) that can operate in maximum water depths up to 46 m (150 ft). Depending on the rig selection and location, the drilling rig will be towed on site using up to three ocean-going tugs licensed to operate in Cook Inlet. Rig moves will be conducted in a manner to minimize any potential risk regarding safety as well as cultural or environmental impact. While under tow to the well sites, rig operations will be monitored by Hilcorp and the drilling contractor management. Very High Frequency (VHF) radio, satellite, and cellular phone communication systems will be used while the rig is under tow. Helicopter transport will also be available.

Similarly to transiting vessels, although some marine mammals could receive sound levels in exceedance of the general acoustic threshold of 120 dB from the tugs towing the drill rig during this project, take is unlikely to occur, primarily because of the predictable movement of vessels and tugs. Marine mammal population density in the project area is low (see Estimated Take section below), and those that are present are likely habituated to the existing baseline of commercial ship traffic. Further, there are no activity-, location-, or species-specific circumstances or other contextual factors that would increase concern and the likelihood of take from towing of the drill rig.

The drilling program for the well will be described in detail in an Exploration Plan to BOEM. The Exploration Plan

will present information on the drilling mud program; casing design, formation evaluation program; cementing programs; and other engineering information. After rig up/rig acceptance by Hilcorp Alaska, the wells will be spudded and drilled to bottom-hole depths of approximately 2,100 to 4,900 m (7,000 to 16,000 ft) depending on the well. It is expected that each well will take about 40–60 days to drill and up to 10–21 days of well testing. If two wells are drilled, it will take approximately 80–120 days to complete the full program; if four wells are drilled, it will take approximately 160–240 days to complete the full program.

Primary sources of rig-based acoustic energy were identified as coming from the D399/D398 diesel engines, the PZ–10 mud pump, ventilation fans (and associated exhaust), and electrical generators. The source level of one of the strongest acoustic sources, the diesel engines, was estimated to be 137 dB re 1 μ Pa rms at 1 m in the 141–178 Hz bandwidth. Based on this measured level, the 120 dB rms acoustic received level isopleth would be 50 m (154 ft) away from where the energy enters the water (jack-up leg or drill riser). Drilling and well construction sounds are similar to vessel sounds in that they are relatively low-level and low-frequency. Since the rig is stationary in a location with low marine mammal density, the impact of drilling and well construction sounds produced from the jack up rig is expected to be lower than a typical large vessel. There is open water in all directions from the drilling location. Any marine mammal approaching the rig would be fully aware of its presence long before approaching or entering the zone of influence for behavioral harassment, and we are unaware of any specifically important habitat features (e.g., concentrations of prey or refuge from predators) within the rig's zone of influence that would encourage marine mammal use and exposure to higher levels of noise closer to the source. Given the absence of any activity-, location-, or species-specific circumstances or other contextual factors that would increase concern, we do not expect routine drilling noise to result in the take of marine mammals.

When planned and permitted operations are completed, the well will be suspended according to Bureau of Safety and Environmental Enforcement (BSEE) regulations. The well casings will be landed in a mudline hanger after each hole section is drilled. When the well is abandoned, the production casing is sealed with mechanical plugging devices and cement to prevent the movement of any reservoir fluids

between various strata. Each casing string will be cutoff below the surface and sealed with a cement plug. A final shallow cement plug will be set to approximately 3.05 m (10 ft) below the mudline. At this point, the surface casing, conductor, and drive pipe will be cutoff and the three cutoff casings and the mudline hanger are pulled to the deck of the jack-up rig for final disposal. The plugging and abandonment procedures are part of the Well Plan which is reviewed by BSEE prior to being issued an approved Permit to Drill.

A drive pipe is a relatively short, large-diameter pipe driven into the sediment prior to the drilling of oil wells. The drive pipe serves to support the initial sedimentary part of the well, preventing the looser surface layer from collapsing and obstructing the wellbore. Drive pipes are installed using pile driving techniques. Hilcorp proposed to drive approximately 60 m of 76.2-cm pipe at each well site prior to drilling using a Delmar D62–22 impact hammer (or similar). This hammer has an impact weight of 6,200 kg (13,640 lbs). The drive pipe driving event is expected to last one to three days at each well site, although actual pounding of the pipe will only occur intermittently during this period. Conductors are slightly smaller diameter pipes than the drive pipes used to transport or “conduct” drill cuttings to the surface. For these wells, a 50.8-cm [20-in] conductor pipe may be drilled, not hammered, inside the drive pipe, dependent on the integrity of surface formations.

Illingworth & Rodkin (2014) measured the hammer noise for hammering the drive pipe operating from the rig *Endeavour* for *Buccaneer* in 2013 and report the source level at 190 dB at 55 m, with underwater levels exceeding 160 dB rms threshold at 1.63 km (1 mi). The measured sound levels for the pipe driving were used to evaluate potential Level A (source level of 221dB @1m and assuming 15 logR transmission loss) and Level B (1,630 m distance to the 160 dB threshold) acoustic harassment of marine mammals. Conductors are slightly smaller diameter pipes than the drive pipes used to transport or “conduct” drill cuttings to the surface. For these wells, a 50.8-cm (20-in) conductor pipe may be drilled, not hammered, inside the drive pipe, dependent on the integrity of surface formations. There are no noise concerns associated with the conductor pipe drilling.

Once the well is drilled, accurate follow-up seismic data may be collected by placing a receiver at known depths in the borehole and shooting a seismic

airgun at the surface near the borehole, called vertical seismic profiling (VSP). These data provide high-resolution images of the geological layers penetrated by the borehole and can be used to accurately correlate original surface seismic data. The actual size of the airgun array is not determined until the final well depth is known, but typical airgun array volumes are between 600 and 880 cui. VSP typically takes less than two full days at each well site. Illingworth & Rodkin (2014) measured a 720 cui array for *Buccaneer* in 2013 and report the source level at 227 dB at 1 m, with underwater levels exceeding 160 dB rms threshold at 2.47 km (1.54 mi). The measured sound levels for the VSP were used to evaluate potential Level A (227 dB rms at 1 m assuming 15 logR transmission loss) and Level B (2,470 m distance to the 160 dB threshold) harassment isopleths.

Iniskin Peninsula Exploration

Hilcorp Alaska initiated baseline exploratory data collection in 2013 for a proposed land-based oil and gas exploration and development project on the Iniskin Peninsula of Alaska, near Chinitna Bay. The proposed project is approximately 97 km (60 mi) west of Homer on the west side of Cook Inlet in the Fitz Creek drainage. New project infrastructure includes material sites, a 6.9 km (4.3 mi) long access road, prefabricated bridges to cross four streams, an air strip, barge landing/staging areas, fuel storage facilities, water wells and extraction sites, an intertidal causeway, a camp/staging area, and a drill pad. Construction is anticipated to start in 2020.

An intertidal rock causeway is proposed to be constructed adjacent to the Fitz Creek staging area to improve the accessibility of the barge landing during construction and drilling operations. The causeway will extend seaward from the high tide line approximately 366 m (1,200 ft) to a landing area 46 m (150 ft) wide. A dock face will be constructed around the rock causeway so that barges will be able to dock along the causeway. Rock placement for the causeway is not known to generate sound at levels expected to disturb marine mammals. The causeway is also not proposed at a known pinniped haulout or other biologically significant location for local marine mammals. Therefore, rock laying for the causeway is not considered further in this document.

The causeway will need to be 75 percent built before the construction of the dock face will start. The dock face will be constructed with 18-m (60-ft) tall Z-sheet piles, all installed using a

vibratory hammer. It will take approximately 14–25 days, depending on the length of the work shift, assuming approximately 25 percent of the day actual pile driving. The timing of pile driving will be in late summer or early winter, after the causeway has been partially constructed. Illingworth & Rodkin (2007) compiled measured near-source (10 m [32.8 ft]) SPL data from vibratory pile driving for different pile sizes ranging in diameter from 30.5 to 243.8 cm (12 to 96 in). For this petition, the source level of the 61.0-cm (24-in) AZ steel sheet pile from Illingworth & Rodkin (2007) was used for the sheet pile. The measured sound levels of 160 dB rms at 10 m assuming 15 logR transmission loss for the vibratory sheet pile driving was used to evaluate potential Level A and B harassment isopleths.

Activities in Middle Cook Inlet Offshore Production Platforms

Of the 17 production platforms in central Cook Inlet, 15 are owned by Hilcorp. Hilcorp performs routine construction on their platforms, depending on needs of the operations. Construction activities may take place up to 24 hrs a day. In-water activities include support vessels bringing supplies five days a week up to two trips per day between offshore systems at Kenai (OSK) and the platform. Depending on the needs, there may also be barges towed by tugs with equipment and helicopters for crew and supply changes. Routine supply-related transits from vessels and helicopters are not substantially different from routine vessel and air traffic already occurring in Cook Inlet, and take is not expected to occur from these activities.

Offshore Production Drilling

Hilcorp routinely conducts development drilling activities at offshore platforms on a regular basis to meet the asset's production needs. Development drilling activities occurs from existing platforms within the Cook Inlet through either open well slots or existing wellbores in existing platform legs. Drilling activities from platforms within Cook Inlet are accomplished by using conventional drilling equipment from a variety of rig configurations.

Some other platforms in Cook inlet have permanent drilling rigs installed that operate under power provided by the platform power generation systems, while others do not have drill rigs, and the use of a mobile drill rig is required. Mobile offshore drill rigs may be powered by the platform power generation (if compatible with the

platform power system) or self-generate power with the use of diesel fired generators. For the reasons outlined above for the Lower Inlet, noise from routine drilling is not considered further in this document.

Helicopter logistics for development drilling programs operations will include transportation for personnel and supplies. The helicopter support will be managed through existing offshore services based at the OSK Heliport to support rig crew changes and cargo handling. Helicopter flights to and from the platform while drilling is occurring is anticipated to increase (on average) by two flights per day from normal platform operations.

Major supplies will be staged on-shore at the OSK Dock in Nikiski. Required supplies and equipment will be moved from the staging area to the platform in which drilling occurring by existing supply vessels that are currently in use supporting offshore operations within Cook Inlet. Vessel trips to and from the platform while drilling is occurring is anticipated to increase (on average) by two trips per day from normal platform operations. During mobile drill rig mobilization and demobilization, one support vessel is used continuously for approximately 30 days to facilitate moving rig equipment and materials.

Oil and Gas Pipeline Maintenance

Each year, Hilcorp Alaska must verify the structural integrity of their platforms and pipelines located within Cook Inlet. Routine maintenance activities include: subsea pipeline inspections, stabilizations, and repairs; platform leg inspections and repairs; and anode sled installations and/or replacement. In general, pipeline stabilization and pipeline repair are anticipated to occur in succession for a total of 6–10 weeks. However, if a pipeline stabilization location also requires repair, the divers will repair the pipeline at the same time they are stabilizing it. Pipeline repair activities are only to be conducted on an as-needed basis whereas pipeline stabilization activities will occur annually. During underwater inspections, if the divers identify an area of the pipeline that requires stabilization, they will place Sea-Crete bags at that time rather than waiting until the major pipeline stabilization effort that occurs later in the season.

Natural gas and oil pipelines located on the seafloor of the Cook Inlet are inspected on an annual basis using ultrasonic testing (UT), cathodic protection surveys, multi-beam sonar surveys, and sub-bottom profilers. Deficiencies identified are corrected

using pipeline stabilization methods or USDOT-approved pipeline repair techniques. The Applicant employs dive teams to conduct physical inspections and evaluate cathodic protection status and thickness of subsea pipelines on an annual basis. If required for accurate measurements, divers may use a water jet to provide visual access to the pipeline. For stabilization, inspection dive teams may place Sea-Crete bags beneath the pipeline to replace any materials removed by the water jet. Results of the inspections are recorded and significant deficiencies are noted for repair.

Multi-beam sonar and sub-bottom profilers may also be used to obtain images of the seabed along and immediately adjacent to all subsea pipelines. Elements of pipeline inspections that could produce underwater noise include: the dive support vessel, water jet, multi-beam sonar/sub-bottom profiler and accompanying vessel.

A water jet is a zero-thrust water compressor that is used for underwater removal of marine growth or rock debris underneath the pipeline. The system operates through a mobile pump which draws water from the location of the work. Water jets likely to be used in Cook Inlet include, but are not limited to, the CaviDyne CaviBlaster® and the Gardner Denver Liqua-Blaster. Noise generated during the use of the water jets would be very short in duration (30 minutes or less at any given time) and intermittent.

Hilcorp Alaska conducted underwater measurements during 13 minutes of CaviBlaster® use in Cook Inlet in April 2017 (Austin 2017). Received sound levels were measured up to 143 dB re 1 μ Pa rms at 170 m and up to 127 dB re 1 μ Pa rms at 1,100 m. Sounds from the CaviBlaster® were clearly detectable out to the maximum measurement range of 1.1 km. Using the measured transmission loss of 19.5 log R (Austin 2017), the source level for the CaviBlaster® was estimated as 176 dB re 1 μ Pa at 1 m. The sounds were broadband in nature, concentrated above 500 Hz with a dominant tone near 2 kHz.

Specifications for the GR 29 Underwater Hydraulic Grinder state that the SPL at the operator's position would be 97 dB in air (Stanley 2014). There are no underwater measurements available for the grinder, so using a rough estimate of converting sound level in dB in air to water by adding 61.5 dB would result in an underwater level of approximately 159 dB. The measured sound levels for the water jet and grinder were used to evaluate potential

Level A and B acoustic harassment isopleths.

If necessary, Hilcorp may use an underwater pipe cutter to replace existing pipeline segments in Cook Inlet. The following tools are likely to be used for pipeline cutting activities:

- A diamond wire saw used for remote cutting underwater structures such as pipes and I-Beams. These saws use hydraulic power delivered by a dedicated power source. The saw usually uses a method that pushes the spinning wire through the pipe.
- A hydraulically-powered Guillotine saw which uses an orbital cutting movement similar to traditional power saws.

Generally, sound radiated from the diamond wire cutter is not easily discernible from the background noise during the cutting operation. The Navy measured underwater sound levels when the diamond saw was cutting caissons for replacing piles at an old fuel pier at Naval Base Point Loma (Naval Base Point Loma Naval Facilities Engineering Command Southwest 2017). They reported an average SPL for a single cutter at 136.1–141.4 dB rms at 10 m.

Specifications for the Guillotine saw state that the SPL at the operator's position would be 86 dB in air (Wachs 2014). There are no underwater measurements available for the grinder, so using a rough estimate of converting sound level in dB in air to water by adding 61.5 dB would result in an underwater level of approximately 148 dB.

Because the measured levels for use of underwater saws do not exceed the NMFS criteria, the noise from underwater saws was not considered further in this document. Scour spans beneath pipelines greater than 23 m (75 ft) have the potential to cause pipeline failures. To be conservative, scour spans of 15 m (50 ft) or greater identified using multi-beam sonar surveys are investigated using dive teams. Divers perform tactile inspections to confirm spans greater than 15 m (50 ft). The pipeline is stabilized along these spans with Sea-Crete concrete bags. While in the area, the divers will also inspect the external coating of the pipeline and take cathodic protection readings if corrosion wrap is found to be absent. Elements of pipeline stabilization that could produce underwater noise include: Dive support vessel and water jet.

Significant pipeline deficiencies identified during pipeline inspections are repaired as soon as practicable using methods including, but not limited to, USDOT-approved clamps and/or fiber glass wraps, bolt/flange replacements,

and manifold replacements. In some cases, a water jet may be required to remove sand and gravel from under or around the pipeline to allow access for assessment and repair. The pipeline surface may also require cleaning using a hydraulic grinder to ensure adequate repair. If pipeline replacement is required, an underwater pipe cutter such as a diamond wire saw or hydraulically-powered Guillotine saw may be used. Elements of pipeline repair that could produce underwater noise include: Dive support vessel, water jet, hydraulic grinder, and underwater pipe cutter.

Platform Leg Inspection and Repair

Hilcorp's platforms in Cook Inlet are inspected on a routine basis. Divers and certified rope access technicians visually inspect subsea platform legs. These teams also identify and correct significant structural deficiencies. Platform leg integrity and pipeline-to-platform connections beneath the water surface are evaluated by divers on a routine basis. Platform legs, braces, and pipeline-to-platform connections are evaluated for cathodic protection status, structure thickness, excessive marine growth, damage, and scour. If required, divers may use a water jet to clean or provide access to the structure. If necessary, remedial grinding using a hydraulic under water grinder may be required to determine extent damage and/or to prevent further crack propagation. All inspection results are recorded and significant deficiencies are noted for repair. Elements of subsea platform leg inspection and repair that could produce underwater noise include: Dive support vessel, hydraulic grinder, water jet.

Platform leg integrity along the tidal zone is inspected on a routine basis. Difficult-to-reach areas may be accessed using either commercially-piloted unmanned aerial systems (UAS). Commercially-piloted UASs may be deployed from the top-side of the platform to obtain images of the legs. Generally, the UAS is in the air for 15–20 minutes at a time due to battery capacity, which allows for two legs and part of the underside of the platform to be inspected. The total time to inspect a platform is approximately 1.5 hrs of flight time. The UAS is operated at a distance of up to 30.5 m (100 ft) from the platform at an altitude of 9–15 m (30–50 ft) above sea level. To reduce potential harassment of marine mammals, the area around the platform would be inspected prior to launch of the UAS to ensure there are no flights directly above marine mammals. As no flights will be conducted directly over

marine mammals, the effects of drone use for routine maintenance are not considered further in this application.

Anode Sled Installation and Replacement

Galvanic and impressed current anode sleds are used to provide cathodic protection for the pipelines and platforms in Cook Inlet. Galvanic anode sleds do not require a power source and may be installed along the length of the pipelines on the seafloor. Impressed current anode sleds are located on the seafloor at each of the corners of each platform and are powered by rectifiers located on the platform. Anodes are placed at the seafloor using dive vessels and hand tools. If necessary, a water jet may be used to provide access for proper installation. Anodes and/or cables may be stabilized using Sea-Crete bags.

Pingers

Several types of moorings are deployed in support of Hilcorp operations; all of which require an acoustic pinger for location or release. The pinger is deployed over the side of a vessel and a short signal is emitted to the mooring device. The mooring device responds with a short signal to indicate that the device is working, to indicate range and bearing data, or to illicit a release of the unit from the anchor. These are used for very short periods of time when needed.

The types of moorings requiring the use of pingers anticipated to be used in the Petition period include acoustic moorings during the 3D seismic survey (assumed 2–4 moorings), node placement for the 2D survey (used with each node deployment), and potential current profilers deployed each season (assumed 2–4 moorings). The total amount of time per mooring device is less than 10 minutes during deployment and retrieval. To avoid disturbance, the pinger would not be deployed if marine mammals have been observed within 135 m (443 ft) of the vessel. The short duration of the pinger deployment as well as Hilcorp's mitigation suggests take of marine mammals from pinger use is unlikely to occur and pingers are not considered further in this analysis.

North Cook Inlet Unit Subsea Well Plugging and Abandonment

The discovery well in the North Cook Inlet Unit was drilled over 50 years ago and is planned to be abandoned, so Hilcorp Alaska plans to conduct a geohazard survey to locate the well and conduct plugging and abandonment (P&A) activities for a previously drilled subsea exploration well in 2020. The

geohazard survey location is approximately 402–804 m ($\frac{1}{4}$ – $\frac{1}{2}$ mi) south of the Tyonek platform and will take place over approximately seven days with a grid spacing of approximately 250 m (820 ft). The suite of equipment used during a typical geohazards survey consists of single beam and multi-beam echosounders, which provide water depths and seafloor morphology; a side scan sonar that provides acoustic images of the seafloor; a sub-bottom profiler which provides 20 to 200 m (66 to 656 ft) sub-seafloor penetration with a 6- to 20-cm (2.4–7.9-in) resolution. The echosounders and sub-bottom profilers are generally hull-mounted or towed behind a single vessel. The vessel travels at 3–4.5 knots (5.6–8.3 km/hr).

After the well has been located, Hilcorp plans to conduct plugging and abandonment activities over a 60–90 day time period in May through July in 2020. The jack-up rig will be similar to what is described above (the Spartan 151 drill rig, or similar). The rig will be towed onsite using up to three ocean-going tugs. Once the jack-up rig is on location, divers working off a boat will assist in preparing the subsea wellhead and mudline hanger for the riser to tie the well to the jack-up. Once the riser is placed, the BOP equipment is made up to the riser. At this point, the well will be entered and well casings will be plugged with mechanical devices and cement and then cutoff and pulled. A shallow cement plug will be set in the surface casing to 3.05 m (10 ft) below the mudline hanger. The remaining well casings will be cutoff and the mudline hanger will be recovered to the deck of the jack-up rig for disposal. The well abandonment will be performed in accordance to Alaska Oil and Gas Conservation Commission (AOGCC) regulations.

Trading Bay Exploratory Drilling

Hilcorp plans to conduct exploratory drilling activities in the Trading Bay area. The specific sites of interest have not yet been identified, but the general area is shown in Figure 3 in the application. Hilcorp will conduct geohazard surveys over the areas of interest to locate potential hazards prior to drilling with the same suite of equipment as described above for exploratory drilling in the lower Inlet. The survey is expected to take place over 30–60 days in 2019 from a single vessel.

The exploratory drilling and well completion activities will take place in site-specific areas based on the geohazard survey. Hilcorp plans to drill 1–2 exploratory wells in this area in the

open water season of 2020 with the same equipment and methods as described above for lower Inlet exploratory drilling. The noise of routine drilling is not considered further as explained in the description of activities in the Lower Inlet. However, drive pipe installation and vertical seismic profiling will be considered further.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see *Proposed Mitigation and Proposed Monitoring and Reporting*).

Description of Marine Mammals in the Area of Specified Activities

Eleven species of marine mammal have the potential to occur in the action area during the five year period of activities proposed by Hilcorp. These species are described in further detail below.

Fin Whales

For management purposes, three stocks of fin whales are currently recognized in U.S. Pacific waters: Alaska (Northeast Pacific), California/Washington/Oregon, and Hawaii. Recent analyses provide evidence that the population structure should be reviewed and possibly updated. However, substantially new data on the stock structure is lacking (Muto *et al.* 2017). Fin whales, including the Northeastern Pacific stock, are listed as endangered under the ESA.

Mizroch *et al.* (2009) provided a comprehensive summary of fin whale sightings data, including whaling catch data and determined there could be at least six populations of fin whales. Evidence suggests two populations are migratory (eastern and western North Pacific) and two to four more are year-round residents in peripheral seas such as the Gulf of California, East China Sea, Sanriku-Hokkaido, and possibly the Sea of Japan. The two migratory stocks are likely mingling in the Bering Sea in July and August. Moore *et al.* (1998, 2006), Watkins *et al.* (2000), and Stafford *et al.* (2007) documented high rates of calling along the Alaska coast beginning in August/September and lasting through February. Fin whales are regularly observed in the Gulf of Alaska during the summer months, even though calls are seldom detected during this period (Stafford *et al.* 2007). Instruments moored in the southeast Bering Sea detected calls over the course of a year and found peaks from September to November as well as in February and March (Stafford *et al.* 2010). Delarue *et al.* (2013) detected calls in the northeastern Chukchi Sea from

instruments moored from July through October from 2007 through 2010.

Fin whales are found seasonally in the Gulf of Alaska, Bering Sea, and as far north as the northern Chukchi Sea (Muto *et al.* 2017). Surveys conducted in coastal waters of the Aleutians and the Alaska Peninsula found that fin whales occurred primarily from the Kenai Peninsula to the Shumagin Islands and were abundant near the Semidi Islands and Kodiak Island (Zerbini *et al.* 2006). An opportunistic survey conducted on the shelf of the Gulf of Alaska found fin whales concentrated west of Kodiak Island in Shelikof Strait, and in the southern Cook Inlet region. Smaller numbers were also observed over the shelf east of Kodiak to Prince William Sound (AFSC, 2003). In the northeastern Chukchi Sea, visual sightings and acoustic detections have been increasing, which suggests the stock may be re-occupying habitat used prior to large-scale commercial whaling (Muto *et al.* 2017). Most of these areas are feeding habitat for fin whales. Fin whales are rarely observed in Cook Inlet, and most sightings occur near the entrance of the inlet. During the NMFS aerial surveys in Cook Inlet from 2000–2016, 10 sightings of 26 estimated individual fin whales in lower Cook Inlet were observed (Shelden *et al.* 2013, 2015, 2016).

Humpback Whales

Currently, three populations of humpback whales are recognized in the North Pacific, migrating between their respective summer/fall feeding areas and winter/spring calving and mating areas as follows (Baker *et al.* 1998; Calambokidis *et al.* 1997). Although there is considerable distributional overlap in the humpback whale stocks that use Alaska, the whales seasonally found in lower Cook Inlet are probably of the Central North Pacific stock (Muto *et al.* 2017). Listed as endangered under the ESA, this stock has recently been estimated at 7,890 animals (Muto *et al.* 2017). The Central North Pacific stock winters in Hawaii and summers from British Columbia to the Aleutian Islands (Calambokidis *et al.* 1997), including Cook Inlet.

Humpback whales in the high latitudes of the North Pacific Ocean are seasonal migrants that feed on euphausiids and small schooling fishes (Muto *et al.* 2017). During the spring, these animals migrate north and spend the summer feeding in the prey-rich sub-polar waters of southern Alaska, British Columbia, and the southern Chukchi Sea. Individuals from the Western North Pacific (endangered), Hawaii (not listed under the ESA), and

the Mexico (threatened) DPSs migrate to areas near and potentially in the Petition region. However, most of the individuals that migrate to the Cook Inlet area are likely from the Hawaii DPS and not the Western North Pacific or Mexico DPSs (NMFS 2017).

In the summer, humpback whales are regularly present and feeding in the Cook Inlet region, including Shelikof Strait, Kodiak Island bays, and the Barren Islands, in addition to Gulf of Alaska regions adjacent to the southeast side of Kodiak Island (especially Albatross Banks), the Kenai and Alaska peninsulas, Elizabeth Island, as well as south of the Aleutian Islands. Humpbacks also may be present in some of these areas throughout autumn (Muto *et al.* 2017).

Humpback whales have been observed during marine mammal surveys conducted in Cook Inlet. However, their presence is largely confined to lower Cook Inlet. Recent monitoring by Hilcorp in upper Cook Inlet has also included sightings of humpbacks near Tyonek. During SAExploration's 2015 seismic program, three humpback whales were observed in Cook Inlet; two near the Forelands and one in Kachemak Bay (Kendall *et al.* 2015). During NMFS' Cook Inlet beluga whale aerial surveys from 2000–2016, there were 88 sightings of 191 estimated individual humpback whales in lower Cook Inlet (Shelden *et al.* 2017). They have been regularly seen near Kachemak Bay during the summer months (Rugh *et al.* 2005). There are observations of humpback whales as far north as Anchor Point, with recent summer observations extending to Cape Starichkof (Owl Ridge 2014). Although several humpback whale sightings occurred mid-inlet between Iniskin Peninsula and Kachemak Bay, most sightings occurred outside of the Petition region near Augustine, Barren, and Elizabeth Islands (Shelden *et al.* 2013, 2015, 2017).

Ferguson *et al.* (2015) has established Biologically Important Areas (BIAs) as part of the NOAA Cetacean Density and Distribution Mapping Working Group (CetMap) efforts. This information supplements the quantitative information on cetacean density, distribution, and occurrence by: (1) Identifying areas where cetacean species or populations are known to concentrate for specific behaviors, or be range-limited, but for which there is not sufficient data for their importance to be reflected in the quantitative mapping effort; and (2) providing additional context within which to examine potential interactions between cetaceans and human activities. A "Feeding Area"

BIA for humpback whales in the Gulf of Alaska region encompasses the waters east of Kodiak Island (the Albatross and Portlock Banks), a target for historical commercial whalers based out of Port Hobron, Alaska (Ferguson *et al.* 2015; Reeves *et al.* 1985; Witteveen *et al.* 2007). This BIA also includes waters along the southeastern side of Shelikof Strait and in the bays along the northwestern shore of Kodiak Island. The highest densities of humpback whales around the Kodiak Island BIA occur from July-August (Ferguson *et al.* 2015).

Minke Whale

Minke whales are most abundant in the Gulf of Alaska during summer and occupy localized feeding areas (Zerbini *et al.* 2006). Concentrations of minke whales have occurred along the north coast of Kodiak Island (and along the south coast of the Alaska Peninsula (Zerbini *et al.* 2006). The current estimate for minke whales between Kenai Fjords and the Aleutian Islands is 1,233 individuals (Zerbini *et al.* 2006). During shipboard surveys conducted in 2003, three minke whale sightings were made, all near the eastern extent of the survey from nearshore Prince William Sound to the shelf break (NMML 2003).

Minke whales become scarce in the Gulf of Alaska in fall; most whales are thought to leave the region by October (Consiglieri *et al.* 1982). Minke whales are migratory in Alaska, but recently have been observed off Cape Starichkof and Anchor Point year-round (Muto *et al.* 2017). During Cook Inlet-wide aerial surveys conducted from 1993 to 2004, minke whales were encountered three times (1998, 1999, and 2006), both times off Anchor Point 16 miles northwest of Homer (Shelden *et al.* 2013, 2015, 2017). A minke whale was also reported off Cape Starichkof in 2011 (A. Holmes, pers. comm.) and 2013 (E. Fernandez and C. Hesselbach, pers. comm.), suggesting this location is regularly used by minke whales, including during the winter. Several minke whales were recorded off Cape Starichkof in early summer 2013 during exploratory drilling (Owl Ridge 2014), suggesting this location is regularly used by minke whales year-round. During Apache's 2014 survey, a total of 2 minke whale groups (3 individuals) were observed during this time period, one sighting to the southeast of Kalgin Island and another sighting near Homer (Lomac-MacNair *et al.* 2014). SAExploration noted one minke whale near Tuxedni Bay in 2015 (Kendall *et al.* 2015). This species is unlikely to be seen in upper Cook Inlet but may be encountered in the mid and lower Inlet.

Killer Whales

Two different stocks of killer whales inhabit the Cook Inlet region of Alaska: the Alaska Resident Stock and the Gulf of Alaska, Aleutian Islands, Bering Sea Transient Stock (Muto *et al.* 2017). Seasonal and year-round occurrence has been noted for killer whales throughout Alaska (Braham and Dahlheim 1982), where whales have been labeled as "resident," "transient," and "offshore" type killer whales (Dahlheim *et al.* 2008; Ford *et al.* 2000). The killer whales using Cook Inlet are thought to be a mix of resident and transient individuals from two different stocks: the Alaska Resident Stock, and the Gulf of Alaska, Aleutian Islands, and Bering Sea Transient Stock (Allen and Angliss 2015). Although recent studies have documented movements of Alaska Resident killer whales from the Bering Sea into the Gulf of Alaska as far north as southern Kodiak Island, none of these whales have been photographed further north and east in the Gulf of Alaska where regular photo-identification studies have been conducted since 1984 (Muto *et al.* 2017).

Killer whales are occasionally observed in lower Cook Inlet, especially near Homer and Port Graham (Shelden *et al.* 2003; Rugh *et al.* 2005). The few whales that have been photographically identified in lower Cook Inlet belong to resident groups more commonly found in nearby Kenai Fjords and Prince William Sound (Shelden *et al.* 2003). The availability of these prey species largely determines the likeliest times for killer whales to be in the area. During aerial surveys conducted between 1993 and 2004, killer whales were observed on only three flights, all in the Kachemak and English Bay area (Rugh *et al.* 2005). However, anecdotal reports of killer whales feeding on belugas in upper Cook Inlet began increasing in the 1990s, possibly in response to declines in sea lion and harbor seal prey elsewhere (Shelden *et al.* 2003).

One killer whale group of two individuals was observed during the 2015 SAExploration seismic program near the North Foreland (Kendall *et al.* 2015). During NMFS aerial surveys, killer whales were observed in 1994 (Kamishak Bay), 1997 (Kachemak Bay), 2001 (Port Graham), 2005 (Iniskin Bay), 2010 (Elizabeth and Augustine Islands), and 2012 (Kachemak Bay; Shelden *et al.* 2013). Eleven killer whale strandings have been reported in Turnagain Arm, six in May 1991, and five in August 1993. This species is expected to be rarely seen in upper Cook Inlet but may be encountered in the mid and lower Inlet.

Gray Whales

Gray whales have been reported feeding near Kodiak Island, in southeastern Alaska, and south along the Pacific Northwest (Allen and Angliss 2013). Because most gray whales migrating through the Gulf of Alaska region are thought to take a coastal route, BIA boundaries for the migratory corridor in this region were defined by the extent of the continental shelf (Ferguson *et al.* 2015).

Most gray whales calve and breed from late December to early February in protected waters along the western coast of Baja California, Mexico. In spring, the ENP stock of gray whales migrates approximately 8,000 km (5,000 mi) to feeding grounds in the Bering and Chukchi seas before returning to their wintering areas in the fall (Rice and Wolman 1971). Northward migration, primarily of individuals without calves, begins in February; some cow/calf pairs delay their departure from the calving area until well into April (Jones and Swartz 1984).

Gray whales approach the proposed action area in late March, April, May, and June, and leave again in November and December (Consiglieri *et al.* 1982; Rice and Wolman 1971) but migrate past the mouth of Cook Inlet to and from northern feeding grounds. Some gray whales do not migrate completely from Baja to the Chukchi Sea but instead feed in select coastal areas in the Pacific Northwest, including lower Cook Inlet (Moore *et al.* 2007). Most of the population follows the outer coast of the Kodiak Archipelago from the Kenai Peninsula in spring or the Alaska Peninsula in fall (Consiglieri *et al.* 1982; Rice and Wolman 1971). Though most gray whales migrate past Cook Inlet, small numbers have been noted by fishers near Kachemak Bay, and north of Anchor Point (BOEM 2015). During the NMFS aerial surveys, gray whales were observed in the month of June in 1994, 2000, 2001, 2005 and 2009 on the east side of Cook Inlet near Port Graham and Elizabeth Island but also on the west side near Kamishak Bay (Shelden *et al.* 2013). One gray whale was sighted as far north at the Beluga River. Additionally, summering gray whales were seen offshore of Cape Starichkof by marine mammal observers monitoring Buccaneer's Cosmopolitan drilling program in 2013 (Owl Ridge 2014). During Apache's 2012 seismic program, nine gray whales were observed in June and July (Lomac-MacNair *et al.* 2013). During Apache's seismic program in 2014, one gray whale was observed (Lomac-MacNair *et al.* 2014). During SAExploration's seismic survey in 2015,

no gray whales were observed (Kendall *et al.* 2015). This species is unlikely to be seen in upper Cook Inlet but may be encountered in the mid and lower Inlet.

Cook Inlet Beluga Whales

The Cook Inlet beluga whale DPS is a small geographically isolated population that is separated from other beluga populations by the Alaska Peninsula. The population is genetically distinct from other Alaska populations suggesting the peninsula is an effective barrier to genetic exchange (O'Corry-Crowe *et al.* 1997). The Cook Inlet beluga whale population is estimated to have declined from 1,300 animals in the 1970s (Calkins 1989) to about 340 animals in 2014 (Shelden *et al.* 2015). The precipitous decline documented in the mid-1990s was attributed to unsustainable subsistence practices by Alaska Native hunters (harvest of >50 whales per year) (Mahoney and Shelden 2000). In 2006, a moratorium to cease hunting was agreed upon to protect the species. In April 2011, NMFS designated critical habitat for the beluga under the ESA (76 FR 20180) as shown on Figure 13 of the application. NMFS finalized the Conservation Plan for the Cook Inlet beluga in 2008 (NMFS 2008a). NMFS finalized the Recovery Plan for Cook Inlet beluga whales in 2016 (NMFS 2016a).

The Cook Inlet beluga stock remains within Cook Inlet throughout the year (Goetz *et al.* 2012a). Two areas, consisting of 7,809 km² (3,016 mi²) of marine and estuarine environments considered essential for the species' survival and recovery were designated critical habitat. However, in recent years the range of the beluga whale has contracted to the upper reaches of Cook Inlet because of the decline in the population (Rugh *et al.* 2010). Area 1 of the Cook Inlet beluga whale critical habitat encompasses all marine waters of Cook Inlet north of a line connecting Point Possession (61.04° N, 150.37° W) and the mouth of Three Mile Creek (61.08.55° N, 151.04.40° W), including waters of the Susitna, Little Susitna, and Chickaloon Rivers below mean higher high water (MHHW). This area provides important habitat during ice-free months and is used intensively by Cook Inlet beluga between April and November (NMFS 2016a).

Since 1993, NMFS has conducted annual aerial surveys in June, July or August to document the distribution and abundance of beluga whales in Cook Inlet. The collective survey results show that beluga whales have been consistently found near or in river mouths along the northern shores of upper Cook Inlet (*i.e.*, north of East and

West Foreland). In particular, beluga whale groups are seen in the Susitna River Delta, Knik Arm, and along the shores of Chickaloon Bay. Small groups had also been recorded seen farther south in Kachemak Bay, Redoubt Bay (Big River), and Trading Bay (McArthur River) prior to 1996 but very rarely thereafter. Since the mid-1990s, most (96 to 100 percent) beluga whales in upper Cook Inlet have been concentrated in shallow areas near river mouths, no longer occurring in the central or southern portions of Cook Inlet (Hobbs *et al.* 2008). Based on these aerial surveys, the concentration of beluga whales in the northernmost portion of Cook Inlet appears to be consistent from June to October (Rugh *et al.* 2000, 2004a, 2005, 2006, 2007).

Though Cook Inlet beluga whales can be found throughout the inlet at any time of year, they spend the ice-free months generally in the upper Cook Inlet, shifting into the middle and lower Inlet in winter (Hobbs *et al.* 2005). In 1999, one beluga whale was tagged with a satellite transmitter, and its movements were recorded from June through September of that year. Since 1999, 18 beluga whales in upper Cook Inlet have been captured and fitted with satellite tags to provide information on their movements during late summer, fall, winter, and spring. Using location data from satellite-tagged Cook Inlet belugas, Ezer *et al.* (2013) found most tagged whales were in the lower to middle inlet (70 to 100 percent of tagged whales) during January through March, near the Susitna River Delta from April to July (60 to 90 percent of tagged whales) and in the Knik and Turnagain Arms from August to December.

During the spring and summer, beluga whales are generally concentrated near the warmer waters of river mouths where prey availability is high and predator occurrence is low (Moore *et al.* 2000). Beluga whales in Cook Inlet are believed to mostly calve between mid-May and mid-July, and concurrently breed between late spring and early summer (NMFS 2016a), primarily in upper Cook Inlet. Movement was correlated with the peak discharge of seven major rivers emptying into Cook Inlet. Boat-based surveys from 2005 to the present (McGuire and Stephens 2017), and initial results from passive acoustic monitoring across the entire inlet (Castellote *et al.* 2016) also support seasonal patterns observed with other methods. Other surveys also confirm Cook Inlet belugas near the Kenai River during summer months (McGuire and Stephens 2017).

During the summer and fall, beluga whales are concentrated near the

Susitna River mouth, Knik Arm, Turnagain Arm, and Chickaloon Bay (Nemeth *et al.* 2007) where they feed on migrating eulachon (*Thaleichthys pacificus*) and salmon (*Onchorhynchus* spp.) (Moore *et al.* 2000). Data from tagged whales (14 tags between July and March 2000 through 2003) show beluga whales use upper Cook Inlet intensively between summer and late autumn (Hobbs *et al.* 2005). Critical Habitat Area 1 reflects this summer distribution.

As late as October, beluga whales tagged with satellite transmitters continued to use Knik Arm and Turnagain Arm and Chickaloon Bay, but some ranged into lower Cook Inlet south to Chinitna Bay, Tuxedni Bay, and Trading Bay (McArthur River) in the fall (Hobbs *et al.* 2005). Data from NMFS aerial surveys, opportunistic sighting reports, and satellite-tagged beluga whales confirm they are more widely dispersed throughout Cook Inlet during the winter months (November–April), with animals found between Kalgin Island and Point Possession. In November, beluga whales moved between Knik Arm, Turnagain Arm, and Chickaloon Bay, similar to patterns observed in September (Hobbs *et al.* 2005). By December, beluga whales were distributed throughout the upper to mid-inlet. From January into March, they moved as far south as Kalgin Island and slightly beyond in central offshore waters. Beluga whales also made occasional excursions into Knik Arm and Turnagain Arm in February and March despite ice cover greater than 90 percent (Hobbs *et al.* 2005).

During Apache's seismic test program in 2011 along the west coast of Redoubt Bay, lower Cook Inlet, a total of 33 beluga whales were sighted during the survey (Lomac-MacNair *et al.* 2013). During Apache's 2012 seismic program in mid-inlet, a total of 151 sightings of approximately 1,463 estimated individual beluga whales were observed (Lomac-MacNair *et al.* 2013). During SAExploration's 2015 seismic program, a total of eight sightings of approximately 33 estimated individual beluga whales were visually observed during this time period and there were two acoustic detections of beluga whales (Kendall *et al.* 2015). Hilcorp recently reported 143 sightings of beluga whales while conducting pipeline work near Ladd Landing in upper Cook Inlet, which is not near the area that seismic surveys are proposed but near some potential well sites.

Ferguson *et al.* (2015) delineated one "Small" and "Resident" BIA for Cook Inlet beluga whales. Small and Resident BIAs are defined as "areas and time within which small and resident

populations occupy a limited geographic extent” (Ferguson *et al.* 2015). The Cook Inlet beluga whale BIA was delineated using the habitat model results of Goetz *et al.* 2012 and the critical habitat boundaries (76 FR 20180).

Harbor Porpoise

In Alaskan waters, three stocks of harbor porpoises are currently recognized for management purposes: Southeast Alaska, Gulf of Alaska, and Bering Sea Stocks (Muto *et al.* 2017). Porpoises found in Cook Inlet belong to the Gulf of Alaska Stock which is distributed from Cape Suckling to Unimak Pass and most recently was estimated to number 31,046 individuals (Muto *et al.* 2017). They are one of the three marine mammals (the other two being belugas and harbor seals) regularly seen throughout Cook Inlet (Nemeth *et al.* 2007), especially during spring eulachon and summer salmon runs.

Harbor porpoises primarily frequent the coastal waters of the Gulf of Alaska and Southeast Alaska (Dahlheim *et al.* 2000, 2008), typically occurring in waters less than 100 m deep (Hobbs and Waite 2010). The range of the Gulf of Alaska stock includes the entire Cook Inlet, Shelikof Strait, and the Gulf of Alaska. Harbor porpoises have been reported in lower Cook Inlet from Cape Douglas to the West Foreland, Kachemak Bay, and offshore (Rugh *et al.* 2005a). Although they have been frequently observed during aerial surveys in Cook Inlet (Shelden *et al.* 2014), most sightings are of single animals, and are concentrated at Chinitna and Tuxedni bays on the west side of lower Cook Inlet (Rugh *et al.* 2005) and in the upper inlet. The occurrence of larger numbers of porpoise in the lower Cook Inlet may be driven by greater availability of preferred prey and possibly less competition with beluga whales, as belugas move into upper inlet waters to forage on Pacific salmon during the summer months (Shelden *et al.* 2014).

The harbor porpoise frequently has been observed during summer aerial surveys of Cook Inlet, with most sightings of individuals concentrated at Chinitna and Tuxedni Bays on the west side of lower Cook Inlet (Figure 14 of the application; Rugh *et al.* 2005). Mating probably occurs from June or July to October, with peak calving in May and June (as cited in Consiglieri *et al.* 1982). Small numbers of harbor porpoises have been consistently reported in the upper Cook Inlet between April and October, except for a recent survey that recorded higher

numbers than typical. NMFS aerial surveys have identified many harbor porpoise sightings throughout Cook Inlet.

During Apache’s 2012 seismic program, 137 sightings (190 individuals) were observed between May and August (Lomac-MacNair *et al.* 2013). Lomac-MacNair *et al.* 2014 identified 77 groups of harbor porpoise totaling 13 individuals during Apache’s 2014 seismic survey, both from vessels and aircraft, during the month of May. During SAExploration’s 2015 seismic survey, 52 sightings (65 individuals) were observed north of the Forelands (Kendall *et al.* 2015).

Recent passive acoustic research in Cook Inlet by Alaska Department of Fish and Game (ADF&G) and the Marine Mammal Laboratory (MML) have indicated that harbor porpoises occur more frequently than expected, particularly in the West Foreland area in the spring (Castellote *et al.* 2016), although overall numbers are still unknown at this time.

Dall’s Porpoise

Dall’s porpoises are widely distributed throughout the North Pacific Ocean including preferring deep offshore and shelf-slopes, and deep oceanic waters (Muto *et al.* 2017). The Dall’s porpoise range in Alaska extends into the southern portion of the Petition region (Figure 14 of the application). Dall’s porpoises are present year-round throughout their entire range in the northeast including the Gulf of Alaska, and occasionally the Cook Inlet area (Morejohn 1979). This porpoise also has been observed in lower Cook Inlet, around Kachemak Bay, and rarely near Anchor Point (Owl Ridge 2014; BOEM 2015).

Throughout most of the eastern North Pacific they are present during all months of the year, although there may be seasonal onshore-offshore movements along the west coast of the continental United States and winter movements of populations out of areas with ice such as Prince William Sound (Muto *et al.* 2017). Dall’s porpoises were observed (2 groups, 3 individuals) during Apache’s 2014 seismic survey which occurred in the summer months (Lomac-MacNair *et al.* 2014). Dall’s porpoises were observed during the month of June in 1997 (Iniskin Bay), 1999 (Barren Island), and 2000 (Elizabeth Island, Kamishak Bay and Barren Island) (Shelden *et al.* 2013). Dall’s porpoises have been observed in lower Cook Inlet, including Kachemak Bay and near Anchor Point (Owl Ridge 2014). One Dall’s porpoise was observed in August north of Nikiski in the middle

of the Inlet during SAExploration’s 2015 seismic program (Kendall *et al.* 2015).

Harbor Seal

Harbor seals occupy a wide variety of habitats in freshwater and saltwater in protected and exposed coastlines and range from Baja California north along the west coasts of Washington, Oregon, and California, British Columbia, and Southeast Alaska; west through the Gulf of Alaska, Prince William Sound, and the Aleutian Islands; and north in the Bering Sea to Cape Newenham and the Pribilof Islands. Harbor seals are found throughout the entire lower Cook Inlet coastline, hauling out on beaches, islands, mudflats, and at the mouths of rivers where they whelp and feed (Muto *et al.* 2017).

The major haul out sites for harbor seals are located in lower Cook Inlet. The presence of harbor seals in upper Cook Inlet is seasonal. In Cook Inlet, seal use of western habitats is greater than use of the eastern coastline (Boveng *et al.* 2012). NMFS has documented a strong seasonal pattern of more coastal and restricted spatial use during the spring and summer for breeding, pupping, and molting, and more wide-ranging seal movements within and outside of Cook Inlet during the winter months (Boveng *et al.* 2012). Large-scale patterns indicate a portion of harbor seals captured in Cook Inlet move out of the area in the fall, and into habitats within Shelikof Strait, Northern Kodiak Island, and coastal habitats of the Alaska Peninsula, and are most concentrated in Kachemak Bay, across Cook Inlet toward Iniskin and Iliamna Bays, and south through the Kamishak Bay, Cape Douglas and Shelikof Strait regions (Boveng *et al.* 2012).

A portion of the Cook Inlet seals move into the Gulf of Alaska and Shelikof Strait during the winter months (London *et al.* 2012). Seals move back into Cook Inlet as the breeding season approaches and their spatial use is more concentrated around haul-out areas (Boveng *et al.* 2012; London *et al.* 2012). Some seals expand their use of the northern portion of Cook Inlet. However, in general, seals that were captured and tracked in the southern portion of Cook Inlet remained south of the Forelands (Boveng *et al.* 2012). Important harbor seal haul-out areas occur within Kamishak and Kachemak Bays and along the coast of the Kodiak Archipelago and the Alaska Peninsula. Chinitna Bay, Clearwater and Chinitna Creeks, Tuxedni Bay, Kamishak Bay, Oil Bay, Pomeroy and Iniskin Islands, and Augustine Island are also important spring-summer breeding and molting areas and known haul-outs sites (Figure

15 of the application). Small-scale patterns of movement within Cook Inlet also occur (Boveng *et al.* 2012). Montgomery *et al.* (2007) recorded over 200 haul out sites in lower Cook Inlet alone. However, only a few dozen to a couple hundred seals seasonally occur in upper Cook Inlet (Rugh *et al.* 2005), mostly at the mouth of the Susitna River where their numbers vary in concert with the spring eulachon and summer salmon runs (Nemeth *et al.* 2007; Boveng *et al.* 2012).

The Cook Inlet/Shelikof Stock is distributed from Anchorage into lower Cook Inlet during summer and from lower Cook Inlet through Shelikof Strait to Unimak Pass during winter (Boveng *et al.* 2012). Large numbers concentrate at the river mouths and embayments of lower Cook Inlet, including the Fox River mouth in Kachemak Bay, and several haul outs have been identified on the southern end of Kalgin Island in lower Cook Inlet (Rugh *et al.* 2005; Boveng *et al.* 2012). Montgomery *et al.* (2007) recorded over 200 haul-out sites in lower Cook Inlet alone. During Apache's 2012 seismic program, harbor seals were observed in the project area from early May until the end of the seismic operations in late September (Lomac-MacNair *et al.* 2013). Also in 2012, up to 100 harbor seals were observed hauled out at the mouths of the Theodore and Lewis rivers during monitoring activity associated with Apache's 2012 Cook Inlet seismic program. During Apache's 2014 seismic program, 492 groups of harbor seals (613 individuals) were observed. This was the highest sighting rate of any marine mammal observed during the summer of 2014 (Lomac-MacNair *et al.* 2014). During SAExploration's 2015 seismic survey, 823 sightings (1,680 individuals) were observed north and between the Forelands (Kendall *et al.* 2015).

Steller Sea Lions

The western DPS (WDPS) stock of Steller sea lions most likely occurs in Cook Inlet (78 FR 66139). The center of abundance for the Western DPS is considered to extend from Kenai to Kiska Island (NMFS 2008b). The WDPS of the Steller sea lion is defined as all populations west of longitude 144° W to the western end of the Aleutian Islands. The range of the WDPS includes 38 rookeries and hundreds of haul out sites. The Hilcorp action area only considers the WDPS stock. The most recent comprehensive aerial photographic and land-based surveys of WDPS Steller sea lions in Alaska were conducted during the 2014 and 2015 breeding seasons (Fritz *et al.* 2015).

The WDPS of Steller sea lions is currently listed as endangered under the ESA (55 FR 49204) and designated as depleted under the MMPA. Critical habitat was designated on August 27, 1993 (58 FR 45269) south of the proposed project area in the Cook Inlet region (Figure 16 of the application). The critical habitat designation for the WDPS of Steller sea lions was determined to include a 37 km (20 nm) buffer around all major haul outs and rookeries, and associated terrestrial, atmospheric, and aquatic zones, plus three large offshore foraging areas (Figure 16 of the application). NMFS also designated no entry zones around rookeries (50 CFR 223.202). Designated critical habitat is located outside Cook Inlet at Gore Point, Elizabeth Island, Perl Island, and Chugach Island (NMFS 2008b).

The geographic center of Steller sea lion distribution is the Aleutian Islands and the Gulf of Alaska, although as the WDPS has declined, rookeries in the west became progressively smaller (NMFS 2008b). Steller sea lion habitat includes terrestrial sites for breeding and pupping (rookeries), resting (haul outs), and marine foraging areas. Nearly all rookeries are at sites inaccessible to terrestrial predators on remote rocks, islands, and reefs. Steller sea lions inhabit lower Cook Inlet, especially near Shaw Island and Elizabeth Island (Nagahut Rocks) haul out sites (Rugh *et al.* 2005) but are rarely seen in upper Cook Inlet (Nemeth *et al.* 2007). Steller sea lions occur in Cook Inlet but south of Anchor Point around the offshore islands and along the west coast of the upper inlet in the bays (Chinitna Bay, Iniskin Bay, etc.) (Rugh *et al.* 2005). Portions of the southern reaches of the lower inlet are designated as critical habitat, including a 20-nm buffer around all major haulout sites and rookeries. Rookeries and haul out sites in lower Cook Inlet include those near the mouth of the inlet, which are far south of the project area.

Steller sea lions feed largely on walleye pollock, salmon, and arrowtooth flounder during the summer, and walleye pollock and Pacific cod during the winter (Sinclair and Zeppelin 2002). Except for salmon, none of these are found in abundance in upper Cook Inlet (Nemeth *et al.* 2007).

Steller sea lions can travel considerable distances (Baba *et al.* 2000). Steller sea lions are not known to migrate annually, but individuals may widely disperse outside of the breeding season (late May to early July; Jemison *et al.* 2013; Allen and Angliss 2014). Most adult Steller sea lions inhabit rookeries during the breeding season

(late May to early July). Some juveniles and non-breeding adults occur at or near rookeries during the breeding season, but most are on haul outs. Adult males may disperse widely after the breeding season and, during fall and winter, many sea lions increase use of haul outs, especially terrestrial sites but also on sea ice in the Bering Sea (NMFS 2008b).

Steller sea lions have been observed during marine mammal surveys conducted in Cook Inlet. In 2012, during Apache's 3D Seismic surveys, there were three sightings of approximately four individuals in upper Cook Inlet (Lomac-MacNair *et al.* 2013). Marine mammal observers associated with Buccaneer's drilling project off Cape Starichkof observed seven Steller sea lions during the summer of 2013 (Owl Ridge 2014). During SAExploration's 3D Seismic Program in 2015, four Steller sea lions were observed in Cook Inlet. One sighting occurred between the West and East Forelands, one near Nikiski and one northeast of the North Foreland in the center of Cook Inlet (Kendall *et al.* 2015). During NMFS Cook Inlet beluga whale aerial surveys from 2000–2016, there were 39 sightings of 769 estimated individual Steller sea lions in lower Cook Inlet (Shelden *et al.* 2017). Sightings of large congregations of Steller sea lions during NMFS aerial surveys occurred outside the Petition region, on land in the mouth of Cook Inlet (*e.g.*, Elizabeth and Shaw Islands).

California Sea Lions

There is limited information on the presence of California sea lions in Alaska. From 1973 to 2003, a total of 52 California sea lions were reported in Alaska, with sightings increasing in the later years. Most sightings occurred in the spring; however, they have been observed during all seasons. California sea lion presence in Alaska was correlated with increasing population numbers within their southern breeding range (Maniscalco *et al.* 2004).

There have been relatively few California sea lions observed in Alaska, most are often alone or occasionally in small groups of two or more and usually associated with Steller sea lions at their haulouts and rookeries (Maniscalco *et al.* 2004). California sea lions are not typically observed farther north than southeast Alaska, and sightings are very rare in Cook Inlet. California sea lions have not been observed during the annual NMFS aerial surveys in Cook Inlet. However, a sighting of two California sea lions was documented during the Apache 2012 seismic survey (Lomac-MacNair *et al.* 2013). Additionally, NMFS' anecdotal sighting

database has four sightings in Seward and Kachemak Bay.

The California sea lion breeds from the southern Baja Peninsula north to Año Nuevo Island, California. Breeding season lasts from May to August, and most pups are born from May through July. Their nonbreeding range extends northward into British Columbia and occasionally farther north into Alaskan waters. California sea lions have been observed in Alaska during all four seasons; however, most of the sightings have occurred during the spring (Maniscalco *et al.* 2004).

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SAR; [https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-](https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports)

mammal-stock-assessment-reports-region), and more general information about these species (*e.g.*, physical and behavioral descriptions) may be found on NMFS' website (<https://www.fisheries.noaa.gov/species-directory/>).

Table 2 lists all species with expected potential for occurrence in Cook Inlet and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2016). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here

as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' 2017 U.S. Alaska and Pacific SARs (Muto *et al.*, 2017; Carretta *et al.*, 2017). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2017 SARs and draft 2018 SARs (available online at: <https://www.fisheries.noaa.gov/action/2018-draft-marine-mammal-stock-assessment-reports-available>).

TABLE 2—SPECIES WITH THE POTENTIAL TO OCCUR IN COOK INLET, ALASKA

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae: Gray whale	<i>Eschrichtius robustus</i>	Eastern Pacific	-/-; N	20,990 (0.05, 20,125, 2011) ..	624	4.25
Family Balaenopteridae (rorquals): Fin whale	<i>Balaenoptera physalus</i>	Northeastern Pacific	E/D; Y	3,168 (0.26, 2,554 2013)	5.1	0.4
Minke whale	<i>Balaenoptera acutorostrata</i>	Alaska	-/-; N	N/A	N/A	0
Humpback whale	<i>Megaptera novaeangliae</i>	Western North Pacific	E/D; Y	1,107 (0.3, 865, 2006)	3	3.2
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae: Beluga whale	<i>Delphinapterus leucas</i>	Cook Inlet	E/D; Y	312 (0.1, 287, 2014)	0.54	0.57
Killer whale	<i>Orcinus orca</i>	Alaska Resident	-/-; N	2,347 (N/A, 2,347, 2012)	24	1
		Alaska Transient	-/-; N	587 (N/A, 587, 2012)	5.9	1
Family Phocoenidae (porpoises): Harbor porpoise	<i>Phocoena phocoena</i>	Gulf of Alaska	-/-; Y	31,046 (0.214, N/A, 1998)	Undet	72
Dall's porpoise	<i>Phocoenoides dalli</i>	Alaska	-/-; N	83,400 (0.097, N/A, 1993)	Undet	38
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions): Steller sea lion	<i>Eumetopias jubatus</i>	Western	E/D; Y	53,303 (N/A, 53,303, 2016) ...	320	241
California sea lion	<i>Zalophus californianus</i>	U.S.	-/-; N	296,750 (153,337, N/A, 2011)	9,200	331
Family Phocidae (earless seals): Harbor seal	<i>Phoca vitulina</i>	Cook Inlet/Shelikof	-/-; N	27,386 (25,651, N/A, 2011) ...	770	234

¹ Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

² NMFS marine mammal stock assessment reports online at: www.nmfs.noaa.gov/pr/sars/. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable [explain if this is the case]

³ These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.*, commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

Note: Italicized species are not expected to be taken or proposed for authorization.

All species that could potentially occur in the proposed survey areas are

included in Table 2. As described below, all 11 species (with 12 managed

stocks) temporally and spatially co-occur with the activity to the degree that

take is reasonably likely to occur, and we have proposed authorizing it.

In addition, sea otters may be found in Cook Inlet. However, sea otters are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (i.e., low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group):

- Low-frequency cetaceans (mysticetes): generalized hearing is estimated to occur between approximately 7 Hz and 35 kHz;
- Mid-frequency cetaceans (larger toothed whales, beaked whales, and most delphinids): generalized hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High-frequency cetaceans (porpoises, river dolphins, and members of the genera *Kogia* and *Cephalorhynchus*; including two members of the genus *Lagenorhynchus*, on the basis of recent echolocation data and genetic data): generalized hearing is

estimated to occur between approximately 275 Hz and 160 kHz;

- Pinnipeds in water; Phocidae (true seals): generalized hearing is estimated to occur between approximately 50 Hz to 86 kHz; and
- Pinnipeds in water; Otariidae (eared seals): generalized hearing is estimated to occur between 60 Hz and 39 kHz.

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Eleven marine mammal species (eight cetacean and three pinniped (two otariid and one phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, four are classified as low-frequency cetaceans (i.e., all mysticete species), two are classified as mid-frequency cetaceans (i.e., all delphinid and ziphiid species and the sperm whale), and two are classified as high-frequency cetaceans (i.e., harbor porpoise and *Kogia* spp.).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take by Incidental Harassment* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take by Incidental Harassment* section, and the *Proposed Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Description of Active Acoustic Sound Sources

This section contains a brief technical background on sound, the characteristics of certain sound types, and on metrics used in this proposal in as much as the information is relevant to the specified activity and to a discussion of the potential effects of the

specified activity on marine mammals found later in this document.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the “loudness” of a sound and is typically described using the relative unit of the dB. A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)) and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa) while the received level is the SPL at the listener’s position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urlick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 $\mu\text{Pa}^2\text{-s}$) represents the total energy contained within a pulse and considers both intensity and duration of exposure. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-p) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source and is represented in the same units as the rms sound pressure. Another common metric is peak-to-peak sound pressure (pk-pk), which is the algebraic difference between the peak positive and peak negative sound pressures.

Peak-to-peak pressure is typically approximately 6 dB higher than peak pressure (Southall *et al.*, 2007).

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for pulses produced by the airgun arrays considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.*, 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.*, wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.*, sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.*, vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including the following (Richardson *et al.*, 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitsun, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf sound becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions;

- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times;

- *Biological:* Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz; and

- *Anthropogenic:* Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly. Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.*, a passing vessel) is sometimes termed background sound, as opposed to ambient sound.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise “ambient” or “background” sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.*, 1995). The result is that, depending on the source type and its intensity, sound from a given activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals. Details of source types are described in the following text.

Sounds are often considered to fall into one of two general types: Pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.*, Ward, 1997 in Southall *et al.*, 2007). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts.

Pulsed sound sources (*e.g.*, airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient

pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.*, rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Airgun arrays produce pulsed signals with energy in a frequency range from about 10–2,000 Hz, with most energy radiated at frequencies below 200 Hz. The amplitude of the acoustic wave emitted from the source is equal in all directions (*i.e.*, omnidirectional), but airgun arrays do possess some directionality due to different phase delays between guns in different directions. Airgun arrays are typically tuned to maximize functionality for data acquisition purposes, meaning that sound transmitted in horizontal directions and at higher frequencies is minimized to the extent possible.

As described above, two types of sub-bottom profiler would also be used by Hilcorp during the geotechnical and geohazard surveys: A low resolution unit (1–4 kHz) and a high resolution unit (2–24 kHz).

Potential Effects of Underwater Sound—Please refer to the information given previously (“Description of Active Acoustic Sound Sources”) regarding sound, characteristics of sound types, and metrics used in this document. Note that, in the following discussion, we refer in many cases to a recent review article concerning studies of noise-induced hearing loss conducted from 1996–2015 (*i.e.*, Finneran, 2015). For study-specific citations, please see that work. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound

from active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.*, 1995; Gordon *et al.*, 2004; Nowacek *et al.*, 2007; Southall *et al.*, 2007; Götz *et al.*, 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. We first describe specific manifestations of acoustic effects before providing discussion specific to the use of airguns.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. First is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.*, when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

We describe the more severe effects certain non-auditory physical or physiological effects only briefly as we do not expect that use of airgun arrays, sub-bottom profilers, drill rig construction, or sheet pile driving are reasonably likely to result in such effects (see below for further discussion). Potential effects from impulsive sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.*, 1973). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary

effect of extreme behavioral reactions (*e.g.*, change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.*, 2006; Southall *et al.*, 2007; Zimmer and Tyack, 2007; Tal *et al.*, 2015). The suite of activities considered here do not involve the use of devices such as explosives or mid-frequency tactical sonar that are associated with these types of effects.

1. **Threshold Shift**—Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.*, 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.*, tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.*, 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.*, Ward, 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals. There is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above a 40-dB threshold shift approximates PTS onset; *e.g.*, Kryter *et al.*, 1966; Miller, 1974) which would induce mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.*, Southall *et al.* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as airgun pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis, and PTS cumulative sound exposure level (SELcum) thresholds are 15 to 20 dB higher than TTS SELcum thresholds (Southall *et al.*, 2007). Given the higher level of sound combined with longer exposure

duration necessary to cause PTS, it is expected that limited PTS could occur from the proposed activities. For mid-frequency cetaceans in particular, potential protective mechanisms may help limit onset of TTS or prevent onset of PTS. Such mechanisms include dampening of hearing, auditory adaptation, or behavioral amelioration (*e.g.*, Nachtigall and Supin, 2013; Miller *et al.*, 2012; Finneran *et al.*, 2015; Popov *et al.*, 2016). Given the higher level of sound, longer durations of exposure necessary to cause PTS, it is possible but unlikely PTS would occur during the proposed seismic surveys, geotechnical surveys, or other exploratory drilling activities.

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.*, recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts.

Finneran *et al.* (2015) measured hearing thresholds in three captive bottlenose dolphins before and after exposure to ten pulses produced by a seismic airgun in order to study TTS induced after exposure to multiple pulses. Exposures began at relatively low levels and gradually increased over a period of several months, with the highest exposures at peak SPLs from 196 to 210 dB and cumulative (unweighted) SELs from 193–195 dB. No substantial TTS was observed. In addition, behavioral reactions were

observed that indicated that animals can learn behaviors that effectively mitigate noise exposures (although exposure patterns must be learned, which is less likely in wild animals than for the captive animals considered in this study). The authors note that the failure to induce more significant auditory effects is likely due to the intermittent nature of exposure, the relatively low peak pressure produced by the acoustic source, and the low-frequency energy in airgun pulses as compared with the frequency range of best sensitivity for dolphins and other mid-frequency cetaceans.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds (northern elephant seal, harbor seal, and California sea lion) exposed to a limited number of sound sources (*i.e.*, mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.*, 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018).

Critical questions remain regarding the rate of TTS growth and recovery after exposure to intermittent noise and the effects of single and multiple pulses. Data at present are also insufficient to construct generalized models for recovery and determine the time necessary to treat subsequent exposures as independent events. More information is needed on the relationship between auditory evoked potential and behavioral measures of TTS for various stimuli. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and NMFS (2016).

Marine mammals in the action area during the proposed activities are less likely to incur TTS hearing impairment from some of the sources proposed to be

used due to the characteristics of the sound sources, particularly sources such as the water jets, which include lower source levels (176 dB @1m) and generally very short pulses and duration of the sound. Even for high-frequency cetacean species (*e.g.*, harbor porpoises), which may have increased sensitivity to TTS (Lucke *et al.*, 2009; Kastelein *et al.*, 2012b), individuals would have to make a very close approach and also remain very close to vessels operating these sources in order to receive multiple exposures at relatively high levels, as would be necessary to cause TTS. Intermittent exposures—as would occur due to the brief, transient signals produced by these sources—require a higher cumulative SEL to induce TTS than would continuous exposures of the same duration (*i.e.*, intermittent exposure results in lower levels of TTS) (Mooney *et al.*, 2009a; Finneran *et al.*, 2010). Moreover, most marine mammals would more likely avoid a loud sound source rather than swim in such close proximity as to result in TTS (much less PTS). Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a sub-bottom profiler emits a pulse is small—because if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause temporary threshold shift and would likely exhibit avoidance behavior to the area near the transducer rather than swim through at such a close range. Further, the restricted beam shape of the sub-bottom profiler and other geophysical survey equipment makes it unlikely that an animal would be exposed more than briefly during the passage of the vessel. Boebel *et al.* (2005) concluded similarly for single and multibeam echosounders, and more recently, Lurton (2016) conducted a modeling exercise and concluded similarly that likely potential for acoustic injury from these types of systems is negligible, but that behavioral response cannot be ruled out. Animals may avoid the area around the survey vessels, thereby reducing exposure. Effects of non-pulsed sound on marine mammals, such as vibratory pile driving, are less studied. In a study by Malme *et al.* (1986) on gray whales as well as Richardson *et al.* (1997) on beluga whales, the only reactions documented in response to drilling sound playbacks were behavioral reactions. Any disturbance to marine mammals is likely to be in the form of temporary avoidance or alteration of opportunistic foraging behavior near the survey location.

2. Behavioral Effects—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.*, minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.*, species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.*, Richardson *et al.*, 1995; Wartzok *et al.*, 2003; Southall *et al.*, 2007; Weilgart, 2007; Archer *et al.*, 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.*, 2012), and can vary depending on characteristics associated with the sound source (*e.g.*, whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.*, 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a “progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,” rather than as, more generally, moderation in response to human disturbance (Bejder *et al.*, 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.*, 1995; NRC, 2003; Wartzok *et al.*, 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.*, 1997). Observed responses of wild marine mammals to

loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.*, 1995; Nowacek *et al.*, 2007). However, many delphinids approach acoustic source vessels with no apparent discomfort or obvious behavioral change (*e.g.*, Barkaszi *et al.*, 2012).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.*, Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely, and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.*, Frankel and Clark 2000; Ng and Leung 2003; Nowacek *et al.* 2004; Goldbogen *et al.* 2013). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.*, foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.*, bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.*, Croll *et al.* 2001; Nowacek *et al.*

2004; Madsen *et al.* 2006; Yazvenko *et al.* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Visual tracking, passive acoustic monitoring, and movement recording tags were used to quantify sperm whale behavior prior to, during, and following exposure to airgun arrays at received levels in the range 140–160 dB at distances of 7–13 km, following a phase-in of sound intensity and full array exposures at 1–13 km (Madsen *et al.*, 2006; Miller *et al.*, 2009). Sperm whales did not exhibit horizontal avoidance behavior at the surface. However, foraging behavior may have been affected. The sperm whales exhibited 19 percent less vocal (buzz) rate during full exposure relative to post exposure, and the whale that was approached most closely had an extended resting period and did not resume foraging until the airguns had ceased firing. The remaining whales continued to execute foraging dives throughout exposure; however, swimming movements during foraging dives were six percent lower during exposure than control periods (Miller *et al.*, 2009). These data raise concerns that seismic surveys may impact foraging behavior in sperm whales, although more data are required to understand whether the differences were due to exposure or natural variation in sperm whale behavior (Miller *et al.*, 2009).

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.*, Kastelein *et al.*, 2001, 2005, 2006; Gailey *et al.*, 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in

response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.*, 2000; Fristrup *et al.*, 2003; Foote *et al.*, 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.*, 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.*, 1994).

Cerchio *et al.* (2014) used passive acoustic monitoring to document the presence of singing humpback whales off the coast of northern Angola and to opportunistically test for the effect of seismic survey activity on the number of singing whales. Two recording units were deployed between March and December 2008 in the offshore environment, and the numbers of singers were counted every hour. Generalized Additive Mixed Models were used to assess the effect of survey day (seasonality), hour (diel variation), moon phase, and received levels of noise (measured from a single pulse during each ten minute sampled period) on singer number. The number of singers significantly decreased with increasing received level of noise, suggesting that humpback whale breeding activity was disrupted to some extent by the survey activity.

Castellote *et al.* (2012) reported acoustic and behavioral changes by fin whales in response to shipping and airgun noise. Acoustic features of fin whale song notes recorded in the Mediterranean Sea and northeast Atlantic Ocean were compared for areas with different shipping noise levels and traffic intensities and during a seismic airgun survey. During the first 72 hours of the survey, a steady decrease in song received levels and bearings to singers indicated that whales moved away from the acoustic source and out of the study area. This displacement persisted for a time period well beyond the 10-day duration of seismic airgun activity, providing evidence that fin whales may avoid an area for an extended period in the presence of increased noise. The authors hypothesize that fin whale acoustic communication is modified to compensate for increased background noise and that a sensitization process may play a role in the observed temporary displacement.

Seismic pulses at average received levels of 131 dB re 1 $\mu\text{Pa}^2\text{-s}$ caused blue whales to increase call production (Di Iorio and Clark, 2010). In contrast, McDonald *et al.* (1995) tracked a blue whale with seafloor seismometers and reported that it stopped vocalizing and changed its travel direction at a range of 10 km from the acoustic source vessel (estimated received level 143 dB pk-pk). Blackwell *et al.* (2013) found that bowhead whale call rates dropped significantly at onset of airgun use at sites with a median distance of 41–45 km from the survey. Blackwell *et al.* (2015) expanded this analysis to show that whales actually increased calling rates as soon as airgun signals were detectable before ultimately decreasing calling rates at higher received levels (*i.e.*, 10-minute SELcum of ~127 dB). Overall, these results suggest that bowhead whales may adjust their vocal output in an effort to compensate for noise before ceasing vocalization effort and ultimately deflecting from the acoustic source (Blackwell *et al.*, 2013, 2015). These studies demonstrate that even low levels of noise received far from the source can induce changes in vocalization and/or behavior for mysticetes.

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.*, 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.*, 1984). Humpback whales showed avoidance behavior in the presence of an active seismic array during observational studies and controlled exposure experiments in western Australia (McCauley *et al.*, 2000). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.*, Bowles *et al.*, 1994; Stone *et al.*, 2000; Morton and Symonds, 2002; Gailey *et al.*, 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.*, Bejder *et al.*, 2006; Teilmann *et al.*, 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.*, directed movement, rate of travel). Relatively little

information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.*, when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.*, Beauchamp and Livoreil 1997; Purser and Radford 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.*, decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.*, Harrington and Veitch 1992; Daan *et al.* 1996; Bradshaw *et al.* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stone (2015) reported data from at-sea observations during 1,196 seismic surveys from 1994 to 2010. When large arrays of airguns (considered to be 500 cui or more) were firing, lateral displacement, more localized avoidance, or other changes in behavior were evident for most odontocetes. However, significant responses to large arrays were found only for the minke whale and fin whale. Behavioral responses observed included changes in swimming or surfacing behavior, with indications that cetaceans remained near the water surface at these times. Cetaceans were recorded as feeding less often when large arrays were active. Behavioral observations of gray whales during a seismic survey monitored whale movements and respirations pre-, during and post-seismic survey (Gailey *et al.*, 2016). Behavioral state and water depth were the best ‘natural’ predictors of whale movements and respiration and, after considering natural variation, none of the response variables were significantly associated with seismic survey or vessel sounds.

Marine mammals are likely to avoid the proposed activities, especially harbor porpoises, while the harbor seals might be attracted to them out of curiosity. However, because the sub-bottom profilers and seismic equipment operate from moving vessels, the area (relative to the available habitat in Cook Inlet) and time that this equipment would be affecting a given location is very small. Further, for mobile sources, once an area has been surveyed, it is not likely that it will be surveyed again, therefore reducing the likelihood of repeated geophysical and geotechnical survey impacts within the survey area. The isopleths for harassment for the stationary sources considered in this document are small relative to those for mobile sources. Therefore, while the sound is concentrated in the same area for the duration of the activity (duration of pile driving, VSP, etc), the amount of area affected by noise levels which we expect may cause harassment are small relative to the mobile sources. Additionally, animals may more predictably avoid the area of the disturbance as the source is stationary. Overall duration of these sound sources is still short and unlikely to cause more than temporary disturbance.

We have also considered the potential for severe behavioral responses such as stranding and associated indirect injury or mortality from Hilcorp’s use of high resolution geophysical survey equipment, on the basis of a 2008 mass stranding of approximately one hundred melon-headed whales in a Madagascar lagoon system. An investigation of the

event indicated that use of a high-frequency mapping system (12-kHz multibeam echosounder) was the most plausible and likely initial behavioral trigger of the event, while providing the caveat that there is no unequivocal and easily identifiable single cause (Southall *et al.*, 2013). The investigatory panel's conclusion was based on (1) very close temporal and spatial association and directed movement of the survey with the stranding event; (2) the unusual nature of such an event coupled with previously documented apparent behavioral sensitivity of the species to other sound types (Southall *et al.*, 2006; Brownell *et al.*, 2009); and (3) the fact that all other possible factors considered were determined to be unlikely causes. Specifically, regarding survey patterns prior to the event and in relation to bathymetry, the vessel transited in a north-south direction on the shelf break parallel to the shore, ensonifying large areas of deep-water habitat prior to operating intermittently in a concentrated area offshore from the stranding site. This may have trapped the animals between the sound source and the shore, thus driving them towards the lagoon system. The investigatory panel systematically excluded or deemed highly unlikely nearly all potential reasons for these animals leaving their typical pelagic habitat for an area extremely atypical for the species (*i.e.*, a shallow lagoon system). Notably, this was the first time that such a system has been associated with a stranding event. The panel also noted several site- and situation-specific secondary factors that may have contributed to the avoidance responses that led to the eventual entrapment and mortality of the whales. Specifically, shoreward-directed surface currents and elevated chlorophyll levels in the area preceding the event may have played a role (Southall *et al.*, 2013). The report also notes that prior use of a similar system in the general area may have sensitized the animals and also concluded that, for odontocete cetaceans that hear well in higher frequency ranges where ambient noise is typically quite low, high-power active sonars operating in this range may be more easily audible and have potential effects over larger areas than low frequency systems that have more typically been considered in terms of anthropogenic noise impacts. It is, however, important to note that the relatively lower output frequency, higher output power, and complex nature of the system implicated in this event, in context of the other factors noted here, likely produced a fairly

unusual set of circumstances that indicate that such events would likely remain rare and are not necessarily relevant to use of lower-power, higher-frequency systems more commonly used for high resolution geophysical (HRG) survey applications. The risk of similar events recurring may be very low, given the extensive use of active acoustic systems used for scientific and navigational purposes worldwide on a daily basis and the lack of direct evidence of such responses previously reported.

3. Stress Responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.*, Seyle, 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.*, Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and "distress" is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficiently to restore normal function.

Relationships between these physiological mechanisms, animal

behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.*, Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Lankford *et al.*, 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.*, 2002) and, more rarely, studied in wild populations (*e.g.*, Romano *et al.*, 2002). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as "distress." In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

In general, there are few data on the potential for strong, anthropogenic underwater sounds to cause non-auditory physical effects in marine mammals. Such effects, if they occur at all, would presumably be limited to short distances and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.*, 2007). There is no definitive evidence that any of these effects occur even for marine mammals in close proximity to an anthropogenic sound source. In addition, marine mammals that show behavioral avoidance of survey vessels and related sound sources, are unlikely to incur non-auditory impairment or other physical effects. NMFS does not expect that the generally short-term, intermittent, and transitory seismic and geophysical surveys would create conditions of long-term, continuous noise and chronic acoustic exposure leading to long-term physiological stress responses in marine mammals. While the noise from drilling related activities are more continuous and longer term, those sounds are generated at a much lower level than the mobile sources discussed earlier.

4. Auditory Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.*, those used for intraspecific communication and social interactions, prey detection, predator avoidance,

navigation) (Richardson *et al.*, 1995; Erbe *et al.*, 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.*, snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.*, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.*, signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.*, sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds, such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.*, Clark *et al.*, 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.*, Miller *et al.* 2000; Foote *et al.* 2004; Parks *et al.* 2007; Holt *et al.* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore 2014). Masking can be tested directly in captive species (*e.g.*, Erbe 2008) but, in

wild populations, it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.*, Branstetter *et al.* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.*, from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Marine mammal communications would not likely be masked appreciably by the sub-profiler or seismic survey's signals given the directionality of the signal and the brief period when an individual mammal is likely to be within its beam. The probability for conductor pipe driving masking acoustic signals important to the behavior and survival of marine mammal species is low. Vibratory pile driving is also relatively short-term, with rapid oscillations occurring for short durations. It is possible that vibratory pile driving resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory pile and conductor pipe driving, and which have already been taken into account in the exposure analysis. Pile driving would occur for limited durations across multiple widely dispersed sites, thus we do not anticipate masking to significantly affect marine mammals.

Ship Strike

Vessel collisions with marine mammals, or ship strikes, can result in death or serious injury of the animal. Wounds resulting from ship strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus 2001). An animal at the surface may be struck directly by a vessel, a surfacing animal may hit the

bottom of a vessel, or an animal just below the surface may be cut by a vessel's propeller. Superficial strikes may not kill or result in the death of the animal. These interactions are typically associated with large whales (*e.g.*, fin whales), which are occasionally found draped across the bulbous bow of large commercial ships upon arrival in port. Although smaller cetaceans are more maneuverable in relation to large vessels than are large whales, they may also be susceptible to strike. The severity of injuries typically depends on the size and speed of the vessel, with the probability of death or serious injury increasing as vessel speed increases (Knowlton and Kraus 2001; Laist *et al.* 2001; Vanderlaan and Taggart 2007; Conn and Silber 2013). Impact forces increase with speed, as does the probability of a strike at a given distance (Silber *et al.* 2010; Gende *et al.* 2011).

Pace and Silber (2005) also found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45 to 75 percent as vessel speed increased from 10 to 14 kn, and exceeded 90 percent at 17 kn. Higher speeds during collisions result in greater force of impact, but higher speeds also appear to increase the chance of severe injuries or death through increased likelihood of collision by pulling whales toward the vessel (Clyne and Kennedy, 1999). In a separate study, Vanderlaan and Taggart (2007) analyzed the probability of lethal mortality of large whales at a given speed, showing that the greatest rate of change in the probability of a lethal injury to a large whale as a function of vessel speed occurs between 8.6 and 15 kt. The chances of a lethal injury decline from approximately 80 percent at 15 kt to approximately 20 percent at 8.6 kt. At speeds below 11.8 kt, the chances of lethal injury drop below 50 percent, while the probability asymptotically increases toward one hundred percent above 15 kt.

Hilcorp's seismic vessels would travel at approximately 4 knots (7.41 km/hour) while towing seismic survey gear and a maximum of 4.5 knots (8.3 km/hr) while conducting geotechnical and geohazard surveys (Faithweather, 2018). At these speeds, both the possibility of striking a marine mammal and the possibility of a strike resulting in serious injury or mortality are discountable. At average transit speed, the probability of serious injury or mortality resulting from a strike is less than 50 percent. However, the likelihood of a strike actually happening is again discountable. Ship strikes, as analyzed in the studies cited

above, generally involve commercial shipping, which is much more common in both space and time than is geophysical survey activity. Jensen and Silber (2004) summarized ship strikes of large whales worldwide from 1975–2003 and found that most collisions occurred in the open ocean and involved large vessels (e.g., commercial shipping). Commercial fishing vessels were responsible for three percent of recorded collisions, while no such incidents were reported for geophysical survey vessels during that time period.

It is possible for ship strikes to occur while traveling at slow speeds. For example, a hydrographic survey vessel traveling at low speed (5.5 kt) while conducting mapping surveys off the central California coast struck and killed a blue whale in 2009. The State of California determined that the whale had suddenly and unexpectedly surfaced beneath the hull, with the result that the propeller severed the whale's vertebrae, and that this was an unavoidable event. This strike represents the only such incident in approximately 540,000 hours of similar coastal mapping activity ($p = 1.9 \times 10^{-6}$; 95% CI = $0 - 5.5 \times 10^{-6}$; NMFS, 2013b). In addition, a research vessel reported a fatal strike in 2011 of a dolphin in the Atlantic, demonstrating that it is possible for strikes involving smaller cetaceans to occur. In that case, the incident report indicated that an animal apparently was struck by the vessel's propeller as it was intentionally swimming near the vessel. While indicative of the type of unusual events that cannot be ruled out, neither of these instances represents a circumstance that would be considered reasonably foreseeable or that would be considered preventable.

Although the likelihood of the vessel striking a marine mammal is low, we require a robust ship strike avoidance protocol (see "Proposed Mitigation"), which we believe eliminates any foreseeable risk of ship strike. We anticipate that vessel collisions involving a seismic data acquisition vessel towing gear, while not impossible, represent unlikely, unpredictable events for which there are no preventive measures. Given the required mitigation measures, the relatively slow speed of the vessel towing gear, the presence of marine mammal observers, and the short duration of the survey, we believe that the possibility of ship strike is discountable. Further, were a strike of a large whale to occur, it would be unlikely to result in serious injury or mortality. No incidental take resulting from ship strike is anticipated, and this

potential effect of the specified activity will not be discussed further in the following analysis.

Stranding

When a living or dead marine mammal swims or floats onto shore and becomes "beached" or incapable of returning to sea, the event is a "stranding" (Geraci *et al.* 1999; Perrin and Geraci 2002; Geraci and Lounsbury 2005). The legal definition for a stranding under the MMPA is (A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.

Marine mammals strand for a variety of reasons, such as infectious agents, biotoxins, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound exposure, or combinations of these stressors sustained concurrently or in series. However, the cause or causes of most strandings are unknown (Eaton, 1979; Best 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Fair and Becker 2000; Moberg, 2000; Romero 2004; Sih *et al.* 2004).

Use of military tactical sonar has been implicated in a majority of investigated stranding events, although one stranding event was associated with the use of seismic airguns. This event occurred in the Gulf of California, coincident with seismic reflection profiling by the R/V Maurice Ewing operated by Lamont-Doherty Earth Observatory (LDEO) of Columbia University and involved two Cuvier's beaked whales (Hildebrand 2004). The vessel had been firing an array of 20 airguns with a total volume of 8,500 cui

(Hildebrand 2004). Most known stranding events have involved beaked whales, though a small number have involved deep-diving delphinids or sperm whales (e.g., Southall *et al.* 2013). In general, long duration (~1 second) and high-intensity sounds (>235 dB SPL) have been implicated in stranding events (Hildebrand 2004). With regard to beaked whales, mid-frequency sound has been implicated in a few specific cases (when causation can be determined) (Hildebrand 2004). Although seismic airguns create predominantly low-frequency energy, the signal does include a mid-frequency component. Based on the information presented above, we have considered the potential for the proposed survey to result in marine mammal stranding and have concluded that, based on the best available information, stranding is not expected to occur.

Other Potential Impacts

Here, we briefly address the potential risks due to entanglement and contaminant spills. We are not aware of any records of marine mammal entanglement in towed arrays such as those considered here. The discharge of trash and debris is prohibited (33 CFR 151.51–77) unless it is passed through a machine that breaks up solids such that they can pass through a 25-mm mesh screen. All other trash and debris must be returned to shore for proper disposal with municipal and solid waste. Some personal items may be accidentally lost overboard. However, U.S. Coast Guard and Environmental Protection Act regulations require operators to become proactive in avoiding accidental loss of solid waste items by developing waste management plans, posting informational placards, manifesting trash sent to shore, and using special precautions such as covering outside trash bins to prevent accidental loss of solid waste. There are no meaningful entanglement risks posed by the described activity, and entanglement risks are not discussed further in this document.

Marine mammals could be affected by accidentally spilled diesel fuel from a vessel associated with proposed survey activities. Quantities of diesel fuel on the sea surface may affect marine mammals through various pathways: Surface contact of the fuel with skin and other mucous membranes, inhalation of concentrated petroleum vapors, or ingestion of the fuel (direct ingestion or by the ingestion of oiled prey) (e.g., Geraci and St. Aubin, 1980, 1990). However, the likelihood of a fuel spill during any particular geophysical survey is considered to be remote, and

the potential for impacts to marine mammals would depend greatly on the size and location of a spill and meteorological conditions at the time of the spill. Spilled fuel would rapidly spread to a layer of varying thickness and break up into narrow bands or windows parallel to the wind direction. The rate at which the fuel spreads would be determined by the prevailing conditions such as temperature, water currents, tidal streams, and wind speeds. Lighter, volatile components of the fuel would evaporate to the atmosphere almost completely in a few days. Evaporation rate may increase as the fuel spreads because of the increased surface area of the slick. Rougher seas, high wind speeds, and high temperatures also tend to increase the rate of evaporation and the proportion of fuel lost by this process (Scholz *et al.*, 1999). We do not anticipate potentially meaningful effects to marine mammals as a result of any contaminant spill resulting from the proposed survey activities, and contaminant spills are not discussed further in this document.

Similarly, marine mammals could be affected by spilled hazardous materials generated by the drilling process. Large and small quantities of hazardous materials, including diesel fuel and gasoline, would be handled, transported, and stored following the rules and procedures described in the Spill Prevention, Control, and Countermeasure (SPCC) Plan. Spills and leaks of oil or wastewater arising from the proposed activities that reach marine waters could result in direct impacts to the health of exposed marine mammals. Individual marine mammals could show acute irritation or damage to their eyes, blowhole or nares, and skin; fouling of baleen, which could reduce feeding efficiency; and respiratory distress from the inhalation of vapors (Geraci and St. Aubin 1990). Long-term impacts from exposure to contaminants to the endocrine system could impair health and reproduction (Geraci and St. Aubin 1990). Ingestion of contaminants could cause acute irritation to the digestive tract, including vomiting and aspiration into the lungs, which could result in pneumonia or death (Geraci and St. Aubin 1990). However, the measures outlined in Hilcorp's spill plan minimize the risk of a spill such that we do not anticipate potentially meaningful effects to marine mammals as a result of oil spills from this activity, and oil spills are not discussed further in this document.

Anticipated Effects on Marine Mammal Habitat

Effects to Prey—Marine mammal prey varies by species, season, and location and, for some, is not well documented. Fish react to sounds which are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pulsed sound on fish, although several are based on studies in support of construction projects (*e.g.*, Scholik and Yan 2001, 2002; Popper and Hastings 2009). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior, although the behavioral threshold currently observed is < 150 dB RMA re 1 μ Pa. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.* 1992; Skalski *et al.* 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality. The most likely impact to fish from survey activities at the project area would be temporary avoidance of the area. The duration of fish avoidance of a given area after survey effort stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

Information on seismic airgun impacts to zooplankton, which represent an important prey type for mysticetes, is limited. However, McCauley *et al.* (2017) reported that experimental exposure to a pulse from a 150 cui airgun decreased zooplankton abundance when compared with controls, as measured by sonar and net tows, and caused a two- to threefold increase in dead adult and larval zooplankton. Although no adult krill were present, the study found that all larval krill were killed after air gun passage. Impacts were observed out to the maximum 1.2 km range sampled. The reaction of fish to airguns depends on the physiological state of the fish, past exposures, motivation (*e.g.*, feeding, spawning, migration), and other environmental factors. While we agree that some studies have demonstrated that airgun sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.*, Fewtrell and McCauley, 2012; Pearson *et al.*, 1992; Skalski *et al.*, 1992; Santulli *et al.*, 1999; Paxton *et al.*, 2017), other studies have shown no or slight reaction to airgun sounds (*e.g.*, Pena *et al.*, 2013; Wardle *et al.*, 2001;

Jorgenson and Gyselman, 2009; Cott *et al.*, 2012).

In general, impacts to marine mammal prey are expected to be limited due to the relatively small temporal and spatial overlap between the proposed survey and any areas used by marine mammal prey species. The proposed activities would occur over a relatively short time period in a given area and would occur over a very small area relative to the area available as marine mammal habitat in Cook Inlet. We do not have any information to suggest the proposed survey area represents a significant feeding area for any marine mammal, and we believe any impacts to marine mammals due to adverse effects to their prey would be insignificant due to the limited spatial and temporal impact of the proposed activities. However, adverse impacts may occur to a few species of fish and to zooplankton. Packard *et al.* (1990) showed that cephalopods were sensitive to particle motion, not sound pressure, and Mooney *et al.* (2010) demonstrated that squid statocysts act as an accelerometer through which particle motion of the sound field can be detected. Auditory injuries (lesions occurring on the statocyst sensory hair cells) have been reported upon controlled exposure to low-frequency sounds, suggesting that cephalopods are particularly sensitive to low-frequency sound (Andre *et al.*, 2011; Sole *et al.*, 2013). However, these controlled exposures involved long exposure to sounds dissimilar to airgun pulses (*i.e.*, 2 hours of continuous exposure to 1-second sweeps, 50–400 Hz). Behavioral responses, such as inking and jetting, have also been reported upon exposure to low-frequency sound (McCauley *et al.*, 2000b; Samson *et al.*, 2014).

Indirect impacts from spills or leaks could occur through the contamination of lower-trophic-level prey, which could reduce the quality and/or quantity of marine mammal prey. In addition, individuals that consume contaminated prey could experience long-term effects to health (Geraci and St. Aubin 1990). However, the likelihood of spills and leaks, as described above, is low. This likelihood, in combination with Hilcorp's spill plan to reduce the risk of hazardous material spills, is such that its effect on prey is not considered further in this document.

Acoustic Habitat—Acoustic habitat is the soundscape—which encompasses all of the sound present in a particular location and time, as a whole—when considered from the perspective of the animals experiencing it. Animals produce sound for, or listen for sounds produced by, conspecifics

(communication during feeding, mating, and other social activities), other animals (finding prey or avoiding predators) and the physical environment (finding suitable habitats, navigating). Together, sounds made by animals and the geophysical environment (e.g., produced by earthquakes, lightning, wind, rain, waves) make up the natural contributions to the total acoustics of a place. These acoustic conditions, termed acoustic habitat, are one attribute of an animal's total habitat.

Soundscapes are also defined by, and acoustic habitat influenced by, the total contribution of anthropogenic sound. This may include incidental emissions from sources such as vessel traffic or may be intentionally introduced to the marine environment for data acquisition purposes (as in the use of airgun arrays or other sources). Anthropogenic noise varies widely in its frequency content, duration, and loudness and these characteristics greatly influence the potential habitat-mediated effects to marine mammals (please see also the previous discussion on masking under "Acoustic Effects"), which may range from local effects for brief periods of time to chronic effects over large areas and for long durations. Depending on the extent of effects to habitat, animals may alter their communications signals (thereby potentially expending additional energy) or miss acoustic cues (either conspecific or adventitious). For more detail on these concepts see, e.g., Barber *et al.*, 2010; Pijanowski *et al.*, 2011; Francis and Barber 2013; Lillis *et al.* 2014.

Problems arising from a failure to detect cues are more likely to occur when noise stimuli are chronic and overlap with biologically relevant cues used for communication, orientation, and predator/prey detection (Francis and Barber 2013). Although the signals emitted by seismic airgun arrays are generally low frequency, they would also likely be of short duration and transient in any given area due to the nature of these surveys. Sub-bottom profiler use is also expected to be short term and not concentrated in one location for an extended period of time. The activities related to exploratory drilling, while less transitory in nature, are anticipated to have less severe effects due to lower source levels and therefore smaller disturbance zones than the mobile sources considered here. Nonetheless, we acknowledge the general addition of multiple sound source types into the area, which are expected to have intermittent impacts on the soundscape, typically of

relatively short duration in any given area.

In summary, activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat or populations of fish species or on the quality of acoustic habitat. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this proposed rule, which will inform both NMFS' consideration of "small numbers" and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of seismic survey and construction equipment has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result from equipment such as seismic airguns, primarily for mysticetes and high frequency species, because predicted auditory injury zones are larger than for mid-frequency species and otariids. Auditory injury is unlikely to occur for mid-frequency cetaceans. The proposed mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas;

and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (e.g., previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to experience behavioral disturbance (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (e.g., frequency, predictability, duty cycle), the environment (e.g., bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.*, 2007, Ellison *et al.*, 2012). Based on the available science and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral disturbance rising to the level of Level B Harassment. NMFS predicts that marine mammals are likely to experience behavioral disturbance sufficient to constitute Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μ Pa (rms) for continuous (e.g., vibratory pile-driving, drilling) and above 160 dB re 1 μ Pa (rms) for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources.

Hilcorp's proposed activity includes the use of continuous (vibratory pile driving, water jet) and impulsive (seismic airguns, sub-bottom profiler, conductor pipe driving, VSP) sources, and therefore the 120 and 160 dB re 1 μ Pa (rms) are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury

(Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). Hilcorp’s proposed activity includes the use of impulsive (seismic

airguns, sub-bottom profiler, conductor pipe driving, VSP) and non-impulsive (vibratory pile driving, water jet) sources.

These thresholds for PTS are provided in the table below. The references, analysis, and methodology used in the

development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at: <http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm>.

BILLING CODE 3510-22-P

Table 3. Thresholds identifying the onset of Permanent Threshold Shift.

Hearing Group	PTS Onset Acoustic Thresholds* (Received Level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	<i>Cell 1</i> <i>L</i> _{pk,flat} : 219 dB <i>L</i> _{E,LF,24h} : 183 dB	<i>Cell 2</i> <i>L</i> _{E,LF,24h} : 199 dB
Mid-Frequency (MF) Cetaceans	<i>Cell 3</i> <i>L</i> _{pk,flat} : 230 dB <i>L</i> _{E,MF,24h} : 185 dB	<i>Cell 4</i> <i>L</i> _{E,MF,24h} : 198 dB
High-Frequency (HF) Cetaceans	<i>Cell 5</i> <i>L</i> _{pk,flat} : 202 dB <i>L</i> _{E,HF,24h} : 155 dB	<i>Cell 6</i> <i>L</i> _{E,HF,24h} : 173 dB
Phocid Pinnipeds (PW) (Underwater)	<i>Cell 7</i> <i>L</i> _{pk,flat} : 218 dB <i>L</i> _{E,PW,24h} : 185 dB	<i>Cell 8</i> <i>L</i> _{E,PW,24h} : 201 dB
Otariid Pinnipeds (OW) (Underwater)	<i>Cell 9</i> <i>L</i> _{pk,flat} : 232 dB <i>L</i> _{E,OW,24h} : 203 dB	<i>Cell 10</i> <i>L</i> _{E,OW,24h} : 219 dB

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (*L*_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (*L*_E) has a reference value of 1μPa²s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (i.e., varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

BILLING CODE 3510-22-C

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

2D Seismic Survey—The area of ensonification for the 2D seismic survey

was calculated by multiplying the distances (in km) to the NMFS thresholds (Level A harassment distances from the User spreadsheet and Level B harassment distances to the 160dB isopleth) on both sides of the vessel by the distance of the line (in km) to be surveyed each day. The in-water source line is 6 km in length and only one line will be surveyed each day.

Therefore, the line length surveyed each day for the 2D seismic survey is 6 km.

3D Seismic Survey—The area of ensonification for the 3D seismic survey was calculated by multiplying the distances (in km) to the NMFS thresholds by the distance of the line (in km) to be surveyed each day. The line length is approximately 27.78 km (15 nm), which will take approximately 3.75 hrs to survey at a vessel speed of

4 knots (7.5 km/hr) with a turn of 1.5 hrs. In a 24-hr period, assuming no delays, the survey team will be able to collect data on 4.5 lines or approximately 127 km. The distance in between line lengths is 3.7 km (2 nm), so there will be overlap of the area of Level B ensonification, resulting in an overestimation of exposures. Instead, the total daily area of ensonification was calculated using GIS. The Level B radii were added to each track line estimated to be traveled in a 24-hour period, and when there was overlapping areas, the resulting polygons were merged to one large polygon to eliminate the chance that the areas could be summed multiple times over the same area. The results of the overall area are summarized in Table 6 below and shown on Figure 19 in the application (only showing Level B).

Geohazard Sub-bottom Profiler for Well Sites—The area of ensonification for the sub-bottom profiler used during the geohazard surveys for the well sites was calculated by multiplying the distances (in km) to the NMFS thresholds by the distance of the line (in km) to be surveyed each day. The maximum required monitoring distance from the well site per BOEM is 2,400 m (or a total length of 4,800 m in diameter) and the minimum transect width is 150 m, so the total maximum number of transects to be surveyed is 32 (4,800 m/150 m). The total distance to be surveyed is 153.60 km (4.8 km × 32 transects). Assuming a vessel speed of 4 knots (7.41 km/hr), it will take approximately 0.65 hrs (38 minutes) to survey a single transect of 4.8 km (time = distance/rate). Assuming the team is surveying for 50 percent of the day (or 12 hrs), the total number of days it will take to survey the total survey grid is 7.77 days (0.65 hr × 12 hr). Similar to

the 3D seismic survey, there will be overlap in the Level B ensonification of the sound because of the distance in between the transects. However, because the area and grid to be surveyed depends on the results of the 3D survey and the specific location, Hilcorp Alaska proposes to use this overestimate for purposes of this proposed rulemaking. The total line length to be surveyed per day is 19.76 km (total distance to be surveyed 153.6 km/total days 7.77).

Geohazard Sub-bottom Profiler for Pipeline Maintenance—The area of ensonification for the sub-bottom profiler used during geohazard surveys for the pipeline maintenance was calculated by multiplying the distances (in km) to the NMFS thresholds by the distance of the line (in km) to be surveyed each day. The assumed transect grid is 300 m by 300 m with 150 m transect widths, so the total to be surveyed is 2,400 m (2.4 km). Assuming a vessel speed of 4 knots (7.41 km/hr), it will take approximately 0.08 hrs (4.86 min) to survey a single transect. The total number of days it will take to survey the grid is 1 day. Similar to the 3D seismic survey, there will be overlap of the Level B ensonification area because of the distance in between the transects. However, because the area and grid to be surveyed depends on the results of the 3D survey and the specific location, Hilcorp Alaska proposes to use this overestimate for purposes of this proposed rule. The total line length to be surveyed per day is 2.4 km.

Other sources—For stationary sources, area of a circle to the relevant Level A or Level B harassment isopleths was used to determine ensonified area. These sources include: Conductor pipe driving, VSP, vibratory sheet pile driving, and water jets.

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes by Level A harassment. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of Level A harassment take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available; and NMFS continues to develop ways to quantitatively refine these tools and will qualitatively address the output where appropriate. For stationary sources such as conductor pipe driving or vibratory pile driving, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS. For mobile sources such as seismic airguns or sub-bottom profilers, the User Spreadsheet predicts the closest distance at which a stationary animal would not incur PTS if the sound source traveled by the animal in a straight line at a constant speed. Inputs used in the User Spreadsheet, and the resulting isopleths are reported below (Tables 4, 5, and 6). Transmission loss used for all calculation was practical spreading (15 LogR).

TABLE 4—NMFS USER SPREADSHEET INPUTS

Activity	Type of source	Source level	Weighting factor adjustment	Source velocity	Pulse duration	Repetition rate	Duration per day
2D/3D seismic	mobile, impulsive	217 dB peak @100 m; 185 dB SEL @100 m.	1 kHz	2.05 m/s	N/A	every 6 s	N/A.
Sub-bottom profiler	mobile, impulsive	212 dB rms @1 m	4 kHz	2.05 m/s	0.02 s	every 0.30 s	N/A.
Pipe driving	stationary, impulsive	195 dB rms @55 m	2 kHz	N/A	0.02 s	600 strikes/hr	2 hrs/day.
VSP	stationary, impulsive	227 dB rms @1m	1 kHz	N/A	0.02 s	Every 6 s	4 hrs/day.
Vibratory sheet pile driving.	stationary, non-impulsive.	160 dB rms @ 10 m	2.5 kHz	N/A	N/A	N/A	4 hrs/day.
Water jet	stationary, non-impulsive.	176 dB rms @1 m	2 kHz	N/A	N/A	N/A	0.5 hrs/day.

TABLE 5—CALCULATED DISTANCES TO NMFS LEVEL A HARASSMENT THRESHOLDS

Activity	Level A														
	Low frequency cetaceans			Mid frequency cetaceans			High frequency cetaceans			Phocids			Otariids		
	Impulsive		Non-impulsive 199 dB SEL	Impulsive		Non-impulsive 198 dB SEL	Impulsive		Non-impulsive 173 dB SEL	Impulsive		Non-impulsive 201 dB SEL	Impulsive		Non-impulsive 219 dB SEL
	219 dB pk	183 dB SEL		230 dB pk	185 dB SEL		202 dB pk	155 dB SEL		218 dB pk	185 dB SEL		232 dB pk	203 dB SEL	
2D/3D seismic	74	399	.....	14	<1	.....	1,000	45	.....	86	66	.....	10	1	.....
Sub-bottom profiler	<1	77	.....	<1	4	.....	5	1,108	.....	<1	48	.....	<1	<1	.....
Pipe driving	1	134	.....	<1	103	.....	19	3,435	.....	2	1,543	.....	<1	112	.....
VSP	3	11,217	.....	<1	96	.....	46	2,617	.....	4	3,371	.....	<1	249	.....
Vibratory sheet pile driving .....	.....	.....	15	.....	.....	1	.....	.....	22	.....	.....	9	.....	.....	<1
Water jet .....	.....	.....	14	.....	.....	<1	.....	.....	13	.....	.....	8	.....	.....	1
Hydraulic grinder .....	.....	.....	1	.....	.....	<1	.....	.....	1	.....	.....	<1	.....	.....	<1
Tugs towing .....	.....	.....	<1	.....	.....	<1	.....	.....	<1	.....	.....	<1	.....	.....	<1

TABLE 6—CALCULATED DISTANCES TO NMFS LEVEL B THRESHOLDS

Activity	Level B	
	Impulsive	Non-impulsive
	160 dB rms	120 dB rms
2D/3D seismic	7,330	.....
Sub-bottom profiler	2,929	.....
Pipe driving	1,630	.....
VSP	2,470	.....
Vibratory sheet pile driving .....	.....	4,642
Water jet .....	.....	5,411
Hydraulic grinder	<1	398
Tugs towing .....	.....	2,514

Marine Mammal Occurrence

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

Beluga whale—Historically, beluga whales were observed in both upper and lower Cook Inlet in June and July (Rugh *et al.* 2000). However, between 1993 and 1995, less than 3 percent of all of the annual sightings were in the lower inlet, south of the East and West Forelands, hardly any (one whale in Tuxedni Bay in 1997 and two in Kachemak Bay in 2001) have been seen in the lower inlet

during these surveys 1996–2016 (Rugh *et al.* 2005; Sheldon *et al.* 2013, 2015, 2017). Because of the extremely low sighting rates, it is difficult to provide an accurate estimate of density for beluga whales in the mid and lower Cook Inlet region.

Goetz *et al.* (2012b) developed a habitat-based model to estimate Cook Inlet beluga density based on seasonally collected data. The model was based on sightings, depth soundings, coastal substrate type, environmental sensitivity index, anthropogenic disturbance, and anadromous fish streams to predict densities throughout

Cook Inlet. The result of this work is a beluga density map of Cook Inlet, which predicts spatially explicit density estimates for Cook Inlet belugas. Figure 1 shows the Goetz *et al.* (2012b) estimates with the project area. Using data from the GIS files provided by NMFS and the different project locations, the resulting estimated density is shown in Table 7. The water jets would be used on pipelines throughout the middle Cook Inlet region, so the higher density for the Trading Bay area was used.

BILLING CODE 3510-22-P

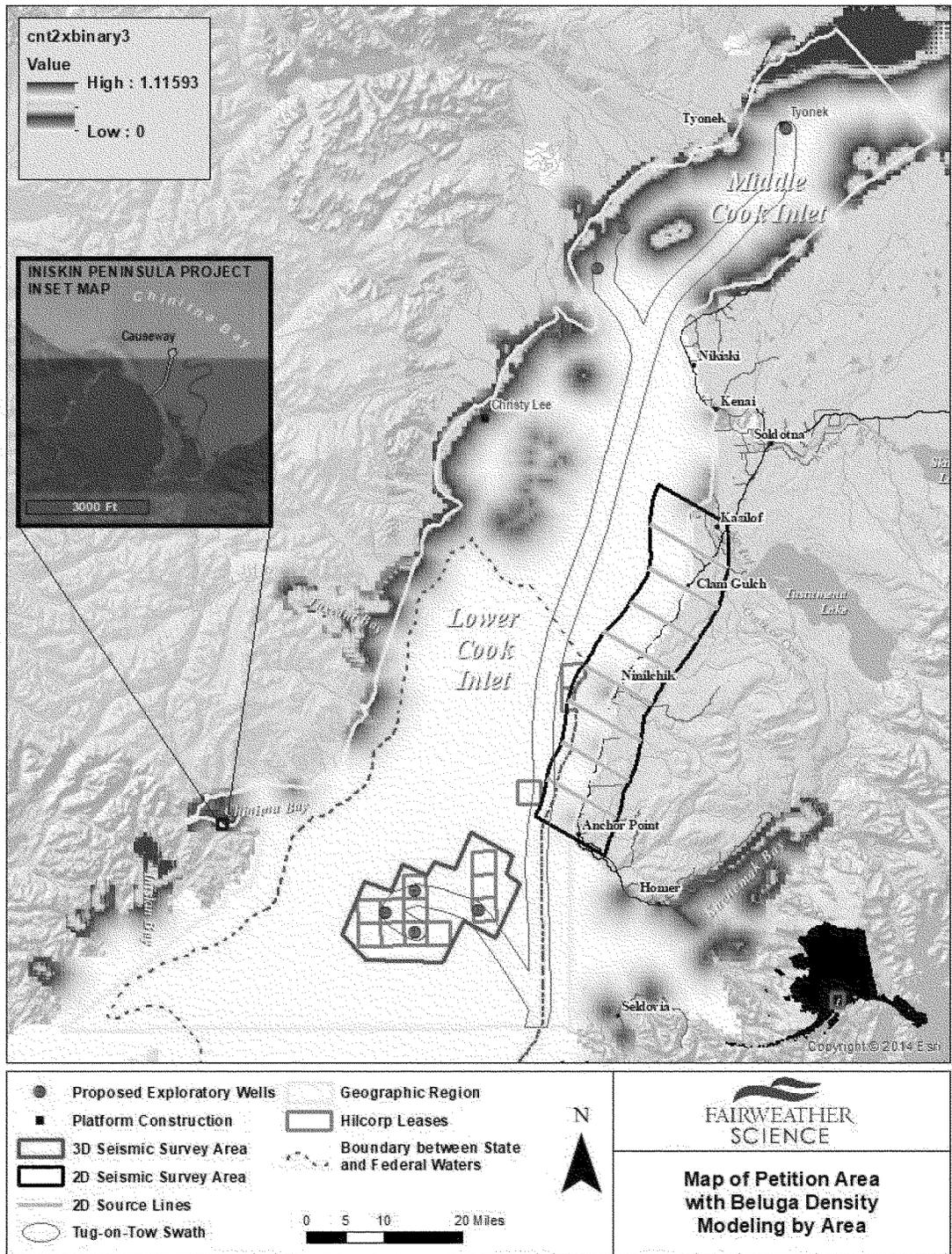


Figure 1. Beluga whale density as defined by Goetz *et al.* (2012b) in action area.

Densities resulting from this model are summarized in Table 7 below.

TABLE 7—COOK INLET BELUGA WHALE DENSITY BASED ON GOETZ HABITAT MODEL

Project location	Project activity	Beluga whale density (ind/km ²)
Lower Cook Inlet (OCS)	3D seismic, geohazard, pipe driving	0.00
Lower Cook Inlet (east side)	2D seismic	0.00–0.011106
Iniskin Bay area	Sheet pile driving	0.024362
North Cook Inlet Unit	Geohazard, pipe driving	0.001664
Trading Bay area	Geohazard, pipe driving, water jets	0.004453–0.015053

Other Marine Mammals—Density estimates of species other than beluga whales were estimated from the NMFS June aerial surveys conducted for beluga whales between 2000 and 2016 (Rugh *et al.* 2005; Sheldon *et al.* 2013, 2015, 2017). Although these surveys are only flown for a few days in one month, they represent the best available relatively

long-term dataset for marine mammal sightings in Cook Inlet. Table 8 below summarizes the maximum marine mammals observed for each year for the survey and area covered. To estimate density, the total number of individuals per species sighted during surveys was divided by the distance flown on the surveys. The total number of animals

observed accounts for both lower and upper Cook Inlet, so this density estimate is higher than what is anticipated for the lower Cook Inlet area. There are no density estimates available for California sea lions for Cook Inlet so largest potential group size was used.

TABLE 8—DENSITY ESTIMATES FOR MARINE MAMMALS IN ACTION AREA

Species	Estimated density (# marine mammals/km ²) ³
Beluga whale:	
Lower and Middle Cook Inlet ¹	0.00006
Lower Cook Inlet ²	0.01111
North Cook Inlet Unit ²	0.00166
Trading Bay area ²	0.01505
Iniskin Peninsula ²	0.02436
Humpback whale	0.00009
Minke whale	0.00000
Gray whale	0.00001
Fin whale	0.00005
Killer whale	0.00011
Dall's porpoise	0.00006
Harbor porpoise	0.00037
Harbor seal	0.00655
Steller sea lion	0.00035

¹ NMFS aerial survey combined lower and middle Cook Inlet density.

² Goetz *et al.* 2012(b) habitat-based model density.

³ When using data from NMFS aerial surveys, the survey year with the greatest calculated density was used to calculate exposures. No density available for California sea lions in Cook Inlet.

Duration

The duration was estimated for each activity and location. For some projects, like the 3D seismic survey, the design of the project is well developed; therefore, the duration is well-defined. However, for some projects, the duration is not well developed, such as activities around the lower Cook Inlet well sites, because the duration depends on the results of previous studies and equipment availability. Our assumptions regarding these activities, which were used to estimate duration, are discussed below.

2D Seismic—A single vessel is capable of acquiring a source line in approximately 1–2 hrs and only one source line will be collected in one day

to allow for all the node deployments and retrievals, and intertidal and land zone shot holes drilling. There are up to 10 source lines, so assuming all operations run smoothly, there will only be 2 hrs per day over 10 days of airgun activity. The duration that was used to assess exposures from the 2D seismic survey is 10 days.

3D Seismic—The total anticipated duration of the survey is 45–60 days, including delays due to equipment, weather, tides, and marine mammal shut downs. The duration that was used to assess exposures from the 3D seismic survey is 60 days.

Geohazard Surveys (Sub-bottom profiler)—Assuming surveying occurs 50 percent of the day (or 12 hrs), the total number of days it will take to

survey the total geohazard survey grid for a single well is 7.77 days. This duration was multiplied by the number of wells per site resulting in 31.1 days for the four Lower Cook Inlet OCS wells, 7.7 days for the North Cook Inlet Unit well, and 15.5 days for the two Trading Bay area wells.

The total number of days it will take to survey the geohazard survey grid for a pipeline maintenance is 1 day. This duration was multiplied by the number of anticipated surveys per year (high estimate of 3 per year), for a total of 3 days.

Drive Pipe—It takes approximately 3 days to install the drive pipe per well with only 25 percent of the day necessary for actual pipe driving. This duration was multiplied by the number

of wells per site resulting in 3 days for the four lower Cook Inlet wells and 1.5 days for the two Trading Bay area wells. Drive pipe installation is not part of the activities planned at the North Cook Inlet site.

VSP—It takes approximately 2 days to perform the VSP per well with only 25 percent of the day necessary for actual seismic work. VSP is not part of the plugging and abandonment (P&A) activities at the North Cook Inlet site. This duration was multiplied by the number of wells per site, resulting in 2 days for the four lower Cook Inlet wells and 1 day for the two Trading Bay area wells.

Vibratory Sheet Pile Driving—The total number of days expected to install the sheet pile dock face using vibratory hammers on the rock causeway is 14 days with only 25 percent of the day for actual pile driving, resulting in 3.5 days of sound for the Iniskin project.

Water jets—Water jets are only used when needed for maintenance;

therefore, the annual duration was estimated to evaluate exposures. Each water jet event was estimated to be 30 minutes or less in duration. We acknowledge that due to the short duration of this activity, it is possible that take will not occur—however, we are including consideration of potential take to conservatively ensure coverage for the applicant. It was estimated that a water jet event occurs 3 times a month, resulting in only 1.5 hrs per month of water jet operation. Water jets are used during ice-free months, so this duration was multiplied by 7 months (May–November) resulting in 10.5 days.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate. The numbers of each marine mammal species that could potentially be exposed to sounds associated with the proposed activities that exceed NMFS' acoustic Level A and B harassment

criteria were estimated per type of activity and per location. The specific years when these activities might occur are not known at this time, so this method of per activity per location allows for flexibility in operations and provides NMFS with appropriate information for assessing potential exposures. Individual animals may be exposed to received levels above our harassment thresholds more than once per day, but NMFS considers animals only “taken” once per day. Exposures refer to any instance in which an animal is exposed to sound sources above NMFS' Level A or Level B harassment thresholds. The estimated exposures (without any mitigation) per activity per location were calculated by multiplying the density of marine mammals (# of marine mammals/km²) by the area of ensonification (km²) and the duration (days per year). These results of these calculations are presented in Tables 9 and 10 below.

TABLE 9—ESTIMATED NUMBER OF LEVEL A EXPOSURES PER ACTIVITY AND LOCATION

Species	3D seismic	2D seismic	Iniskin vibratory sheet pile	Water jets ⁶	Sub-bottom profiler				Pipe driving		Vertical seismic profiling	
	LCI ¹	LCI ¹			LCI ¹	MCI ⁴	LCI ¹	NCI ²	TB ³	LCI ¹	TB ³	LCI ¹	TB^{3}
Humpback whale	6.80	0.05	0.00	0.00	0.00	0.09	0.02	0.04	0.00	0.00	5.97	2.98
Minke whale	0.04	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.03	0.02
Gray whale	0.29	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.25	0.13
Fin whale	1.19	0.01	0.00	0.00	0.00	0.02	0.00	0.01	0.00	0.00	1.05	0.52
Killer whale	0.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Beluga whale	0.00	0.01	0.00	0.00	0.00	0.00	0.00	0.02	0.00	0.00	0.00	0.00
Dall's porpoise ...	1.31	0.01	0.00	0.00	0.00	0.11	0.03	0.06	0.00	0.00	0.03	0.01
Harbor porpoise	37.25	0.29	0.00	0.00	0.04	3.20	0.80	1.60	0.00	0.00	0.81	0.40
Harbor seal	287.11	2.26	0.00	0.00	0.09	7.39	1.85	3.69	0.05	0.02	5.80	2.90
Steller sea lion ..	0.70	0.01	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.01	0.01

¹LCI—Lower Cook Inlet Wells, ²NCI—North Cook Inlet Unit well, ³TB = Trading Bay wells, ⁴MCI—Middle Cook Inlet Pipeline Maintenance.

TABLE 10—ESTIMATED NUMBER OF LEVEL B EXPOSURES PER ACTIVITY AND LOCATION

Species	3D seismic	2D seismic	Iniskin vibratory sheet pile	Water jets ⁶	Sub-bottom profiler				Pipe driving		Vertical seismic profiling	
	LCI ¹	LCI ¹			LCI ¹	MCI ⁴	LCI ¹	NCI ²	TB ³	LCI ¹	TB ³	LCI ¹	TB^{3}
Humpback whale	85.43	0.83	0.64	0.01	0.04	3.40	0.85	1.70	0.05	0.02	0.07	0.04
Minke whale	0.45	0.00	0.00	0.00	0.00	0.02	0.00	0.01	0.00	0.00	0.00	0.04
Gray whale	3.60	0.04	0.03	0.00	0.00	0.14	0.04	0.07	0.00	0.00	0.00	0.04
Fin whale	14.99	0.15	0.11	0.00	0.01	0.60	0.15	0.30	0.01	0.00	0.01	0.04
Killer whale	29.02	0.28	0.22	0.00	0.01	1.15	0.29	0.58	0.02	0.01	0.02	0.04
Beluga whale	0.00	0.00	8.24	0.05	0.00	0.00	0.75	13.54	0.00	0.19	0.00	0.04
Dall's porpoise ...	7.42	0.07	0.06	0.00	0.00	0.30	0.07	0.15	0.00	0.00	0.01	0.04
Harbor porpoise	211.70	2.06	1.58	0.02	0.10	8.42	2.10	4.21	0.12	0.06	0.18	0.04
Harbor seal	11,255.01	109.38	84.17	0.83	5.24	447.52	111.88	223.76	6.23	3.11	9.53	0.04
Steller sea lion ..	366.99	3.57	2.74	0.03	0.17	14.59	3.65	7.30	0.20	0.10	0.31	0.04

¹LCI—Lower Cook Inlet Wells, ²NCI—North Cook Inlet Unit well, ³TB = Trading Bay wells, ⁴MCI—Middle Cook Inlet Pipeline Maintenance.

The take estimates by activity and location discussed in the previous section are not representative of the estimated takes per year (*i.e.*, annual takes). It is difficult to characterize each year accurately because many of the activities are progressive (*i.e.*, they depend on results and/or completion of

the previous activity). This results in much uncertainty in the timing, duration, and complete scope of work. Each year, the applicant will submit an application for an LOA with the specific details of the planned work for that year with estimated take numbers. The most realistic scenario used to estimate

annual takes includes 3D seismic surveys in the first season, activities for one well in the second season in lower Cook Inlet, as well as the plugging and abandonment activities in North Cook Inlet Unit and the two wells in the Trading Bay area. For the third season, we have included activities for drilling

two wells in lower Cook Inlet and the final well in the fourth season. Table 17 summarizes the activities included in this second scenario.

TABLE 11—SUMMARY OF ACTIVITIES CONSIDERED BY YEAR

Year	Activity	Area
May 2019–2020	3D seismic	LCI.
	Geohazard	LCI.
	Sheet pile driving	Iniskin (LCI).
April 2020–2021	Pipeline maintenance (geohazard, water jet, grinder)	MCI.
	Drilling activities (tugs, geohazard, pipe driving, VSP) at all 1 well	LCI.
	Drilling activities (tugs, geohazard, pipe driving, VSP) at 2 wells	TB.
	P&A activities (tugs, geohazard) at 1 well	NCI.
April 2021–2022	Pipeline maintenance (geohazard, water jet, grinder)	MCI.
	Drilling activities (tugs, geohazard, pipe driving, VSP) at 2wells	LCI.
	2D seismic	LCI.
April 2022–2023	Pipeline maintenance (geohazard, water jet, grinder)	MCI.
	Drilling activities (tugs, geohazard, pipe driving, VSP) at 1 well	LCI.
April 2023–2024	Pipeline maintenance (geohazard, water jet, grinder)	MCI.
	Pipeline maintenance (geohazard, water jet, grinder)	MCI.

LCI—Lower Cook Inlet Wells, NCI—North Cook Inlet Unit well, TB = Trading Bay wells, MCI—Middle Cook Inlet Pipeline Maintenance.

TABLE 12—ESTIMATED EXPOSURES FOR FIRST YEAR OF ACTIVITY

Species	Level A						Level B					
	MCI pipeline geohazard	MCI pipeline water jet	LCI 3D seismic	LCI sub-bottom profiler	LCI sheet pile driving	Total	MCI pipeline geohazard	MCI pipeline water jet	LCI 3D seismic	LCI sub-bottom profiler	LCI sheet pile driving	Total
Humpback whale	0	0	6.8	0.09	0	6.89	0.04	0.15	85.43	3.4	2.56	91.57
Minke whale	0	0	0.04	0	0	0.04	0	0	0.45	0.02	0.01	0.48
Gray whale	0	0	0.29	0	0	0.29	0	0.01	3.60	0.14	0.11	3.86
Fin whale	0	0	0.29	0.02	0	0.31	0.01	0.03	3.60	0.60	0.45	4.68
Killer whale	0	0	1.19	0	0	1.19	0.01	0.05	14.99	1.15	0.87	17.08
Beluga whale	0	0	0	0	0	0	0	1.2	0	0	32.98	34.18
Dall's porpoise	0	0	1.31	0.11	0	1.42	0	0.01	7.42	0.3	0.22	7.95
Harbor porpoise	0.04	0	37.25	3.2	0	40.49	0.1	0.37	211.70	8.42	6.33	226.92
Harbor seal	0.09	0	287.11	7.39	0	294.58	5.24	19.85	11255.01	447.52	336.67	12064.29
Steller sea lion	0	0	0.7	0	0	0.7	0.17	0.65	366.99	14.59	10.98	393.38
California sea lion	0	0	0	0	0	0	0	0	0	0	0	0

TABLE 13—ESTIMATED EXPOSURES FOR SECOND YEAR OF ACTIVITY

	Level A					Level B				
	MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (1 well only)			MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (1 well only)		
Humpback whale	0	0	1.51			0.04	0.15	0.97		
Minke whale	0	0	0.01			0	0	0.01		
Gray whale	0	0	0.06			0	0.01	0.04		
Fin whale	0	0	0.27			0.01	0.03	0.17		
Killer whale	0	0	0			0.01	0.05	0.33		
Beluga whale	0	0	0			0	1.2	0		
Dall's porpoise	0	0	0.04			0	0.01	0.08		
Harbor porpoise	0.04	0	1			0.10	0.37	2.4		
Harbor seal	0.09	0	3.31			5.24	19.85	127.64		
Steller sea lion	0	0	0			0.17	0.65	4.16		
California sea lion	0	0	0			0	0	0		
	Level A				Subtotal for all activities	Level B				Subtotal for all activities
	NCI geohazard (1 well)	TB geohazard (2 wells)	TB pipe driving (2 wells)	TB VSP		NCI geohazard (1 well)	TB geohazard (2 wells)	TB pipe driving (2 wells)	TB VSP	
Humpback whale	.02	.04	0	2.98	4.57	0.85	1.7	0.09	0.14	3.95
Minke whale	0	0	0	0.02	0.02	0	0.01	0	0	0.02
Gray whale	0	0	0	0.13	0.19	0.04	0.07	0	0.01	0.17
Fin whale	0	0.01	0	0.52	0.8	0.15	0.3	0.02	0.03	0.69
Killer whale	0	0	0	0	0	0.85	0.58	0.03	0.05	1.9
Beluga whale	0.02	0.02	0	0	0.04	0.85	13.54	0.75	1.15	17.5

TABLE 13—ESTIMATED EXPOSURES FOR SECOND YEAR OF ACTIVITY—Continued

	Level A				Total	Level B				Total
	MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (1 well only)	LCI 2D seismic		MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (1 well only)	LCI 2D seismic	
Dall's porpoise ...	0.02	0.06	0	0.01	0.13	0.85	0.15	0.01	0.01	1.12
Harbor porpoise	0.02	1.6	0	0.4	3.07	0.85	4.21	0.23	0.36	8.52
Harbor seal	0.02	3.69	0.02	2.9	10.04	0.85	223.76	12.46	19.07	408.87
Steller sea lion ..	0.02	0	0	0.01	0.03	0.85	7.3	0.41	0.62	14.15
California sea lion	0	0	0	0	0	0	0	0	0	0

TABLE 14—ESTIMATED EXPOSURES FOR THIRD YEAR OF ACTIVITY

	Level A				Total	Level B				Total
	MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (2 wells only)	LCI 2D seismic		MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (2 wells only)	LCI 2D seismic	
Humpback whale	0	0	3.03	0.05	3.08	0.04	0.15	1.94	0.83	2.96
Minke whale	0	0	0.02	0	0.02	0	0	0.01	0	0.02
Gray whale	0	0	0.13	0	0.13	0	0.01	0.08	0.04	0.12
Fin whale	0	0	0.53	0.01	0.54	0.01	0.03	0.34	0.15	0.52
Killer whale	0	0	0	0	0	0.01	0.05	0.66	0.28	1.01
Beluga whale	0	0	0	0.01	0.01	0	1.2	0	4.8	6.09
Dall's porpoise ...	0	0	0.07	0.01	0.08	0	0.01	0.17	0.07	0.26
Harbor porpoise	0.04	0	2	0.29	2.34	0.1	0.37	4.8	2.06	7.33
Harbor seal	0.09	0	6.62	2.26	8.97	5.24	19.85	255.28	109.38	389.76
Steller sea lion ..	0	0	0.01	0.01	0.01	0.17	0.65	8.32	3.57	12.71
California sea lion	0	0	0	0	0	0	0	0	0	0

TABLE 15—ESTIMATED EXPOSURES FOR FOURTH YEAR OF ACTIVITY

	Level A			Total	Level B			Total
	MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (1 well only)		MCI pipeline geohazard	MCI pipeline water jet	LCI geohazard, pipe driving, VSP (1 well only)	
Humpback whale	0	0	1.51	1.52	0.04	0.15	0.97	1.16
Minke whale	0	0	0.01	0.01	0	0	0.01	0.01
Gray whale	0	0	0.06	0.06	0	0.01	0.04	0.05
Fin whale	0	0	0.27	0.27	0.01	0.03	0.17	0.2
Killer whale	0	0	0	0	0.01	0.05	0.33	0.39
Beluga whale	0	0	0	0	0	1.2	0	1.2
Dall's porpoise	0	0	0.04	0.04	0	0.01	0.08	0.10
Harbor porpoise	0.04	0	1	1.04	0.1	0.37	2.40	2.87
Harbor seal	0.09	0	3.31	3.40	5.24	19.85	127.64	152.74
Steller sea lion	0	0	0	0	0.17	0.65	4.16	4.98
California sea lion	0	0	0	0	0	0	0	0

TABLE 16—ESTIMATED EXPOSURES FOR FIFTH YEAR OF ACTIVITY

	Level A			Level B		
	MCI pipeline geohazard	MCI pipeline water jet	Total	MCI pipeline geohazard	MCI pipeline water jet	Total
Humpback whale	0	0	0	0.04	0.15	0.19
Minke whale	0	0	0	0	0	0
Gray whale	0	0	0	0	0.01	0.01
Fin whale	0	0	0	0.01	0.03	0.03
Killer whale	0	0	0	0.01	0.05	0.06
Beluga whale	0	0	0	0	1.2	1.2
Dall's porpoise	0	0	0	0	0.01	0.02
6.09+Harbor porpoise	0.04	0	0.04	0.1	0.37	0.47
Harbor seal	0.09	0	0.09	5.24	19.85	25.10
Steller sea lion	0	0	0	0.17	0.65	0.82
California sea lion	0	0	0	0	0	0

TABLE 17—ESTIMATED MAXIMUM EXPOSURES THAT MAY BE AUTHORIZED IN ONE YEAR, BASED ON FIRST YEAR OF ACTIVITY

Species	Level A			Level B		
	Total calculated	Total authorized	Percent of stock	Total calculated	Total authorized	Percent of stock
Humpback whale	6.89	7	0.63	91.57	92	8.31
Minke whale	0.04	0	0	0.48	1	0.08
Gray whale	0.29	0	0	3.86	4	0.02
Fin whale	0.31	0	0	4.68	5	0.16
Killer whale	1.19	0	0	17.08	17	0.72 (resident) or 2.90 (transient)
Beluga whale	0	0	0	34.18	30	9.62
Dall's porpoise	1.42	2	0.0024	7.95	8	0.01
Harbor porpoise	40.49	40	0.13	226.92	227	0.73
Harbor seal	294.58	295	1.1	12064.29	6,000	21.91
Steller sea lion	0.7	1	0	393.38	394	0.74
California sea lion	0	0	0	0	5	0

TABLE 18—TOTAL EXPOSURES CALCULATED AND REQUESTED OVER THE 5-YEAR REGULATIONS

Group	Species	Calculated Exposures		Authorized Exposures	
		Level A	Level B	Level A	Level B
LF Cetaceans	Humpback whale	16.06	99.82	16	100
	Minke whale	0.08	0.53	0	5
	Gray whale	0.68	4.21	0	5
	Fin whale	1.91	6.93	0	7
MF Cetaceans	Killer whale	0.2	20.44	0	20
	Beluga whale	0.05	60.17	0	35
HF Cetaceans	Dall's porpoise	1.67	9.45	5	10
	Harbor porpoise	46.97	246.12	47	246
Phocids	Harbor seal	317.07	13040.77	317	6847
Otariids	Steller sea lion	0.76	426.04	5	426
	California sea lion	0	0	0	5

Based on the results of the acoustic harassment analysis, Hilcorp Alaska is requesting a small number of takes by Level A harassment for humpback whales, Dall's porpoises, harbor porpoises, Steller sea lions, and harbor seals. Hilcorp Alaska does not anticipate that any of the activities will result in mortality or serious injury to marine mammals, but these species may be exposed to levels exceeding the Level A harassment thresholds. Seals are highly curious and exhibit high tolerance for anthropogenic activity, so they are likely to enter within the larger Level A harassment isopleths. Porpoises are difficult to observe at greater distances and usually only remain in an area for a short period of time. The total requested takes by Level A harassment are for 16 humpback whales, 5 Dall's porpoises, 47 harbor porpoises, and 317 harbor seals. Note this is not a request for annual takes, but total takes over the 5-year period.

The requested takes by Level B harassment for minke and gray whale are rounded up to 5 animals, based on the assumption that one could be taken per year for five years. The requested

takes by Level B harassment for humpback whales is 100 animals, although it is not expected to approach this number as humpbacks are easily observable during monitoring efforts. The requested takes by Level B harassment for killer whales are rounded up to 20 animals to allow for small groups. The requested takes by Level B harassment for Dall's and harbor porpoise are rounded up to 10 and 246 animals, respectively, due to the inconspicuous nature of porpoises.

The requested takes by Level B harassment for harbor seals is 6,847 animals. The estimated number of instances of takes by Level B harassment of 13,041 resulting from the calculations outlined above is an overestimate due to the inclusion of haul out sites numbers in the underlying density estimate used to calculate take. Using the daily ensonified area x number of survey days x density method results in a reasonable estimate of the instances of take, but likely significantly overestimates the number of individual animals expected to be taken. With most species, even this overestimated number is still very small, and additional analysis is not

really necessary to ensure minor impacts. However, because of the number and density of harbor seals in the area, a more accurate understanding of the number of individuals likely taken is necessary to fully analyze the impacts and ensure that the total number of harbor seals taken is small.

As described below, based on monitoring results from the area, it is likely that the modeled number of estimated instances of harbor seal take referenced above is overestimated. The density estimate from NMFS aerial surveys includes harbor seal haulouts far south of the action area that may never move to an ensonified area. Further, we believe that we can reasonably estimate the comparative number of individual harbor seals that will likely be taken, based both on monitoring data, operational information, and a general understanding of harbor seal habitat use.

Using the daily ensonified area x number of survey days x density, the number of instances of exposure above the 160-dB threshold estimated for Hilcorp's activity in Cook Inlet is large.

However, when we examine monitoring data from previous activities, it is clear this number is an overestimate—compared to both aerial and vessel based observation efforts. Apache’s monitoring report from 2012 details that they saw 2,474 harbor seals from 29 aerial flights (over 29 days) in the vicinity of the survey during the month of June, which is the peak month for harbor seal haulout. In surveying the literature, correction factors to account for harbor seals in water based on land counts vary from 1.2 to 1.65 (Harvey & Goley, 2011). Using the most conservative factor of 1.65 (allowing us to consider that some of the other individuals on land may have entered the water at other points in day), if Apache saw 2,474 seals hauled out then there were an estimated 1,500 seals in the water during those 29 days. To account for the limited number of surveys (29 surveys), NMFS conservatively multiplied the number of seals by 5.5 to estimate the number of seals that might have been seen if the aerial surveys were conducted for 160 days. This yields an estimate of 8,250 instances of seal exposure in the water, which is far less than the exposure estimate resulting from Hilcorp’s calculations. NMFS further reduced the estimate given the context of the activity. The activity with the highest potential take of harbor seal according to calculations is 3D seismic surveying, primarily due to the high source levels. However, the 3D seismic surveying is occurring primarily offshore, which is also the area where they are least likely to encounter harbor seals. The calculated exposures from 3D seismic

surveying account for 92 percent of the total calculated harbor seal exposures across the five years of the project, accounting for a high proportion of the takes allocated to deeper water seismic activity which is less likely to spatially overlap with harbor seals. That the number of potential instances of exposure is likely less than calculated is also supported by the visual observations from Protected Species Observers (PSOs) on board vessels. PSOs in Cook Inlet sighted a total of 285 seals in water over 147 days of activity, which would rise to about 310 if adjusted to reflect 160 days of effort. Given the size of the disturbance zone for these activities, it is likely that not all harbor seals that were exposed were seen by PSOs. However 310 is still far less than the estimate given by the density calculations.

Further, based on the residential nature of harbor seals and the number of offshore locations included in Hilcorp’s project, where harbor seals are unlikely to reside, NMFS estimated the number of individual harbor seals exposed, given the instances of exposures. Given these multiple methods, as well as the behavioral preferences of harbor seals for haulouts in certain parts of the Inlet (Montgomery *et al.*, 2007), and high concentrations at haulouts in the lower Inlet, it is unreasonable to expect that more than 25 percent of the population, or 6,847 individuals, will be taken by Level B harassment during Hilcorp’s activity. Therefore, we estimate that 6,847 individuals are taken, which equates to 25 percent of the estimated abundance in NMFS stock assessment report.

Effects of Specified Activities on Subsistence Uses of Marine Mammals

The availability of the affected marine mammal stocks or species for subsistence uses may be impacted by this activity. The subsistence uses that may be affected and the potential impacts of the activity on those uses are described below. Measures included in this proposed rule to reduce the impacts of the activity on subsistence uses are described in the *Proposed Mitigation* section. Last, the information from this section and the *Proposed Mitigation* section is analyzed to determine whether the necessary findings may be made in the *Unmitigable Adverse Impact Analysis and Determination* section.

The ADF&G conducted studies to document the harvest and use of wild resources by residents of communities on the east and west sides of Cook Inlet (Jones and Kostick 2016). Data on wild resource harvest and use were collected, including basic information about who, what, when, where, how, and how much wild resources are being used to develop fishing and hunting opportunities for Alaska residents. Tyonek was surveyed in 2013 (Jones *et al.*, 2015), and Nanwalek, Port Graham, and Seldovia were surveyed in 2014 (Jones and Kostick 2016). Marine mammals were harvested by three (Seldovia, Nanwalek, Port Graham) of the four communities but at relatively low rates. The harvests consisted of harbor seals, Steller sea lions, and northern sea otters (*Enhydra lutris*), the latter of which is managed by the U.S. Fish and Wildlife Service and not mentioned further.

TABLE 19—MARINE MAMMAL HARVEST BY TYONEK IN 2013 AND NIKISKI, PORT GRAHAM, SELDOVIA, AND NANWALEK IN 2014

Village	Harvest (pounds per capita)	Households attempting harvest number (% of residents)	Number of marine mammals harvested			
			Harbor seal	Steller sea lion	Northern sea otter	Beluga whale
Tyonek	2	6 (6%)	6	0	0	0
Seldovia	1	2 (1%)	5	0	3	0
Nanwalek	11	17 (7%)	22	6	1	0
Port						
Graham	8	27 (18%)	16	1	24	0

In Tyonek, harbor seals were harvested between June and September by 6 percent of the households (Jones *et al.* 2015). Seals were harvested in several areas, encompassing an area stretching 20 miles along the Cook Inlet coastline from the McArthur River Flats north to the Beluga River. Seals were

searched for or harvested in the Trading Bay areas as well as from the beach adjacent to Tyonek (Jones *et al.* 2015). In Seldovia, the harvest of harbor seals (5 total) occurred exclusively in December (Jones and Kostick 2016).

In Nanwalek, 22 harbor seals were harvested in 2014 between March and

October, the majority of which occur in April. Nanwalek residents typically hunt harbor seals and Steller sea lions at Bear Cove, China Poot Bay, Tutka Bay, Seldovia Bay, Koyuktolik Bay, Port Chatam, in waters south of Yukon Island, and along the shorelines close to

Nanwalek, all south of the Petition region (Jones and Kosick 2016).

According to the results presented in Jones and Kostick (2016) in Port Graham, harbor seals were the most frequently used marine mammal; tribal members harvested 16 in the survey year. Harbor seals were harvested in January, February, July, August, September, November, and December. Steller sea lions were used noticeably less and harvested in November and December.

The Cook Inlet beluga whale has traditionally been hunted by Alaska Natives for subsistence purposes. For several decades prior to the 1980s, the Native Village of Tyonek residents were the primary subsistence hunters of Cook Inlet beluga whales. During the 1980s and 1990s, Alaska Natives from villages in the western, northwestern, and North Slope regions of Alaska either moved to or visited the south-central region and participated in the yearly subsistence harvest (Stanek 1994). From 1994 to 1998, NMFS estimated 65 whales per year were taken in this harvest, including those successfully taken for food, and those struck and lost. NMFS has concluded that this number is high enough to account for the estimated 14 percent annual decline in population during this time (Hobbs *et al.* 2008). Actual mortality may have been higher, given the difficulty of estimating the number of whales struck and lost during the hunts. In 1999, a moratorium was enacted (Pub. L. 106–31) prohibiting the subsistence take of Cook Inlet beluga whales except through a cooperative agreement between NMFS and the affected Alaska Native organizations.

On October 15, 2008, NMFS published a final rule that established long-term harvest limits on the Cook Inlet beluga whales that may be taken by Alaska Natives for subsistence purposes (73 FR 60976). That rule prohibits harvest for a 5-year period (2008–2012), if the average abundance for the Cook Inlet beluga whales from the prior five years (2003–2007) is below 350 whales. The next 5-year period that could allow for a harvest (2013–2017) would require the previous five-year average (2008–2012) to be above 350 whales. Since the Cook Inlet beluga whale harvest was regulated in 1999 requiring cooperative agreements, five beluga whales have been struck and harvested. Those beluga whales were harvested in 2001 (one animal), 2002 (one animal), 2003 (one animal), and 2005 (two animals). The Native Village of Tyonek agreed not to hunt or request a hunt in 2007, when no co-management agreement was to be signed (NMFS 2008).

The 2008 Cook Inlet Beluga Whale Subsistence Harvest Final Supplemental Environmental Impact Statement (NMFS 2008a) authorizes how many beluga whales can be taken during a 5-year interval based on the 5-year population estimates and 10-year measure of the population growth rate. Based on the 2008–2012 5-year abundance estimates, no hunt occurred between 2008 and 2012 (NMFS 2008a). The Cook Inlet Marine Mammal Council, which managed the Alaska Native Subsistence fishery with NMFS, was disbanded by a unanimous vote of the Tribes' representatives on June 20, 2012. No harvest has occurred since then and no harvest is likely in 2018.

Residents of the Native Village of Tyonek are the primary subsistence users in Knik Arm area (73 FR 60976). No households hunted beluga whale locally in Cook Inlet due to conservation concerns (Jones *et al.* 2015). The proposed project should not have any effect because no beluga harvest has taken place since 2005, and beluga hunts are not expected during the next five-year period.

Proposed Mitigation

In order to issue an LOA under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope,

range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned) and;

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Mitigation for Marine Mammals and Their Habitat

Hilcorp has reviewed mitigation measures employed during seismic research surveys authorized by NMFS under previous incidental harassment authorizations, as well as recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), Weir and Dolman (2007), Nowacek *et al.* (2013), Wright (2014), and Wright and Cosentino (2015), and has incorporated a suite of proposed mitigation measures into their project description based on the above sources.

To reduce the potential for disturbance from acoustic stimuli associated with the activities, Hilcorp has proposed to implement the following mitigation measures for marine mammals:

- (1) Vessel-based and shore-based visual mitigation monitoring;
- (2) Establishment of a marine mammal exclusion zone (EZ) and safety zone (SZ);
- (3) Shutdown procedures;
- (4) Power down procedures;
- (5) Ramp-up procedures; and
- (6) Vessel strike avoidance measures.

In addition to the measures proposed by Hilcorp, NMFS has proposed the following mitigation measures: Aerial overflights for pre-clearance and seasonal closure of the Susitna River Delta.

Exclusion and safety zones—The Exclusion Zone (EZ) is defined as the area in which all operations are shut down in the event a marine mammal enters or is about to enter this zone based on distances to the Level A harassment threshold or what can be effectively monitored for the species. The Safety Zone (SZ) is an area larger than the EZ and is defined as the area within which operations may power down in the event a marine mammal enters or is about to enter, and may be considered a Level B harassment. For all activities, if a marine mammal for which

take is not authorized is seen within or entering the SZ, operations will shut down. A minimum 10 meter shutdown zone will be observed for all in-water construction and heavy machinery.

The distances for the EZ and SZ for the activities are summarized in Table 20 and described in the following text:

(1) The distances to the Level A harassment thresholds for the 2D/3D seismic activity were calculated using the methods described above and are indicated in Table 5 above. As in several recent IHAs authorizing take from seismic surveys (e.g., five surveys in the Atlantic (82 FR 26244) and NSF (83 FR 44578)), we have proposed a more standardized 500-m EZ, which is practicable to implement and minimizes the likelihood of injury or more severe behavioral responses. The SZ for all marine mammals is 1,000 m. The distances to the thresholds for the sub-

bottom profiler were calculated using the methods described above. The EZ for all marine mammals is rounded up to 100 m.

(2) The distances to the Level A harassment thresholds for the pipe driving were calculated using methods above and the distance to the Level B harassment threshold is based on Illingworth & Rodkin (2014) measurements of 1,600 m to the 160 dB zone. The EZ for all marine mammals is rounded up to 100 m. The SZ for all marine mammals is 1,600 m.

(3) The distances to the Level A harassment thresholds for VSP were calculated using methods described in above and the distance to the Level B harassment threshold is based on Illingworth & Rodkin (2014) measurements of 2,470 m to the 160 dB zone. The EZ for all marine mammals is 500 m.

(4) The distances to the Level A and B harassment thresholds for the vibratory sheet pile driving were calculated using the methods described above. The EZ for all marine mammals is 100 m. The SZ for all marine mammals is 2,500 m.

(5) The distances to the Level A harassment thresholds for the water jet were calculated using methods described above and the distance to the Level B harassment threshold is based on Austin (2017) measurements of 860 m to the 120 dB zone. The EZ for all marine mammals is rounded up to 15 m. The SZ for all marine mammals is 860 m.

(6) NMFS proposes that Hilcorp shut down if a beluga is observed within or entering the EZ or SZ for seismic airgun or sub-bottom profiler use.

TABLE 20—RADII OF EXCLUSION ZONE (EZ) AND SAFETY ZONE (SZ) FOR HILCORP’S ACTIVITIES

Activity	Exclusion zone (EZ) radius (m)	Safety zone (SZ) radius (m)
2D/3D seismic survey	500	1,000
Sub-bottom profilers	100	1,000
Pipe driving	100	1,600
VSP	500	2,500
Sheet pile driving	100	2,500
Water jet	15	860

PSO Placement—For the 2D survey, PSOs will be stationed on the source vessel during all seismic operations and geohazard surveys when the sub-bottom profilers are used. Because of the proximity to land, PSOs may also be stationed on land to augment the viewing area. For the 3D survey, PSOs will be stationed on at least two of the project vessels, the source vessel and the chase vessel. For the VSP, PSOs will be stationed on the drilling rig. For geohazard surveys, PSOs will be stationed on the survey vessel. The viewing area may be augmented by placing PSOs on a vessel specifically for mitigation purposes.

Seismic and Geohazard Survey Mitigation

Aircraft (Seismic only)—NMFS proposes to require aerial overflights to clear the intended area of seismic survey activity of beluga whales on a daily basis. Hilcorp will fly over the action area searching for belugas prior to ramp up of seismic airguns and ramp up will not commence until the flights have confirmed the area appears free of beluga whales. This measure would only apply to 2D and 3D seismic

surveying, not to other sound sources related to geohazard survey or well construction.

Clearing the Exclusion Zone—Prior to the start of daily activities for which take has been requested or if activities have been stopped for longer than a 30-minute period, the PSOs will ensure the EZ is clear of marine mammals for a period of 30 minutes. Clearing the EZ means no marine mammals have been observed within the EZ for that 30-minute period. If any marine mammals have been observed within the EZ, ramp up cannot start until the marine mammal has left the EZ or has not been observed for a 30-minute period prior to the start of the survey.

Power Downs—A power down procedure involves reducing the number of airguns in use, which reduces the SZ radius and was proposed by Hilcorp in their application. In contrast, a shut down procedure occurs when all airgun activity is suspended immediately. During a power down, a mitigation airgun is operated for no longer than three hours. Operation of the mitigation gun allows the size of the SZ to decrease to the size of the EZ for marine mammals other than beluga

whales. If a marine mammal is detected outside the original SZ but is likely to enter that zone, the airguns may be powered down before the animal is within the safety radius, as an alternative to a complete shutdown. Likewise, if a marine mammal is already within the original SZ when first detected, the airguns may be powered down if the PSOs determine it is a reasonable alternative to an immediate shutdown. If a marine mammal is already within the EZ when first detected, the airguns will be shut down immediately.

Following a power down, airgun activity will not resume until the marine mammal has cleared the original SZ. The animal will be considered to have cleared the original SZ if it:

- Is visually observed to have left the SZ,
- Has not been seen within the SZ for 15 min in the case of pinnipeds, and porpoises, or
- Has not been seen within the SZ for 30 min in the case of cetaceans.

Shutdowns—A shutdown is defined as suspending all airgun and sub-bottom profiler activities. Shutdowns are not implemented for the other activities in

Hilcorp's petition that are unlikely to result in take as they are not easily turned off instantaneously. The operating airguns or profiler will be shut down completely if a marine mammal is within or enters the EZ. The operations will shut down completely if a beluga whale is sighted within or entering the SZ or EZ. The shutdown procedure must be accomplished within several seconds (of a "one shot" period) of the determination that a marine mammal is within or enters the EZ.

Following a shutdown, airgun or sub-bottom profiler activity may be reactivated only after the protected species has been observed exiting the applicable EZ. The animal will be considered to have cleared the EZ if it:

- Is visually observed to have left the EZ, or
- Has not been seen within the EZ for 15 min in the case of pinnipeds and porpoises
- Has not been seen within the EZ for 30 min in the case of cetaceans (except for beluga whales which cannot not be seen in the EZ or SZ).

Ramp up—A "ramp up" procedure gradually increases airgun volume at a specified rate. Ramp up is used at the start of airgun operations, including after a power down, shutdown, and after any period greater than 10 minutes in duration without airgun operations. The rate of ramp up will be no more than 6 dB per 5-minute period. Ramp up will begin with the smallest gun in the array that is being used for all airgun array configurations. During the ramp up, the EZ for the full airgun array will be maintained.

If the complete EZ has not been visible for at least 30 minutes prior to the start of operations, ramp up will not commence unless the mitigation gun has been operating since the power down of seismic survey operations. This means that it will not be permissible to ramp up the 24-gun source from a complete shut down in thick fog or at other times when the outer part of the EZ is not visible. Ramp up of the airguns will not be initiated if a marine mammal is sighted within or entering the EZ at any time.

Speed or Course Alteration—If a marine mammal is detected outside the EZ and, based on its position and relative motion, is likely to enter the EZ, the vessel's speed and/or direct course may, when practical and safe, be changed. This technique also minimizes the effect on the seismic program. This technique can be used in coordination with a power down procedure. The marine mammal activities and movements relative to the seismic and support vessels will be closely

monitored to ensure that the marine mammal does not enter the EZ. If the mammal appears likely to enter the EZ, further mitigation actions must be taken, *i.e.*, either further course alterations, power down, or shutdown of the airguns.

Pipe and Sheet Pile Driving Mitigation

Soon after the drill rig is positioned on the well head, the conductor pipe will be driven as the first stage of the drilling operation. Two PSOs (one operating at a time) will be stationed aboard the rig during this two to three day operation monitoring the EZ and the SZ. The impact hammer operator will be notified to shut down hammering operations if a marine mammal is sighted within or enters the EZ. A soft start of the hammering will begin at the start of each hammering session. The soft start procedure involves initially starting with three soft strikes, 30 seconds apart. This delayed-strike start alerts marine mammals of the pending hammering activity and provides them time to vacate the area. Monitoring will occur during all hammering sessions.

A dock face will be constructed on the rock causeway in Iniskin Bay. Two PSOs will be stationed either on a vessel or on land during the 14–21 day operation observing an EZ of 4.6 km for beluga whales. PSOs will implement similar monitoring and mitigation strategies as for the pipe installation.

For impact hammering, "soft-start" technique must be used at the beginning of each day's pipe/pile driving activities to allow any marine mammal that may be in the immediate area to leave before pile driving reaches full energy.

- Clear the EZ 30 minutes prior to a soft-start to ensure no marine mammals are within or entering the EZ.
- Begin impact hammering soft-start with an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3-strike sets.
- Immediately shut down all hammers at any time a marine mammal is detected entering or within the EZ.
- Initial hammering starts will not begin during periods of poor visibility (*e.g.*, night, fog, wind).
- Any shutdown due to a marine mammal sighting within the EZ must be followed by a 30-minute all-clear period and then a standard, full ramp-up.
- Any shutdown for other reasons resulting in the cessation of the sound source for a period greater than 30 minutes, must also be followed by full ramp-up procedures.

Water Jet Mitigation

A PSO will be present on the dive support vessel when divers are using the water jet. Prior to in-water use of the water jet, the EZ around the DSV will be established. The water jet will be shut down if marine mammals are observed within the EZ.

Beluga Critical Habitat Mitigation

Hilcorp must not operate noise producing activities within 10 miles (16 km) of the mean higher high water (MHHW) line of the Susitna Delta (Beluga River to the Little Susitna River) between April 15 and October 15. The purpose of this mitigation measure is to protect beluga whales in the designated critical habitat in this area that is important for beluga whale feeding and calving during the spring and fall months. The range of the setback required by NMFS was designated to protect this important habitat area and also to create an effective buffer where sound does not encroach on this habitat. This seasonal exclusion is proposed to be in effect from April 15–October 15. Activities can occur within this area from October 16–April 14.

Mitigation for Subsistence Uses of Marine Mammals or Plan of Cooperation

Regulations at 50 CFR 216.104(a)(12) further require Incidental Take Authorization applicants conducting activities that take place in Arctic waters to provide a Plan of Cooperation or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. A plan must include the following:

- A statement that the applicant has notified and provided the affected subsistence community with a draft plan of cooperation;
 - A schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the plan of cooperation;
 - A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and
 - What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation.
- Hilcorp Alaska has developed a Stakeholder Engagement Plan (SEP) and

will implement this plan throughout the duration of the Petition. The SEP will help coordinate activities with local stakeholders and thus subsistence users, minimize the risk of interfering with subsistence hunting activities, and keep current as to the timing and status of the subsistence hunts. The Plan is provided in Appendix B of Hilcorp's application.

Presentations will be given at various local forums. Hilcorp Alaska is working with a contractor to update/verify our existing stakeholder list. Meetings and communication will be coordinated with: commercial and sport fishing groups/associations, various Native fisheries and entities as it pertains to subsistence fishing and/or hunting, marine mammal co-management groups, Cook Inlet Regional Citizens Advisory Council, local landowners, government and community organizations, and environmental NGOs.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Proposed Monitoring and Reporting

In order to issue an LOA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth, requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

The PSOs will observe and collect data on marine mammals in and around the project area for 15 (well activity) or 30 minutes (seismic activity) before, during, and for 30 minutes after all of Hilcorp's activities for which take has been requested.

Protected Species Observer Qualifications

NMFS-approved PSOs must meet the following requirements:

1. Independent observers (*i.e.*, not construction personnel) are required;
2. At least one observer must have prior experience working as an observer;
3. Other observers may substitute education (undergraduate degree in biological science or related field) or training for experience;
4. Where a team of three or more observers are required, one observer should be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and
5. NMFS will require submission and approval of observer CVs.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Proposed Monitoring Measures

Sound Source Verification—When site-specific measurements are not available for noise sources of concern for acoustic exposure, NMFS often requires a sound source verification (SSV) to characterize the sound levels, propagation, and to verify the monitoring zones (EZ and SZ). Hilcorp Alaska plans to perform an SSV for the 3D seismic survey and sub-bottom profiler in lower Cook Inlet. Hilcorp

Alaska will work with NMFS to determine if an SSV is needed for other activities occurring in the action area.

Hilcorp will implement a robust monitoring and mitigation program for marine mammals using NMFS-approved PSOs for Petition activities. Much of the activities will use vessel-based PSOs, but land- or platform-based PSOs may also be used to augment project-specific activities. Marine mammal monitoring and mitigation methods have been designed to meet the requirements and objectives which will be specified in the Incidental Take Regulations promulgated by NMFS. Some details of the monitoring and mitigation program may change upon receipt of the individual LOAs issued by NMFS each year.

The main purposes of PSOs are: To conduct visual watches for marine mammals; to serve as the basis for implementation of mitigation measures; to document numbers of marine mammals present; to record any reactions of marine mammals to Hilcorp's activities; and, to identify whether there was any possible effect on accessibility of marine mammals to subsistence hunters in Cook Inlet. These observations will provide the real-time data needed to implement some of the key measures.

PSOs will be on watch during all daylight periods for project-specific activities. Generally, work is conducted 24-hrs a day, depending on the specific activity.

- For 2D seismic surveys, the airgun operations will be conducted during daylight hours.
- For 3D seismic surveys, airgun operations will continue during the waning nighttime hours (ranges from 2230–0600 in early April to 0100–0300 in mid-May) as long as the full array or mitigation gun is operating prior to nightfall and mitigation airgun use cannot be longer than three hours. Night vision and infrared have been suggested for low visibility conditions, but these have not been useful in Cook Inlet or other Alaska-based programs. Passive acoustic monitoring has also been used in Cook Inlet and is typically required for seismic surveys but has not shown to be an effective solution in Cook Inlet's specific environmental conditions. A further discussion of previous passive acoustic monitoring efforts by several entities in Cook Inlet is provided in Section 13 of Hilcorp's application.

- For the sub-bottom profiler, operations will generally be conducted during daylight hours but may continue into the low visibility period as long as the profiler is operating prior to

nightfall. Sub-bottom profiler operations may not begin under low visibility conditions.

- For pipe driving, VSP, and sheet pile driving, operations will generally be conducted during daylight hours.
- Water jet and hydraulic grinder are operated over a 24-hour period as they are limited to low tide conditions. Activities will not start during nighttime but will continue if already started.

Pre-Activity Monitoring—The exclusion zone will be monitored for 30 minutes prior to in-water construction/demolition activities. If a marine mammal is present within the exclusion zone, the activity will be delayed until the animal(s) leave the exclusion zone. Activity will resume only after the PSO has determined that, through sighting or by waiting (15 minutes for pinnipeds and porpoises, 30 minutes for cetaceans) without re-sighting, the animal(s) has moved outside the exclusion zone. If a marine mammal is observed within or entering the exclusion zone, the PSO who sighted that animal will notify all other PSOs and Hilcorp of its presence.

Post-Activity Monitoring—Monitoring of all zones will continue for 30 minutes following the completion of the activity.

For all activities, the PSOs will watch for marine mammals from the best available vantage point on the vessel or station. Ideally this vantage point is an elevated stable platform from which the PSO has an unobstructed 360° view of the water. The PSOs will scan systematically with the naked eye and with binoculars. When a mammal sighting is made, the following information about the sighting will be carefully and accurately recorded:

- Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the PSO, apparent reaction to activities (e.g., none, avoidance, approach, paralleling), closest point of approach, and behavioral pace.

- Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare.

- The positions of other vessel(s) in the vicinity of the PSO location.

- The vessel's position, speed, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

An electronic database or paper form will be used to record and collate data obtained from visual observations.

The results of the PSO monitoring, including estimates of exposure to key

sound levels, will be presented in weekly, monthly, and 90-day reports. Reporting will address the requirements established by NMFS in the LOAs. The technical report(s) will include the list below.

- Summaries of monitoring effort: Total hours, total distances, and distribution of marine mammals throughout the study period compared to sea state, and other factors affecting visibility and detectability of marine mammals;

- Analyses of the effects of various factors influencing detectability of marine mammals: sea state, number of observers, and fog/glare;

- Species composition, occurrence, and distribution of marine mammal sightings including date, water depth, numbers, age/size/gender categories (when discernable), group sizes, and ice cover; and

- Analyses of the effects of seismic program:

- Sighting rates of marine mammals during periods with and without project activities (and other variables that could affect detectability);

- Initial sighting distances versus project activity;

- Closest point of approach versus project activity;

- Observed behaviors and types of movements versus project activity;

- Numbers of sightings/individuals seen versus project activity;

- Distribution around the vessels versus project activity;

- Summary of implemented mitigation measures; and

- Estimates of “take by harassment.”

Proposed Reporting Measures

Immediate reports will be submitted to NMFS if 30 or more belugas are detected over the course of annual operations in the safety and exclusion zones during operation of sound sources to evaluate and make necessary adjustments to monitoring and mitigation. If the number of detected takes for any marine mammal species is met or exceeded, Hilcorp will immediately cease survey operations involving the use of active sound sources (e.g., airguns and pingers) and notify NMFS Office of Protected Resources (OPR).

1. **Weekly Reports** (during years with seismic surveying only)—Hilcorp would submit a weekly field report to NMFS Headquarters as well as the Alaska Regional Office, no later than close of business each Thursday during the weeks when in-water seismic survey activities take place. The weekly field reports would summarize species detected (number, location, distance

from seismic vessel, behavior), in-water activity occurring at the time of the sighting (discharge volume of array at time of sighting, seismic activity at time of sighting, visual plots of sightings, and number of power downs and shutdowns), behavioral reactions to in-water activities, and the number of marine mammals exposed.

2. **Monthly Reports**—Monthly reports will be submitted to NMFS for all months during which in-water seismic activities take place. The monthly report will contain and summarize the following information:

- Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea state and wind force), and associated activities during all seismic operations and marine mammal sightings.

- Species, number, location, distance from the vessel, and behavior of any sighted marine mammals, as well as associated seismic activity (number of power-downs and shutdowns), observed throughout all monitoring activities.

- An estimate of the number (by species) exposed to the seismic activity (based on visual observation) at received levels greater than or equal to the NMFS thresholds discussed above with a discussion of any specific behaviors those individuals exhibited.

- A description of the implementation and effectiveness of the: (i) Terms and conditions of the Biological Opinion's Incidental Take Statement (ITS); and (ii) mitigation measures of the LOA. For the Biological Opinion, the report must confirm the implementation of each Term and Condition, as well as any conservation recommendations, and describe their effectiveness for minimizing the adverse effects of the action on ESA-listed marine mammals.

3. **Annual Reports**—Hilcorp must submit an annual report within 90 days after each activity year, starting from the date when the LOA is issued (for the first annual report) or from the date when the previous annual report ended. The annual report would include:

- Summaries of monitoring effort (e.g., total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals).

- Analyses of the effects of various factors influencing detectability of marine mammals (e.g., sea state, number of observers, and fog/glare).

- Species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if

determinable), group sizes, and ice cover.

- Analyses of the effects of survey operations.
- Sighting rates of marine mammals during periods with and without seismic survey activities (and other variables that could affect detectability), such as: (i) Initial sighting distances versus survey activity state; (ii) closest point of approach versus survey activity state; (iii) observed behaviors and types of movements versus survey activity state; (iv) numbers of sightings/ individuals seen versus survey activity state; (v) distribution around the source vessels versus survey activity state; and (vi) numbers of animals detected in the harassment/safety zone.

NMFS would review the draft annual reports. Hilcorp must then submit a final annual report to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, within 30 days after receiving comments from NMFS on the draft annual report. If NMFS decides that the draft annual report needs no comments, the draft report will be considered to be the final report.

3. Discovery of Injured or Dead Marine Mammals—In the event that personnel involved in the survey activities covered by the authorization discover an injured or dead marine mammal, Hilcorp must report the incident to the Office of Protected Resources (OPR), NMFS and to the Alaska Regional stranding coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Vessel Strike—In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, Hilcorp must report the incident to OPR, NMFS and to regional stranding coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Species identification (if known) or description of the animal(s) involved;

- Vessel's speed during and leading up to the incident;
- Vessel's course/heading and what operations were being conducted (if applicable);
- Status of all sound sources in use;
- Description of avoidance measures/ requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;
- Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;
- Estimated size and length of animal that was struck;
- Description of the behavior of the marine mammal immediately preceding and following the strike;
- If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;
- Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and
- To the extent practicable, photographs or video footage of the animal(s).

Actions to Minimize Additional Harm to Live-Stranded (or Milling) Marine Mammals—In the event of a live stranding (or near-shore atypical milling) event within 50 km of the survey operations, where the NMFS stranding network is engaged in herding or other interventions to return animals to the water, the Director of OPR, NMFS (or designee) will advise the Hilcorp of the need to implement shutdown procedures for all active acoustic sources operating within 50 km of the stranding. Shutdown procedures for live stranding or milling marine mammals include the following:

- If at any time, the marine mammals die or are euthanized, or if herding/ intervention efforts are stopped, the Director of OPR, NMFS (or designee) will advise Hilcorp that the shutdown around the animals' location is no longer needed.
- Otherwise, shutdown procedures will remain in effect until the Director of OPR, NMFS (or designee) determines and advises Hilcorp that all live animals involved have left the area (either of their own volition or following an intervention).
- If further observations of the marine mammals indicate the potential for re-stranding, additional coordination with Hilcorp will be required to determine what measures are necessary to minimize that likelihood (*e.g.*, extending the shutdown or moving

operations farther away) and to implement those measures as appropriate.

Shutdown procedures are not related to the investigation of the cause of the stranding and their implementation is not intended to imply that the specified activity is the cause of the stranding. Rather, shutdown procedures are intended to protect marine mammals exhibiting indicators of distress by minimizing their exposure to possible additional stressors, regardless of the factors that contributed to the stranding.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Given the nature of activities, proposed mitigation and related monitoring, no serious injuries or mortalities are anticipated to occur as a result of Hilcorp's proposed oil and gas activities in Cook Inlet, and none are proposed to be authorized. The number of takes that are anticipated and proposed to be authorized are expected to be limited mostly to short-term Level B harassment, although some PTS may occur. The seismic airguns and other

sound sources do not operate continuously over a 24-hour period. Rather the airguns are operational for a few hours at a time with breaks in between, as surveys can only be conducted during slack tides, totaling a maximum of 12 hours a day for the most frequently used equipment. Sources other than airguns are likely to be used for much shorter durations daily than the 12 potential hours of airgun use.

Cook Inlet beluga whales, the Mexico DPS of humpback whales, fin whales, and the western stock of Steller sea lions are listed as endangered under the ESA. These stocks are also considered depleted under the MMPA. Beluga-specific mitigation measures, such as shutting down whenever beluga whales are sighted by PSOs and an exclusion zone at the Susitna River Delta months of high beluga concentrations, aim to minimize the effects of this activity on the population. Zerbin *et al.* (2006) estimated rates of increase of fin whales in coastal waters south of the Alaska, and data from Calambokidis *et al.* (2008) suggest the population of humpback whales by also be increasing. Steller sea lion trends for the western stock are variable throughout the region with some decreasing and others remaining stable or even indicating slight increases. The other species that may be taken by harassment during Hilcorp's proposed oil and gas program are not listed as threatened or endangered under the ESA nor as depleted under the MMPA.

Odontocete (including Cook Inlet beluga whales, killer whales, and harbor porpoises) reactions to seismic energy pulses are usually assumed to be limited to shorter distances from the airgun(s) than are those of mysticetes, in part because odontocete low-frequency hearing is assumed to be less sensitive than that of mysticetes. When in the Canadian Beaufort Sea in summer, belugas appear to be fairly responsive to seismic energy, with few being sighted within 10–20 km (6–12 mi) of seismic vessels during aerial surveys (Miller *et al.*, 2005). However, as noted above, Cook Inlet belugas are more accustomed to anthropogenic sound than beluga whales in the Beaufort Sea. Therefore, the results from the Beaufort Sea surveys may be less applicable to potential reactions of Cook Inlet beluga whales. Also, due to the dispersed distribution of beluga whales in Cook Inlet during winter and the concentration of beluga whales in upper Cook Inlet from late April through early fall (*i.e.*, far north of the proposed seismic surveys), belugas would likely occur in small numbers in the majority of Hilcorp's proposed survey area

during the majority of Hilcorp's annual operational timeframe.

Taking into account the mitigation measures that are planned, effects on cetaceans are generally expected to be restricted to avoidance of a limited area around the survey operation and short-term changes in behavior, falling within the MMPA definition of "Level B harassment." It is possible that Level A take of marine mammals from sound sources such as seismic airguns may also occur. Due to the short term duration of activities in any given area and the small geographic area in which Hilcorp's activities would be occurring at any one time, it is unlikely that these activities would affect reproduction or survival of cetaceans in Cook Inlet. Animals are not expected to permanently abandon any area that is surveyed, and any behaviors that are interrupted during the activity are expected to resume once the activity ceases. Only a small portion of marine mammal habitat will be affected at any time, and other areas within Cook Inlet will be available for necessary biological functions including breeding, foraging, and mating. In addition, NMFS proposes to seasonally restrict seismic survey operations in locations known to be important for beluga whale feeding, calving, or nursing. One of the primary locations for these biological life functions occur in the Susitna Delta region of upper Cook Inlet. NMFS proposes to implement a 16 km (10 mi) seasonal exclusion from activities for which take has been requested in this region from April 15 to October 15 annually. The highest concentrations of belugas are typically found in this area from early May through September each year. NMFS has incorporated a 2-week buffer on each end of this seasonal use timeframe to account for any anomalies in distribution and marine mammal usage.

Mitigation measures, such as dedicated marine mammal observers, and shutdowns or power downs when marine mammals are seen within defined ranges, are designed both to further reduce short-term reactions and minimize any effects on hearing sensitivity. In all cases, the effects of these activities are expected to be short-term, with no lasting biological consequence. Therefore, the exposure of cetaceans to sounds produced by Hilcorp's proposed oil and gas activities is not anticipated to have an effect on annual rates of recruitment or survival of the affected species or stocks.

Some individual pinnipeds may be exposed to sound from the proposed activities more than once during the timeframe of the project. Taking into

account the mitigation measures that are planned, effects on pinnipeds are generally expected to be restricted to avoidance of a limited area around the survey operation and short-term changes in behavior, falling within the MMPA definition of "Level B harassment," although some pinnipeds may approach close enough to sound sources undetected and incur PTS. Due to the solitary nature of pinnipeds in water, this is expected to be a small number of individuals and the calculated distances to the PTS thresholds incorporate a relatively long duration, making them conservative. Animals are not expected to permanently abandon any area that is surveyed, and any behaviors that are interrupted during the activity are expected to resume once the activity ceases. Only a small portion of pinniped habitat will be affected at any time, and other areas within Cook Inlet will be available for necessary biological functions. In addition, the areas where the activities will take place are largely offshore and not known to be biologically important areas for pinniped populations. Therefore, the exposure of pinnipeds to sounds produced by this phase of Hilcorp's proposed activity is not anticipated to have an effect on annual rates of recruitment or survival on those species or stocks.

The addition of multiple source and supply vessels, and noise due to vessel operations associated with the activities, would not be outside the present experience of marine mammals in Cook Inlet, although levels may increase locally. Given the large number of vessels in Cook Inlet and the apparent habituation to vessels by Cook Inlet beluga whales and the other marine mammals that may occur in the area, vessel activity and its associated noise is not expected to have effects that could cause significant or long-term consequences for individual marine mammals or their populations.

Potential impacts to marine mammal habitat were discussed previously in this document (see the "Anticipated Effects on Habitat" section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor enough as to not affect annual rates of recruitment or survival of marine mammals in the area. Based on the size of Cook Inlet where feeding by marine mammals occurs versus the localized area of the marine survey activities, any missed feeding opportunities in the direct project area would be minor based on the fact that other feeding areas exist elsewhere. Additionally,

operations will not occur in the primary beluga feeding and calving habitat during times of high use by those animals. The proposed mitigation measure of limiting activities around the Susitna Delta would also protect beluga whale prey and their foraging habitat.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- Increased mitigation for beluga whales, including shutdowns at any distance and exclusion zones and avoiding exposure during critical foraging periods around the Susitna Delta;
- Location of activities offshore which minimizes effects of activity on resident pinnipeds at haulouts,
- Concentration of seismic surveying in the lower portions of Cook Inlet going into open water where densities of marine mammals are less than other parts of the Inlet; and
- Comprehensive land, sea, and aerial-based monitoring maximizing marine mammal detection rates as well as acoustic SSV to verify exposure levels.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, NMFS compares the number of individuals taken within a year to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

As described above in Table 18, the takes proposed to be authorized represent less than 25 percent of any stock of population in the year of

maximum activity. Further, takes are expected to be significantly lower in the years without 3D seismic activities. For species listed as endangered under the ESA, takes proposed to be authorized represent no more than nine percent of the stock of humpback whales, ten percent of the stock of Cook Inlet beluga whales, and less than one percent of the Northeastern Pacific stock of fin whales and Western DPS of Steller sea lions.

NMFS finds that any incidental take reasonably likely to result annually from the effects of the proposed activities, as proposed to be mitigated through this rulemaking and LOA process, will be limited to small numbers of the affected species or stock. In addition to the quantitative methods used to estimate take, NMFS also considered qualitative factors that further support the “small numbers” determination, including: (1) The seasonal distribution and habitat use patterns of Cook Inlet beluga whales, which suggest that for much of the time only a small portion of the population would be accessible to impacts from Hilcorp’s activity, as most animals are found in the Susitna Delta region of Upper Cook Inlet from early May through September; (2) other cetacean species and Steller sea lions are not common in the action area; (3) the proposed mitigation requirements, which provide spatio-temporal limitations that avoid impacts to large numbers of belugas feeding and calving in the Susitna Delta and limit exposures to sound levels associated with Level B harassment; (4) the proposed monitoring requirements and mitigation measures described earlier in this document for all marine mammal species that will further reduce impacts and the amount of takes; and (5) monitoring results from previous activities that indicated low numbers of beluga whale sightings within the Level B disturbance exclusion zone and low levels of Level B harassment takes of other marine mammals. Additionally, the rationale provided in the Estimated Take section above, estimates that the number of individual harbor seals like to be exposed to noise that may cause harassment is significantly less than the number of calculated exposure due to the resident nature of harbor seals, offshore locations of the sound sources, and likelihood of harbor seals to be hauled out on land at the time sound sources are deployed.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be

taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an ITA, NMFS must find that the specified activity will not have an “unmitigable adverse impact” on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined “unmitigable adverse impact” in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

The project is unlikely to affect beluga whale harvests because no beluga harvest will take place in 2019, nor is one likely to occur in the other years that would be covered by the 5-year regulations and associated LOAs.

Additionally, the proposed action area is not an important native subsistence site for other subsistence species of marine mammals. Also, because of the relatively small number of marine mammals harvested in Cook Inlet, the number affected by the proposed action is expected to be extremely low. Therefore, because the proposed action would result in only temporary disturbances, the proposed action would not impact the availability of these other marine mammal species for subsistence uses.

The timing and location of subsistence harvest of Cook Inlet harbor seals may coincide with Hilcorp’s project but, because this subsistence hunt is conducted opportunistically and at such a low level (NMFS, 2013c), Hilcorp’s program is not expected to have an impact on the subsistence use of harbor seals.

NMFS anticipates that any effects from Hilcorp’s proposed activities on marine mammals, especially harbor seals and Cook Inlet beluga whales, which are or have been taken for subsistence uses, would be short-term, site specific, and limited to inconsequential changes in behavior and mild stress responses. NMFS does not anticipate that the authorized taking of affected species or stocks will reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (1) Causing the

marine mammals to abandon or avoid hunting areas; (2) directly displacing subsistence users; or (3) placing physical barriers between the marine mammals and the subsistence hunters. And any such potential reductions could be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met. Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the proposed mitigation and monitoring measures, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from Hilcorp's proposed activities.

Adaptive Management

The regulations governing the take of marine mammals incidental to Hilcorp's proposed oil and gas activities would contain an adaptive management component.

The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from Hilcorp regarding practicability) on an annual basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation or monitoring measures could be modified if new data suggests that such modifications would have a reasonable likelihood more effectively achieving the goals of the mitigation and monitoring and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) Results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the

destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of ITAs, NMFS consults internally, in this case with the Alaska Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

NMFS is proposing to authorize take of Cook Inlet beluga whale, Northeastern Pacific stock of fin whales, Western North Pacific, Hawaii, and Mexico DPS of humpback whales, and western DPS of Steller sea lions, which are listed under the ESA.

The Permit and Conservation Division has requested initiation of section 7 consultation with the Alaska Region for the promulgation of 5-year regulations and the subsequent issuance of annual LOAs. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Hilcorp Alaska LLC is the only entity that would be subject to the requirements in these proposed regulations. Hilcorp employs thousands of people worldwide, and has a market value in the billions of dollars. Therefore, Hilcorp is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports.

List of Subjects in 50 CFR Part 217

Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: March 21, 2019.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add subpart Q to part 217 to read as follows:

Subpart Q—Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska

Sec.

217.160	Specified activity and specified geographical region.
217.161	Effective dates.
217.162	Permissible methods of taking.
217.163	Prohibitions.
217.164	Mitigation requirements.
217.165	Requirements for monitoring and reporting.
217.166	Letters of Authorization.
217.167	Renewals and modifications of Letters of Authorization
217.168–217.169	[Reserved]

Subpart Q—Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska

§ 217.160 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Hilcorp Alaska LLC (Hilcorp) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by Hilcorp may be authorized in Letters of Authorization (LOAs) only if it occurs within the action area defined in Cook Inlet, Alaska.

(c) The taking of marine mammals by Hilcorp is only authorized if it occurs incidental to Hilcorp's oil and gas activities including use of seismic airguns, sub-bottom profiler, vertical seismic profiling, pile driving, conductor pipe driving, and water jets.

§ 217.161 Effective dates and definitions.

Regulations in this subpart are effective [EFFECTIVE DATE OF FINAL RULE] through [DATE 5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE].

§ 217.162 Permissible methods of taking.

Under LOAs issued pursuant to § 216.106 of this chapter and § 217.166, the Holder of the LOAs (hereinafter "Hilcorp") may incidentally, but not intentionally, take marine mammals within the area described in § 217.160(b) by Level A harassment and Level B harassment associated with oil and gas activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOAs.

§ 217.163 Prohibitions.

Notwithstanding takings contemplated in § 217.162 and authorized by LOAs issued under § 216.106 of this chapter and 217.166, no person in connection with the activities described in § 217.160 may:

- (a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and 217.166;
- (b) Take any marine mammal not specified in such LOAs;
- (c) Take any marine mammal specified in such LOAs in any manner other than as specified;
- (d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or
- (e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the availability of such species or stock of marine mammal for taking for subsistence uses.

§ 217.164 Mitigation requirements.

When conducting the activities identified in § 217.160(c), the mitigation measures contained in any LOAs issued under §§ 216.106 of this chapter and 217.166 must be implemented. These mitigation measures must include but are not limited to:

- (a) If any marine mammal species for which take is not authorized are sighted within or entering the relevant zones within which they would be exposed to sound above the 120 dB re 1 μ Pa (rms) threshold for continuous (*e.g.*, vibratory pile-driving, drilling) sources or the 160 dB re 1 μ Pa (rms) threshold for non-explosive impulsive (*e.g.*, seismic airguns) or intermittent (*e.g.*, scientific sonar) sources, Hilcorp must take appropriate action to avoid such

exposure (*e.g.*, by altering speed or course or by power down or shutdown of the sound source).

(b) If the allowable number of takes in an LOA listed for any marine mammal species is met or exceeded, Hilcorp must immediately cease survey operations involving the use of active sound source(s), record the observation, and notify NMFS Office of Protected Resources.

(c) Hilcorp must notify NMFS Office of Protected Resources at least 48 hours prior to the start of oil and gas activities each year.

(d) Hilcorp must conduct briefings as necessary between vessel crews, marine mammal monitoring team, and other relevant personnel prior to the start of all survey activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(e) *Establishment of monitoring and exclusion zones.* (1) For all relevant in-water construction and demolition activity, Hilcorp must implement shutdown zones/exclusion zones (EZs) with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.166. If a marine mammal is sighted within or entering the EZ, such operations must cease.

(2) For all relevant in-water construction and demolition activity, Hilcorp must designate safety zones for monitoring (SZ) with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.166 and record and report occurrence of marine mammals within these zones.

(3) For all in-water construction and demolition activity, Hilcorp must implement a minimum EZ of a 10 m radius around the source.

(f) *Shutdown measures.* (1) Hilcorp must deploy protected species observers (PSOs) and PSOs must be posted to monitor marine mammals within the monitoring zones during use of active acoustic sources and pile driving in water.

(2) Monitoring must begin 15 minutes prior to initiation of stationary source activity and 30 minutes prior to initiation of mobile source activity, occur throughout the time required to complete the activity, and continue through 30 minutes post-completion of the activity. Pre-activity monitoring must be conducted to ensure that the EZ is clear of marine mammals, and activities may only commence once observers have declared the EZ clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the EZ, the marine

mammals' behavior must be monitored and documented.

(3) A determination that the EZ is clear must be made during a period of good visibility (*i.e.*, the entire EZ must be visible to the naked eye).

(4) If a marine mammal is observed within or entering the EZ, Hilcorp must halt all noise producing activities for which take is authorized at that location. If activity is delayed due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed outside the EZ or the required amount of time (15 for porpoises and pinnipeds, 30 minutes for cetaceans) have passed without re-detection of the animal.

(5) Monitoring must be conducted by trained observers, who must have no other assigned tasks during monitoring periods. Trained observers must be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. Hilcorp must adhere to the following additional observer qualifications:

(i) Hilcorp must use independent, dedicated, trained visual PSOs, meaning that the PSOs must be employed by a third-party observer provider, must not have tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements (including brief alerts regarding maritime hazards), and must have successfully completed an approved PSO training course appropriate for their designated task.

(ii) Hilcorp must submit PSO resumes for NMFS review and approval. Resumes must be accompanied by a relevant training course information packet that includes the name and qualifications (*i.e.*, experience, training completed, or educational background) of the instructor(s), the course outline or syllabus, and course reference material as well as a document stating successful completion of the course. NMFS is allowed one week to approve PSOs from the time that the necessary information is received by NMFS, after which PSOs meeting the minimum requirements will automatically be considered approved.

(iii) To the maximum extent practicable, the lead PSO must devise the duty schedule such that experienced PSOs are on duty with those PSOs with appropriate training but who have not yet gained relevant experience.

(6) Hilcorp must implement shutdown measures if the number of

authorized takes for any particular species reaches the limit under the applicable LOA and if such marine mammals are sighted within the vicinity of the project area and are entering the SZ during activities.

(7) Hilcorp must implement a shutdown if a beluga whale is seen within or entering the EZ or SZ.

(g) *Impact driving soft start.* (1) Hilcorp must implement soft start techniques for impact pile driving. Hilcorp must conduct an initial set of three strikes from the impact hammer 30 seconds apart, at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three strike sets.

(2) Soft start is required for any impact driving, including at the beginning of the day, after 30 minutes of pre-activity monitoring, and at any time following a cessation of impact pile driving of 30 minutes or longer.

(h) *Airgun ramp up.* (1) Ramp up must be used at the start of airgun operations, including after a power down, shutdown, and after any period greater than 10 minutes in duration without airgun operations.

(2) The rate of ramp up must be no more than 6 dB per 5-minute period.

(3) Ramp up must begin with the smallest gun in the array that is being used for all airgun array configurations.

(4) During the ramp up, the EZ for the full airgun array must be implemented.

(5) If the complete EZ has not been visible for at least 30 minutes prior to the start of operations, ramp up must not commence.

(6) Ramp up of the airguns must not be initiated if a marine mammal is sighted within or entering the EZ at any time.

(i) *Airgun power down.* (1) If a marine mammal, other than a beluga whale, is detected outside the safety zone (SZ) but is likely to enter that zone, the airguns may be powered down before the animal is within the safety zone, as an alternative to a complete shutdown. Likewise, if a marine mammal is already within the SZ when first detected, the airguns may be powered down if the PSOs determine it is a reasonable alternative to an immediate shutdown. If a marine mammal is already within the EZ when first detected, the airguns must be shut down immediately.

(2) Following a power down, airgun activity must not resume until the marine mammal has cleared the SZ. The animal will be considered to have cleared the SZ if it:

(i) Is visually observed to have left the SZ; or

(ii) Has not been seen within the SZ for 15 min in the case of pinnipeds and porpoises; or

(iii) Has not been seen within the SZ for 30 min in the case of cetaceans.

(3) A mitigation airgun must not operate for longer than three hours.

(j) *Aircraft mitigation.* (1) Hilcorp must use aircraft daily to survey the planned seismic survey area prior to the start of seismic surveying. Surveying must not begin unless the aerial flights confirm the proposed survey area for that day is clear of beluga whales.

(2) If beluga whales are sighted during flights, start of seismic surveying must be delayed until it is confirmed the area is free of beluga whales.

(k) *Beluga exclusion zone.* Hilcorp must not operate with noise producing activity within 10 miles (16 km) of the mean higher high water (MHHW) line of the Susitna Delta (Beluga River to the Little Susitna River) between April 15 and October 15.

§ 217.165 Requirements for monitoring and reporting.

(a) *Marine Mammal Monitoring Protocols.* Hilcorp must conduct briefings between construction supervisors and crews and the observer team prior to the start of all pile driving and removal activities, and when new personnel join the work. Trained observers must receive a general environmental awareness briefing conducted by Hilcorp staff. At minimum, training must include identification of marine mammals that may occur in the project vicinity and relevant mitigation and monitoring requirements. All observers must have no other construction-related tasks while conducting monitoring.

(b) Activities must only commence when the entire exclusion zone (EZ) is visible to the naked eye and can be adequately monitored. If conditions (e.g., fog) prevent the visual detection of marine mammals, activities must not be initiated. For activities other than seismic surveying, activity would be halted in low visibility but vibratory pile driving or removal would be allowed to continue if started in good visibility.

(c) Monitoring must begin 15 minutes prior to initiation of stationary source activity and 30 minutes prior to initiation of mobile source activity, occur throughout the time required to complete the activity, and continue through 30 minutes post-completion of the activity. Pre-activity monitoring must be conducted to ensure that the EZ is clear of marine mammals, and activities may only commence once observers have declared the EZ clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the EZ, the animals'

behavior must be monitored and documented.

(d) *Reporting Measures.* (1) *Weekly reports.* Hilcorp must submit weekly reports during the weeks when in-water seismic survey activities take place. The weekly field reports would summarize species detected (number, location, distance from seismic vessel, behavior), in-water activity occurring at the time of the sighting (discharge volume of array at time of sighting, seismic activity at time of sighting, visual plots of sightings, and number of power downs and shutdowns), behavioral reactions to in-water activities, and the number of marine mammals exposed.

(2) *Monthly reports.* Monthly reports must be submitted to NMFS for all months during which in-water seismic activities take place. The monthly report must contain and summarize the following information: Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea state and wind force), and associated activities during all seismic operations and marine mammal sightings; Species, number, location, distance from the vessel, and behavior of any sighted marine mammals, as well as associated seismic activity (number of power-downs and shutdowns), observed throughout all monitoring activities; An estimate of the number (by species) exposed to the seismic activity (based on visual observation) at received levels greater than or equal to the NMFS thresholds discussed above with a discussion of any specific behaviors those individuals exhibited; A description of the implementation and effectiveness of the terms and conditions of the Biological Opinion's Incidental Take Statement (ITS) and mitigation measures of the LOA.

(3) *Annual Reports.* (i) Hilcorp must submit an annual report within 90 days after each activity year, starting from the date when the LOA is issued (for the first annual report) or from the date when the previous annual report ended.

(ii) Annual reports would detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed during the period of the report.

(iii) NMFS would provide comments within 30 days after receiving annual reports, and Hilcorp must address the comments and submit revisions within 30 days after receiving NMFS comments. If no comment is received from the NMFS within 30 days, the annual report will be considered completed.

(4) *Final report.* (i) Hilcorp must submit a comprehensive summary

report to NMFS not later than 90 days following the conclusion of marine mammal monitoring efforts described in this subpart.

(ii) The final report must synthesize all data recorded during marine mammal monitoring, and estimate the number of marine mammals that may have been harassed through the entire project.

(iii) NMFS would provide comments within 30 days after receiving this report, and Hilcorp must address the comments and submit revisions within 30 days after receiving NMFS comments. If no comment is received from the NMFS within 30 days, the final report will be considered as final.

(5) *Reporting of injured or dead marine mammals.* (i) In the event that personnel involved in the survey activities discover an injured or dead marine mammal, Hilcorp must report the incident to the Office of Protected Resources (OPR), NMFS (301–427–8401) and to regional stranding network (877–925–7773) as soon as feasible. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(B) Species identification (if known) or description of the animal(s) involved;

(C) Condition of the animal(s) (including carcass condition if the animal is dead);

(D) Observed behaviors of the animal(s), if alive;

(E) If available, photographs or video footage of the animal(s); and

(F) General circumstances under which the animal was discovered.

(ii) In the event of a ship strike of a marine mammal by any vessel involved in the survey activities, Hilcorp must report the incident to OPR, NMFS and to regional stranding networks as soon as feasible. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Species identification (if known) or description of the animal(s) involved;

(C) Vessel's speed during and leading up to the incident;

(D) Vessel's course/heading and what operations were being conducted (if applicable);

(E) Status of all sound sources in use;

(F) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(G) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(H) Estimated size and length of animal that was struck;

(I) Description of the behavior of the marine mammal immediately preceding and following the strike;

(J) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(K) Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(L) To the extent practicable, photographs or video footage of the animal(s).

(iii) In the event of a live stranding (or near-shore atypical milling) event within 50 km of the survey operations, where the NMFS stranding network is engaged in herding or other interventions to return animals to the water, the Director of OPR, NMFS (or designee) will advise Hilcorp of the need to implement shutdown procedures for all active acoustic sources operating within 50 km of the stranding. Shutdown procedures for live stranding or milling marine mammals include the following:

(A) If at any time, the marine mammal(s) die or are euthanized, or if herding/intervention efforts are stopped, the Director of OPR, NMFS (or designee) will advise Hilcorp that the shutdown around the animals' location is no longer needed.

(B) Otherwise, shutdown procedures must remain in effect until the Director of OPR, NMFS (or designee) determines and advises Hilcorp that all live animals involved have left the area (either of their own volition or following an intervention).

(C) If further observations of the marine mammals indicate the potential for re-stranding, additional coordination with Hilcorp must occur to determine what measures are necessary to minimize that likelihood (*e.g.*, extending the shutdown or moving operations farther away) and Hilcorp must implement those measures as appropriate.

(iv) If NMFS determines that the circumstances of any marine mammal stranding found in the vicinity of the activity suggest investigation of the association with survey activities is warranted, and an investigation into the stranding is being pursued, NMFS will submit a written request to Hilcorp indicating that the following initial available information must be provided as soon as possible, but no later than 7 business days after the request for information.

(A) Status of all sound source use in the 48 hours preceding the estimated time of stranding and within 50 km of the discovery/notification of the stranding by NMFS; and

(B) If available, description of the behavior of any marine mammal(s) observed preceding (*i.e.*, within 48 hours and 50 km) and immediately after the discovery of the stranding.

(C) In the event that the investigation is still inconclusive, the investigation of the association of the survey activities is still warranted, and the investigation is still being pursued, NMFS may provide additional information requests, in writing, regarding the nature and location of survey operations prior to the time period above.

§ 217.166 Letters of authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Hilcorp must apply for and obtain (LOAs) in accordance with § 216.106 of this chapter for conducting the activity identified in § 217.160(c).

(b) LOAs, unless suspended or revoked, may be effective for a period of time not to extend beyond the expiration date of these regulations.

(c) An LOA application must be submitted to the Director, Office of Protected Resources, NMFS, by December 31st of the year preceding the desired start date.

(d) An LOA application must include the following information:

(1) The date(s), duration, and the area(s) where the activity will occur;

(2) The species and/or stock(s) of marine mammals likely to be found within each area;

(3) The estimated number of takes for each marine mammal stock potentially affected in each area for the period of effectiveness of the Letter of Authorization.

(4) If an application is for an LOA renewal, it must meet the requirements set forth in § 217.167.

(e) In the event of projected changes to the activity or to mitigation, monitoring, reporting (excluding changes made pursuant to the adaptive management provision of § 217.97(c)(1)) required by an LOA, Hilcorp must apply for and obtain a modification of LOAs as described in § 217.167.

(f) Each LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, their habitat, and the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(g) Issuance of the LOA(s) must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under these regulations.

(h) If NMFS determines that the level of taking is resulting or may result in more than a negligible impact on the species or stocks of such marine mammal, the LOA may be modified or suspended after notice and a public comment period.

(i) Notice of issuance or denial of the LOA(s) must be published in the **Federal Register** within 30 days of a determination.

§ 217.167 Renewals and modifications of letters of authorization and adaptive management.

(a) An LOA issued under §§ 216.106 of this chapter and 217.166 for the activity identified in § 217.160(c) may be renewed or modified upon request by the applicant, provided that the following are met:

(1) Notification to NMFS that the activity described in the application submitted under § 217.160(a) will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming or remaining LOA period;

(2) Timely receipt (by the dates indicated) of monitoring reports, as required under § 217.165(C)(3);

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 217.165(c) and the LOA issued under §§ 216.106 of this chapter and 217.166, were undertaken and are expected to be

undertaken during the period of validity of the LOA.

(b) If a request for a renewal of a Letter of Authorization indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request as well as the proposed modification to the LOA. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the original determinations made for the regulations are in need of reconsideration; and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

(d) An LOA issued under §§ 216.16 of this chapter and 217.166 for the activity identified in § 217.160 may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS, in response to new information and in consultation with Hilcorp, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations.

(i) Possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures include:

(A) Results from Hilcorp's monitoring from the previous year(s).

(B) Results from marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) NMFS will withdraw or suspend an LOA if, after notice and opportunity for public comment, NMFS determines these regulations are not being substantially complied with or that the taking allowed is or may be having more than a negligible impact on an affected species or stock specified in § 217.162(b) or an unmitigable adverse impact on the availability of the species or stock for subsistence uses. The requirement for notice and comment will not apply if NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals. Notice would be published in the **Federal Register** within 30 days of such action.

§§ 217.168—217.169 [Reserved]

[FR Doc. 2019-05781 Filed 3-29-19; 8:45 am]

BILLING CODE 3510-22-P



FEDERAL REGISTER

Vol. 84

Monday,

No. 62

April 1, 2019

Part III

Department of Labor

Employment and Training Administration

20 CFR Part 655

Labor Certification Process for Temporary Employment in the
Commonwealth of the Northern Mariana Islands (CW-1 Workers); Interim
Final Rule

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 655**

[DOL Docket No. ETA-2019-0001]

RIN 1205-AB92

**Labor Certification Process for
Temporary Employment in the
Commonwealth of the Northern
Mariana Islands (CW-1 Workers)****AGENCY:** Employment and Training
Administration, Department of Labor.**ACTION:** Interim final rule; request for
comments.

SUMMARY: The Department of Labor (Department or DOL) is issuing new regulations governing the certification of temporary employment opportunities to be filled by nonimmigrant workers in the Commonwealth of the Northern Mariana Islands (CNMI) and the obligations applicable to employers of such workers under the CNMI-Only Transitional Worker visa program (CW-1). This interim final rule (IFR), implementing provisions of the Northern Mariana Islands U.S. Workforce Act of 2018 (Workforce Act), establishes the process by which a CNMI employer will obtain a prevailing wage determination (PWD) and temporary labor certification (TLC) from DOL for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in CW-1 status. Although the CW-1 visa classification predates the Workforce Act, classification as a CW-1 nonimmigrant does not currently require a labor certification. The Workforce Act institutes a labor certification requirement as a prerequisite for approval of a CW-1 petition by DHS and charges the Department with promulgating an IFR to administer this new labor certification requirement. We are also issuing regulations to provide for increased worker protections for both United States (U.S.) and foreign workers to ensure no U.S. worker is placed at a competitive disadvantage compared to a foreign worker or is displaced by a foreign worker.

DATES: This IFR is effective April 4, 2019, at 12:00 a.m. Eastern Time (ET). Interested parties are invited to submit written comments on this IFR on or before May 31, 2019.

ADDRESSES: You may submit comments, identified by the Regulatory Information Number (RIN) 1205-AB92, by any one of the following methods:

Electronic Comments: Comments may be sent via <http://www.regulations.gov>, a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type in "DOL CNMI IFR" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Mail: Address written submissions to (including disk and CD-ROM submissions) to Adele Gagliardi, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agency name and the RIN 1205-AB92. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. Comments that are mailed must be received by the date indicated for consideration.

Docket: For access to the docket to read documentation prepared in support of this rule or comments, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Ave. NW, Washington, DC 20210, telephone (202) 513-7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:**I. Executive Summary**

The Workforce Act, Public Law 115-218 (July 24, 2018), provides the Secretary of Homeland Security with authority to administer and enforce a system of allocating and determining the terms and conditions of visas to be issued to certain nonimmigrant workers performing services or labor for an employer in the CNMI. Department of Homeland Security (DHS) regulations establish the CW-1 visa classification to provide for an orderly transition from the CNMI permit system to the U.S. immigration system for a foreign national who is otherwise ineligible for

another classification under the Immigration and Nationality Act (INA). In accordance with the Workforce Act, DHS will update regulations to reflect the statutory requirement that a CW-1 petition for temporary employment in the CNMI be accompanied by an approved TLC from DOL. A TLC granted by DOL confirms that there are not sufficient U.S. workers in the CNMI who are able, willing, qualified, and available to fill the petitioning CW-1 employer's job opportunity. The TLC also confirms that a foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

As explained more fully in the preamble, the IFR establishes the process by which employers obtain a TLC from DOL for use in petitioning DHS to employ a nonimmigrant worker in CW-1 status, which involves four basic steps. First, the employer must request and obtain a PWD from DOL's Office of Foreign Labor Certification (OFLC) before filing a *CW-1 Application for Temporary Employment Certification*. To make this request, the employer will submit a completed *Application for Prevailing Wage Determination* (Form ETA-9141C) with OFLC's National Prevailing Wage Center (NPWC) containing information about the job opportunity in which the nonimmigrant workers will be employed. Based on a review of the information provided by the employer on the Form ETA-9141C, the NPWC will issue a PWD, indicate the source and validity period for its use, and return the Form ETA-9141C with its endorsement to the employer.

Second, the employer must file a completed *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and appropriate appendices) with the OFLC National Processing Center (NPC) no more than 120 calendar days before the date of need. Consistent with the Workforce Act, the employer seeking to extend the employment of a CW-1 worker may file a *CW-1 Application for Temporary Employment Certification* no more than 180 calendar days before the date on which the CW-1 status expires. The NPC Certifying Officer (CO) will review the employer's application for compliance with all applicable program requirements and issue either a Notice of Deficiency (NOD) or Notice of Acceptance (NOA). Where deficiencies in the application are discovered, the NOD will direct the employer that it must respond within 10 business days to submit a modified application

correcting the deficiencies or the CO will deny the application.

Third, where all program requirements are met, the employer will receive a NOA from the CO directing the recruitment of U.S. workers for the job opportunity and requesting a written report of the employer's recruitment efforts. To encourage the hiring of U.S. workers for employment in the CNMI, the employer will be required to advertise the job opportunity on the CNMI Department of Labor's job listing system; contact its former U.S. workers and solicit their return to the job; post a copy of the *CW-1 Application for Temporary Employment Certification* at the place(s) of employment in which the work will be performed by the CW-1 workers; and conduct any other recruitment activities (e.g., contacting community-based organizations or trade unions) required by the CO. The recruitment period will last approximately 21 calendar days and all employer-conducted recruitment must be completed before the written recruitment report can be prepared, signed, and submitted to the NPC for review.

And finally, upon review of the recruitment report, the CO will make a determination either to certify or to deny the *CW-1 Application for Temporary Employment Certification*. The CO will certify the application only where the employer has met all regulatory requirements. If the employer has met all requirements, the CO will send a Final Determination notice and copy of the certified *CW-1 Application for Temporary Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney. The employer will use the Final Determination notice, as well as any other required documentation, to support the filing of a CW-1 petition with U.S. Citizenship and Immigration Services (USCIS).

As a condition of receiving a TLC, the IFR provides a number of worker protections to ensure U.S. workers are not placed at a competitive disadvantage compared to a CW-1 worker, such as requiring a minimum number of hours per week for full-time employment; requiring that U.S. workers in corresponding employment receive the same wages and benefits as the CW-1 workers; and requiring the payment of wages by employers to be finally and unconditionally "free and clear" and no less frequent than every 2 weeks. It also requires that employers guarantee employment for a total number of work hours equal to at least three-fourths of the workdays of the total period of employment for both

CW-1 workers and workers in corresponding employment.

The IFR requires employers to pay visa and related fees of CW-1 workers, and it requires employers to pay the inbound transportation costs—including subsistence costs incurred in transit—of workers who complete 50 percent of the job order period and the outbound transportation costs—including subsistence costs incurred in transit—of employees who complete the entire job order period. To protect U.S. workers in their employment from displacement by a CW-1 worker, this IFR prohibits the employer from laying off any similarly employed U.S. worker in the occupation beginning 270 calendar days before the date of need through the end of the period of employment certified by DOL. It also prohibits employers from retaliating against employees for exercising rights under the CW-1 program and protects workers from discriminatory hiring practices.

Finally, the IFR contains a number of provisions that will lead to increased transparency and enhanced program integrity. It requires employers to provide workers with earnings statements on or before each payday, with hours worked and deductions clearly specified; requires employers to provide workers with copies of the work contract in a language understood by the worker; and requires DOL to maintain an electronic file accessible to the general public with information on all employers applying for TLC to employ CW-1 workers. Additionally, the IFR requires employers to retain all documents and records establishing compliance with the regulations for a period of 3 years after the *CW-1 Application for Temporary Employment Certification* is adjudicated or from the date the CO receives a letter of withdrawal. The employer must make these documents and records available to the DOL, DHS or to any Federal Government Official performing an investigation, inspection, audit, or other law enforcement activity. It also establishes a sanctions and penalties regime for employers that violate program requirements, such as more intensive or assisted recruitment requirements, revocation of a certified *CW-1 Application for Temporary Employment Certification*, or debarment from filing any labor certification application or labor condition application with the Department for up to 5 years. The debarment process for the CW-1 program will provide for notice, an opportunity for rebuttal, and a right to appeal the Department's determination. CW-1 debarment, once it takes effect however, will automatically

debar an individual or entity from other foreign labor certification programs as well. That is, an individual or entity debarred from the CW-1 program will be disqualified from filing any labor certification applications¹ or labor condition applications² with DOL, including an agent or attorney's filing of an application on the debarred entity's behalf, for the period of time set forth in the CW-1 Notice of Debarment, Final Determination (if rebuttal evidence is submitted), or ARB Decision (if the debarment action is appealed).

The Department has concluded that the procedures and requirements outlined in this IFR will help employers obtain a reliable and productive workforce while also providing appropriate incentives to encourage the hiring of U.S. workers in the CNMI and protect the integrity of the program. This IFR is considered an Executive Order (E.O.) 13771 regulatory action. Details on the estimated costs can be found in the rule's economic analysis. Implementing this new labor certification process will further the Congressional intent to incentivize the hiring of U.S. workers in the CNMI by developing and strengthening the CNMI labor force over time; contribute to the success of its economy and labor market by benefiting small business; and create greater job opportunities for U.S. workers in that geographical demarcation. The new regulations also seek to ensure that the wages of U.S. workers are protected, in addition to extending worker protection assurances currently afforded in other TLC programs.

II. Background

A. Legal Framework

President Donald J. Trump signed the Workforce Act into law on July 24, 2018. The purposes of the Workforce Act are to encourage the hiring of U.S. workers in the CNMI workforce and ensure that no U.S. worker is placed at a competitive disadvantage compared to a non-U.S. worker or is displaced by a non-U.S. worker. The Workforce Act

¹ See 20 CFR part 655, subpart A (governing H-2B temporary nonagricultural workers); 20 CFR part 655, subpart B (governing H-2A temporary agricultural workers); 20 CFR part 655, subpart F (governing the temporary employment of D-1 crewmembers on foreign vessels to perform longshore work at U.S. ports); and 20 CFR part 656 (permanent labor certification).

² See 20 CFR part 655, subpart H (governing labor condition applications for H-1B foreign nationals entering the U.S. on a temporary basis to work in specialty occupations or as fashion models, H-1b1 professionals entering under the U.S.-Chile or U.S.-Singapore Free Trade Agreements, and E-3 professionals entering under the U.S.-Australia Free Trade Agreement).

extends the transition period described below (and thus, the CW–1 visa program) through 2029. It also requires that a CW–1 petition for temporary employment filed with DHS be accompanied by an approved TLC from DOL. See Public Law 115–218, sec. 3, 48 U.S.C. 1806(a)(2) and (d)(2). The TLC from DOL must confirm that: (1) There are not sufficient U.S. workers in the CNMI who are able, willing, qualified, and available at the time and place needed to perform the services or labor involved in the petition; and (2) the employment of a nonimmigrant worker who is the subject of a petition will not adversely affect the wages and working conditions of similarly employed U.S. workers. 48 U.S.C. 1806(d)(2)(A).

In order to implement the second requirement that nonimmigrant employment will not adversely affect U.S. workers' wages and working conditions, the Workforce Act mandates the determination of the relevant wage rates. The first option for this determination is for DOL to use, or make available to employers, an occupational wage survey conducted by the Governor of the CNMI (Governor) that meets the statistical standards established by the Department for determining prevailing wages in the CNMI on an annual basis. 48 U.S.C. 1806(d)(2)(B). If that does not occur, then the Workforce Act requires that the prevailing wage for a given occupation in the CNMI be the arithmetic mean of the wages of workers similarly employed in the territory of Guam based on the Occupational Employment Statistics (OES) Survey conducted by the Department's Bureau of Labor Statistics (BLS). *Id.* The Secretary of Labor (Secretary) has delegated the statutory responsibilities of administering the TLC process through the ETA Assistant Secretary to OFLC.

The CNMI is a self-governing commonwealth and unincorporated territory of the United States. In 1976, Congress approved a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (the Covenant), Public Law 94–241, sec. 1, 90 Stat. 263 (Mar. 24, 1976) (48 U.S.C. 1801 and 1801 note). The Covenant, which entered into full effect on Nov. 4, 1986, Presidential Proclamation No. 5564, 51 FR 40399 (Nov. 3, 1986) (48 U.S.C. 1801 note), established the terms of the political relationship between the United States and the CNMI, granted U.S. citizenship to eligible CNMI residents, exempted the CNMI from most U.S. immigration laws, and gave the CNMI local control over its own immigration system.

Congress retained the authority to extend U.S. immigration laws to the CNMI at any time.³ In addition, the Covenant sought to increase the percentage of U.S. workers in the total workforce of the CNMI, while maintaining the minimum number of workers who are not U.S. workers to meet the changing demands of the CNMI economy; to encourage the hiring of U.S. workers into such workforce; and to ensure that no U.S. worker is at a competitive disadvantage for employment compared to a worker who is not a U.S. worker, or is displaced by a worker who is not a U.S. worker.

In 2008, Congress extended U.S. immigration laws to the CNMI through the Consolidated Natural Resources Act of 2008 (CNRA). See Public Law 110–229, Title VII, 122 Stat. 754, 853 (May 8, 2008) (48 U.S.C. 1806 note). Under the CNRA, which amended the Covenant, Federal immigration laws would fully apply after a 5-year (2009–2014) transition period. Once the Federal immigration laws were in place in 2014 without CNMI exceptions, a percentage of the workforce would likely not meet the requirements of U.S. temporary employment visas, and thus would be ineligible to enter or reenter the CNMI, negatively impacting the local economy. Thus, the CNRA provided for a new Commonwealth-Only Transitional Worker visa classification, to be administered by DHS, with the proviso that, to incrementally reduce the Commonwealth's dependence on foreign labor, the number of visas issued would decrease each year, ending with the issuance of zero visas by the end of the transition period. Congress later extended the period's end to December 31, 2019. See Public Law 110–229, sec. 702(a); S. Rep. No. 115–214 at 6–7; Report on 902 Consultations at 6–7; and Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, sec. 10, 128 Stat. 2130, 2134 (Dec. 16, 2014) (extending the transition period to December 31, 2019). The CNRA did not stipulate the requirement of obtaining a labor certification prior to

³ See history summarized in S. Rep. No. 115–214 at 6–7 (2018), <https://www.congress.gov/115/crpt/srpt214/CRPT-115srpt214.pdf>, accompanying S.2325, Northern Mariana Islands U.S. Workforce Act. Provisions of S. 2325 were enacted as part of the Workforce Act. See also immigration issues and recommendations discussed, pre-Workforce Act, in Special Representatives of the United States and the Commonwealth of the Northern Mariana Islands, “Report to the President on 902 Consultations 6–25” (Jan. 2017) (hereafter “Report on 902 Consultations”), <https://www.doi.gov/sites/doi.gov/files/uploads/902-consultations-report-january-2017.pdf>.

filing a petition for a CW–1 worker with DHS.

B. Statutory Basis for an Interim Final Rule

The Workforce Act requires the Secretary to promulgate an IFR implementing the CW–1 TLC and its related provisions, and exempts this rulemaking from the Administrative Procedure Act's (APA's) notice-and-comment requirement under 5 U.S.C. 553(b). See Public Law 115–218, sec. 3(b)(2).

This exemption reflects the exigency created by the new labor certification requirement. Under the CW–1 visa program as amended by the Workforce Act, the Secretary must develop and implement new standards, requirements, and procedures for employers to obtain a TLC before a CW–1 petition can be submitted to DHS. This new TLC process—including a procedure to obtain a PWD required to support the employer's TLC application—must enable employers to hire a nonimmigrant worker under the CW–1 classification with an employment start date as early as October 1, 2019, when the new requirement takes effect.⁴ By statute, an employer that desires to renew the employment of a CW–1 worker may petition DHS no more than 180 calendar days before the expiration of that worker's visa status.⁵ The earliest possible renewal petition date for a CW–1 worker with an October 1, 2019 start date is April 4, 2019. Accordingly, the Secretary must have a process for employers to obtain a PWD and TLC in place by April 4, 2019. See 48 U.S.C. 1806(d)(2)(A)(i).

Because of the exigency created by the statute, the Department is also issuing this IFR with an April 4, 2019 effective date, rather than providing for the usual 30-day waiting period required by section 553(d) of the APA. Under the APA, an agency is authorized to make a rule effective immediately upon a showing of good cause instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). An agency can show good cause for eliminating the 30-day waiting period when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 290 (7th Cir.

⁴ The governing statute, as amended by the Workforce Act, establishes a temporary labor certification requirement beginning with CW–1 petitions filed with DHS with employment start dates in FY 2020. See 48 U.S.C. 1806(d)(2)(A)(i).

⁵ See 48 U.S.C. 1806(d)(3)(D), providing that an employer may petition DHS no earlier than 180 days before the expiration of a CW–1 visa, when the petition is for renewal of the visa.

1979); *United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977). As explained above, because Congress has required that a labor certification process be in place to enable employers to hire CW-1 workers with start dates as early as October 1, 2019, this rulemaking must be effective no later than April 4, 2019, so that an employer may obtain a timely PWD. A valid PWD is required when an employer files its *CW-1 Application for Temporary Employment Certification*. Only after the employer receives a TLC from the Department may it petition USCIS for a CW-1 visa, so the Department is making this rule effective as soon as possible. Employers may request a PWD as early as April 4, 2019.

C. CNMI Labor Market

The CNMI has a total population of 52,263, according to the CNMI Department of Commerce Central Statistics Division.⁶ In the years that followed the establishment of the Covenant, the CNMI economy became reliant on the use of temporary foreign labor. The Government Accountability Office (GAO) found that in 2016, foreign workers made up 53 percent of those employed and filled the majority of all hospitality and construction jobs. The GAO also found that, if all CW workers were removed from the CNMI's labor market, the CNMI's gross domestic product (GDP) would be reduced by between 26 and 62 percent. The GAO report noted that the supply of workers in the unemployed domestic workforce would be well below the CNMI's demand for foreign labor.⁷ The estimated employment level was 29,215 workers (15,559 foreign workers and 13,656 domestic workers) in 2016,⁸ while the number of unemployed persons was 2,386 persons.⁹ Historically, the unemployment rate in the CNMI has been higher than 10 percent because many unemployed

persons in the CNMI lack the skill sets and work experience required for the jobs filled by foreign workers, even though many of those jobs are for low-skilled workers.

According to the CNMI Department of Commerce Central Statistics Division, there were an estimated 2,646 unemployed persons in the CNMI in the 4th quarter of 2017, 53.1 percent (1,406) of whom were U.S. citizens and 11.7 percent (310) of whom were permanent residents.¹⁰ The CNMI unemployment rate was 10.5 percent. The unemployment rate for U.S. citizens was 13.5 percent, for permanent residents was 9.2 percent, and for non-U.S. citizens was 8.2 percent. The unemployment rate was negatively associated with age: The highest rate was 26.2 percent for youth 16 to 19 years of age, while the lowest rate was 2.0 percent for persons 65 years of age and older. The unemployment rate was also inversely related to education level: Persons with less than a high school diploma had the highest unemployment rate at 21.3 percent, while those with at least a master's degree had the lowest unemployment rate at 3.7 percent. With respect to place of birth, the unemployment rate for persons born in a U.S. State or territory was 14.3 percent, for persons born in an Asian country was 7.3 percent, and for persons born in the Pacific Islands was 18.9 percent.¹¹

In light of the CNMI economy's continuing dependence on foreign labor, the CNRA's requirement to reduce and eventually eliminate CW-1 visas generated significant concern among CNMI employers. Increased employer demand for CW-1 visas has resulted, in large part, from recent economic expansion in the construction, casinos, and related hospitality industry sectors. In its February 2018 report, the GAO noted that the U.S. Department of Commerce's Bureau of Economic Analysis (BEA) estimated that the CNMI's GDP increased by almost 29 percent in 2016 (to \$1.242 billion), after increasing by about 4 percent in 2015. BEA attributed this economic growth to a significant increase in visitor

spending, particularly for casino gambling, and investment in the construction of a casino resort in Garapan and other hotel construction in Saipan.¹² The number of visitors to the CNMI grew over 10 percent, primarily reflecting an increase in visitor arrivals from South Korea and China. Reflecting the increase in economic activity, employment rose by approximately 25 percent, from 23,344 in 2013 to 29,215 in 2016. However, documented patterns of labor abuse and exploitation of foreign workers by certain CNMI employers in recent decades have also led to calls for improving the employment opportunities of U.S. workers and strengthening labor protections.¹³

The number of guest workers in the CNMI surged in the 1980s when garment manufacturers from Hong Kong and Korea set up business in the CNMI. The CNMI economy became dependent on foreign labor as the garment and tourism industries expanded in the 1980s and 1990s. According to an October 1999 economic study by the Northern Marianas College, garment manufacturing and tourism accounted for about 85 percent of the CNMI's total economic activity and 96 percent of its exports.¹⁴ The CNMI's guest worker program gained worldwide notoriety in the 1990s when reports of sweatshop conditions and widespread abuse of guest workers began to surface.¹⁵ Notwithstanding large lawsuit settlements and independent monitoring at garment factories, the number of labor abuses continued to be significant.¹⁶

¹² See S. Rep. No. 115-214 at 7. See U.S. Govt. Accountability Office, "Commonwealth of the Northern Mariana Islands: Recent Economic Trends and Preliminary Observations on Workforce Data," GAO-18-373T (Feb. 2018), <https://www.gao.gov/products/GAO-18-373T>.

¹³ See S. Rep. No. 115-214 at 8 (referring to protections such as "higher minimum wage requirements, the potential for revocation, legitimate business requirements, [and] a prohibition on the use of CW visas for construction workers").

¹⁴ U.S. Government Accountability Office, "U.S. Insular Areas: Economic, Fiscal, and Financial Accountability Challenges," GAO-07-119 (Dec. 12, 2006) <https://www.gao.gov/products/GAO-07-119>.

¹⁵ Scott L. Cummings, "Hemmed In Legal Mobilization in the Los Angeles Anti-Sweatshop Movement," *Berkeley Journal of Employment and Labor Law*, Volume 30, 2009.

¹⁶ U.S. Department of the Interior, Office of Insular Affairs, "Federal Ombudsman's Report on the Status of Nonresident Workers in the Commonwealth of the Northern Mariana Islands: Current Conditions, Issues and Trends in the CNMI" (Mar. 29, 2006), <http://www.doi.gov/oia/reports/upload/OmbudsmansReport.pdf>. (concluding that while labor conditions had improved "significantly" in the CNMI since the late 1990s, "complaints of illegal recruitment scams and nonpayment of wages [were] still prevalent.").

⁶ CNMI Department of Commerce, Central Statistics Division, "CNMI Labor Force Participation Measures" (May 2018), <http://ver1.cnmicommerce.com/wp-content/uploads/2018/05/20174QLFPFD-ver-1.1.pdf>.

⁷ See Report on 902 Consultations at 6-7. See U.S. Govt. Accountability Office, "Commonwealth of the Northern Mariana Islands: Implementation of Federal Minimum Wage and Immigration Laws," GAO-17-437 (May 2017), <https://www.gao.gov/products/GAO-17-437>.

⁸ U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands: Recent Economic Trends and Preliminary Observations on Workforce Data," GAO-18-373T (Feb. 2018), <https://www.gao.gov/products/GAO-18-373T>.

⁹ U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands: Implementation of Federal Minimum Wage and Immigration Laws," GAO-17-437 (May 2017), <https://www.gao.gov/products/GAO-17-437>.

¹⁰ The report included the following note regarding the presence of unemployed non-U.S. citizens: "Note that while there are Not U.S. Citizens in the unemployed population, they are likely to be more temporary, compared to U.S. Citizen and Permanent Resident, because of existing laws governing migrant workers. With no job, Not U.S. Citizen, migrant worker will eventually leave the CNMI."

¹¹ CNMI Department of Commerce, Central Statistics Division, "CNMI Labor Force Participation Measures" (May 2018), <http://ver1.cnmicommerce.com/wp-content/uploads/2018/05/20174QLFPFD-ver-1.1.pdf>.

Changes to international trade law and various external events led to declines in the garment and tourism industries in the early 2000s. In the process, the CNMI's dependence on foreign labor in those industries also declined. In 2016, foreign workers were primarily employed in the following occupations: Food preparation and serving related (1,434 foreign workers); management (1,423); office and administrative support (1,269); construction and extraction (1,221); and education, training, and library (1,016). Foreign workers especially outnumbered U.S. workers in education, training, and library (1,016 foreign workers compared to 214 U.S. workers); construction and extraction (1,221 foreign workers compared to 268 U.S. workers); and building and grounds cleaning and maintenance (895 foreign workers compared to 255 U.S. workers).¹⁷

D. Comments on the Rulemaking From Governor of the CNMI

Pursuant to section 3(b)(3) of the Workforce Act, the Governor submitted comments and recommendations on the development of this IFR in a September 2018 letter. In the letter, the Governor recommended that the Department adopt a regulatory framework for the Commonwealth's CW-1 program similar to the H-2B program's framework for Guam, in which the government of Guam approves TLCs. Specifically, the letter stated that "[g]iven the changing nature of the CNMI labor force, and the lack of DOL statistics for the CNMI labor force, it would be in the interest of both DOL and the CNMI to authorize that the preliminary determination of U.S. worker availability in occupational categories petitioned for CW-1 permits be granted to the CNMI government."

Alternatively, the Governor recommended that the Commonwealth collaborate with the Department by providing the Department with data on the number of U.S. workers available in the Commonwealth's major occupational categories. The Governor suggested that the Department use this information to determine whether applications for TLC must be approved.

In accordance with the Workforce Act, the Department has considered the Governor's recommendations in the development of this regulation. As stated in sec. 3(b)(3)(B) of the Workforce Act, the Department may include provisions in this IFR "that are

responsive to any recommendation of the Governor that is not inconsistent with this Act," including the need to protect U.S. workers.

The Governor's request for the authority to issue TLCs in the same manner as the government of Guam approves TLCs in the H-2B program is inconsistent with the statute. This procedure for Guam was established by DHS regulation, under which a petitioning employer must apply for a temporary labor certification with the Governor of Guam. 8 CFR 214.2(h)(6)(iii)(A). The Workforce Act mandates that the Secretary of Homeland Security may not approve a CW-1 petition unless the employer has received a TLC from the Secretary. Public Law 115-218 sec. 3(a)(2)(B), 48 U.S.C. 1806(d)(2)(A). The underlying statutory schemes and histories for these programs are different. Given DOL's longstanding role in issuing TLCs in other contexts, as well as Congress' express direction that DOL issue such TLCs, DOL respectfully declines the Governor's request.

The Governor also requested that the Department use Commonwealth-provided local data in major occupational categories as the primary means for granting TLCs. This request is inconsistent with statutory requirements. The statute states that a TLC must confirm the lack of qualified workers available at the time and place needed to perform the job for which foreign workers are sought. Public Law 115-218 sec. 3(a)(2)(A)(i)(I), 48 U.S.C. 1806(d)(2)(A)(i)(I). The statute requires a case-by-case determination of worker unavailability at the particular time and location of the job for which foreign workers are sought, as opposed to a determination based on general data about worker availability in certain occupational categories. Therefore, the Department did not accept this proposal. It should also be noted that the Governor's suggestion does not provide any details as to what kind of local data might be provided and that it is unclear how "major occupational categories" would be determined or whether those categories would align with the occupations for which there is demand in the CW-1 program. It is possible that local data could be useful to the CO when deciding whether additional recruitment methods are required, but without substantial details as to what kind of data is being proposed, it is not possible to determine whether such data would be useful to the CO.

E. Request for Comments on all Aspects of This Interim Final Rule

The Department invites the public to submit comments on this IFR. The standards and procedures for employers to obtain a TLC under this IFR are largely equivalent to the provisions governing the H-2B temporary nonagricultural program, 80 FR 24042 (Apr. 29, 2015) (2015 H-2B Rule).

III. Discussion of 20 CFR Part 655, Subpart E

A. Introductory Sections

1. Section 655.400, Scope and Purpose of Subpart E

This section informs program users of the statutory authority for the CW-1 TLC process, and the scope of the Department's role in receiving, reviewing, and adjudicating applications for TLC, and in upholding the integrity of *CW-1 Applications for Temporary Employment Certification*. It is through the regulatory provisions in this subpart that the Secretary makes the statutory determination that: (1) There are not sufficient U.S. workers in the Commonwealth who are able, willing, qualified, and who will be available at the time and place needed to perform the services or labor for which an employer desires to import foreign workers; and (2) the employment of the CW-1 worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed. Under the authority in 48 U.S.C. 1806(d)(2)(A), this section also explains that this subpart establishes the minimum standards and obligations with respect to the terms and conditions of the TLC with which CW-1 employers must comply, as well as the rights and obligations of CW-1 workers and workers in corresponding employment.

2. Section 655.401, Authority of Agencies, Offices and Divisions in the Department of Labor

This section describes the authority of and division of activities related to the CW-1 program within DOL. It discusses the authority of OFLC, an office within the Department's Employment and Training Administration (ETA), to issue TLCs and carry out the Secretary's statutory responsibilities as required by 48 U.S.C. 1806.

3. Section 655.402, Definition of Terms

This section establishes definitions of the terms used in part 655, subpart E. To the extent possible, the definitions in this section are consistent with the definition of terms used in other TLC programs, such as the H-2A and H-2B programs.

¹⁷ CNMI Department of Commerce, Statistical Yearbook 2017, Table 5.24 "Average Hourly Wages by Occupation and Citizenship, CNMI: 2016," <http://ver1.cnmicommerce.com/sy-2017-table-5-17-31-wage-survey/>.

a. Administrative Law Judge

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges (OALJ) appointed under 5 U.S.C. 3105, or a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (BALCA or Board) established by part 656 of this chapter, but which must hear and decide administrative judicial reviews, as set forth in § 655.461.

b. Agent

Agent is a term commonly defined and used in other TLC programs and is defined in this section similarly as a person or entity authorized to act on behalf of the employer for TLC purposes, and does not itself employ workers with respect to a specific application. This definition further provides that the agent representing the CW-1 employer must not be disallowed from practice before any court, the Department, the Executive Office for Immigration Review (EOIR) or DHS under 8 CFR 292.3 or 1003.101.

c. Applicant

Applicant means a U.S. worker who is applying for a job opportunity, or on whose behalf an application is made, in response to the employer's recruitment efforts required by this subpart and for which an employer has filed a *CW-1 Application for Temporary Employment Certification*.

d. Application for Prevailing Wage Determination

The *Application for Prevailing Wage Determination* means the Office of Management and Budget (OMB)-approved Form ETA-9141C and the appropriate appendices, submitted by an employer, as set forth in § 655.410, to secure a PWD for use in filing a *CW-1 Application for Temporary Employment Certification*.

e. CW-1 Application for Temporary Employment Certification

The *CW-1 Application for Temporary Employment Certification* means the OMB-approved Form ETA-9142C and the appropriate appendices, a valid PWD, and all supporting documentation submitted by an employer, as set forth in §§ 655.420 through 655.422, to secure a TLC determination from OFLC Administrator.

f. Attorney

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of

Columbia. An attorney can act as an agent as defined in, and subject to the requirements of, this regulation.

g. Board of Alien Labor Certification Appeals or BALCA

BALCA means the permanent Board established by part 656 of this chapter, chaired by the Chief ALJ, and consisting of ALJs appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of BALCA, to handle all administrative judicial reviews in accordance with § 655.461 of this subpart.

h. Certifying Officer or CO

CO means the person who processes *CW-1 Applications for Temporary Employment Certification* submitted by employers with authority to grant or deny TLC, as set forth in § 655.450 of this subpart, under the CW-1 program. The OFLC Administrator is the national CO. Other COs may also be designated by the OFLC Administrator to make the determinations required under this subpart, including making PWDs.

i. Chief Administrative Law Judge or Chief ALJ

Chief ALJ means the chief official of the Department's OALJ or the Chief ALJ's designee.

j. CNMI Department of Labor

The CNMI Department of Labor means the executive Department of the Commonwealth Government that administers employment and job training activities for employers and U.S. workers in the Commonwealth.

k. Commonwealth or CNMI

Commonwealth or CNMI, used interchangeably in this subpart, means the Commonwealth of the Northern Mariana Islands.

l. Corresponding Employment

Corresponding employment means the employment of U.S. workers who are not CW-1 workers by an employer that has an approved *CW-1 Application for Temporary Employment Certification* in any work included in the approved job offer, or in any work performed by the CW-1 workers. Workers in corresponding employment may be either workers hired during the recruitment process, in connection with the *CW-1 Application for Temporary Employment Certification*, or workers who already work for the employer and who perform any work included in the approved job order or any work performed by CW-1 workers.

m. CW-1 Petition

The CW-1 petition means USCIS Form I-129CW, *Petition for a CNMI-Only Nonimmigrant Transitional Worker*, a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and additional evidence as may be prescribed or requested by USCIS.

n. CW-1 Worker

The CW-1 worker means any foreign worker who is lawfully present in the Commonwealth and authorized by DHS to perform temporary labor or services under 48 U.S.C. 1806(d).

o. Date of Need

The date of need means the first date the employer requires services of the CW-1 workers as indicated on the *CW-1 Application for Temporary Employment Certification*.

p. Department of Homeland Security or DHS

DHS means the Federal Department having jurisdiction over certain immigration-related functions, acting through its component agencies, including USCIS.

q. Employee

Employee means a person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this subpart.

r. Employer

Employer means, in summary, a person with a physical location in the Commonwealth that has an employer relationship with a CW-1 worker or worker in corresponding employment under the common law of agency, and that possesses a Federal Employer Identification Number.

s. Employer-Client

Employer-client means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch, or subsidiary of the job

contractor, under which the job contractor provides services or labor to the employer-client on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

t. Employment and Training Administration or ETA

ETA means the agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Workforce Act for the administration and adjudication of a *CW-1 Application for Temporary Employment Certification* and related functions.

u. Federal Holiday

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

v. Full-Time

Full-time for the CW-1 program is 35 or more hours of work per week.

w. Governor

Governor means the Governor of the Commonwealth of the Northern Mariana Islands.

x. Job Contractor

Job contractor means an employer that contracts services or labor on a temporary basis to one or more employers which is not an affiliate, branch, or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control over the services or labor other than hiring, paying, and releasing the workers.

Job contractors generally have an ongoing business of supplying workers to other employers where substantial, direct day-to-day supervision, scheduling, and assignment of work occurs. The following examples illustrate the differences between an employer that is a job contractor and an employer that is not. Employer A is a construction staffing company. It sends several of its employees to Acme Corporation to perform construction work on a commercial building for 11 months. Although Employer A has hired these employees and will be issuing paychecks to these employees for the time worked at Acme Corporation, Employer A will not exercise substantial, direct day-to-day supervision and control over its employees during their performance of services at Acme Corporation. Rather, Acme Corporation will direct and

supervise the Employer A employees during the 11-month project period. Under this particular set of facts, Employer A would be considered a job contractor. By contrast, Employer B is a computer repair company. It sends several of its employees to Acme Corporation and many other employers during the course of a year to disassemble desktop computers for repair and maintenance. Among the employees that Employer B sends to Acme Corporation and these other employers are several computer repair technicians and one supervisor. Employer B's supervisor instructs and supervises the technicians as to the desktops to be repaired at each employer's establishment. Under this particular set of facts, Employer B generally would not be considered a job contractor.

y. Job Offer

Job offer means the written offer made by an employer or potential employer of CW-1 workers to both U.S. and CW-1 workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits, for which the *CW-1 Application for Temporary Employment Certification* is filed. The minimum content requirements of the employer's job offer are discussed under § 655.441 of this subpart.

z. Job Opportunity

Job opportunity means full-time employment at a place in the Commonwealth to which U.S. workers can be referred.

aa. Joint Employment

Where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker. The Department additionally notes that the CNMI program definitions of employer, employee, and joint employment that the Department provides herein are different from the definitions of "employer," "employee," and "employ" in the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) and the definition of "employ" in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* (MSPA). Thus, the statutory definitions in the FLSA and MSPA that determine the existence of an employment relationship or joint employer status neither apply nor are relevant to the determination of whether an entity is a CNMI employer or joint employer.

bb. Layoff

Layoff means any involuntary separation of one or more U.S. employees. This does not include an employer's cause-based termination actions.

cc. Long-Term Worker

Long-term worker means an alien who was admitted to the CNMI as a CW-1 nonimmigrant during fiscal year (FY) 2015, and who was granted CW-1 nonimmigrant status during each of FYs 2016 through 2018. Public Law 115-218 sec. 3(a)(3)(F), 48 U.S.C. 1806(d)(7)(B). As provided by the statute, long-term workers are exempt from the prohibition on Construction and Extraction Occupations under the Department's Standard Occupational Classification Group 47-0000. Public Law 115-218 sec. 3(a)(3)(C), 48 U.S.C. 1806(d)(3)(D)(v).

dd. National Prevailing Wage Center or NPWC

NPWC means that office within OFLC from which employers, agents, or attorneys who wish to file an *CW-1 Application for Temporary Employment Certification* receive a PWD.

ee. NPWC Director

The NPWC Director means the OFLC official to whom the OFLC Administrator has delegated authority to carry out certain NPWC operations and functions.

ff. National Processing Center or NPC

NPC means the office within OFLC in which the COs operate, and which are charged with the adjudication of *CW-1 Applications for Temporary Employment Certification*.

gg. NPC Director

The NPC Director is the OFLC official to whom the OFLC Administrator has delegated authority for purposes of certain NPC operations and functions.

hh. Occupational Employment Statistics or OES Survey

The OES survey means the program under the jurisdiction of BLS that reports annual wage estimates for Guam based on standard occupational classifications (SOCs).

ii. Offered Wage

The offered wage means the wage offered by an employer in the *CW-1 Application for Temporary Employment Certification* and job offer. The offered wage must equal or exceed the highest of the prevailing wage, the Federal minimum wage, or the Commonwealth minimum wage.

jj. Office of Foreign Labor Certification or OFLC

OFLC means the organizational component of the ETA, within the Department of Labor, that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including overseeing the CW-1 program and issuing determinations related to an employer's request for an *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*.

kk. Place of Employment

The place of employment means the worksite (or physical location) where work under the *CW-1 Application for Temporary Employment Certification*, including the job offer, actually is performed by the CW-1 workers and workers in corresponding employment. The employer must provide all known places of employment at the time of filing the *CW-1 Application for Temporary Employment Certification*.

ll. Prevailing Wage

A prevailing wage is the official wage issued by the NPWC on the Form ETA 9141C, *Application for Prevailing Wage Determination for the CW-1 Program*. The employer must pay all CW-1 workers and U.S. workers in corresponding employment the highest of the prevailing wage, the Federal minimum wage, or the Commonwealth minimum wage.

mm. Prevailing Wage Determination or PWD

A PWD is the prevailing wage determination issued by OFLC's NPWC on the Form ETA-9141C, *Application for Prevailing Wage Determination*. The PWD is used in support of the *CW-1 Application for Temporary Employment Certification*.

nn. Secretary

The Secretary means the U.S. Secretary of Labor, the chief official of the U.S. DOL, or the Secretary's designee.

oo. Secretary of Homeland Security

The Secretary of Homeland Security means the chief official of the U.S. DHS or the Secretary of Homeland Security's designee.

pp. Secretary of State

The Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

qq. Strike

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

rr. Successor in Interest

Successor in interest means an employer, agent or attorney that is controlling and carrying on the business of a previous employer:

- Where an employer, agent, or attorney has violated 48 U.S.C. 1806 or these regulations, and has ceased doing business or cannot be located for purposes of enforcement, the following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, and all the circumstances will be considered as a whole:
 - Substantial continuity of the same business operations;
 - Use of the same facilities;
 - Continuity of the work force;
 - Similarity of jobs and working conditions;
 - Similarity of supervisory personnel;
 - Whether the former management or owner retains a direct or indirect interest in the new enterprise;
 - Similarity in machinery, equipment, and production methods;
 - Similarity of products and services;
- and
 - The ability of the predecessor to provide relief.

- For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

ss. Temporary Labor Certification or TLC

TLC means the certification made by the OFLC Administrator, based on the *CW-1 Application for Temporary Employment Certification*, job offer, and all supporting documentation, with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as a CW-1 worker.

tt. United States

The United States means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

uu. U.S. Citizenship and Immigration Services or USCIS

USCIS means the Federal agency within DHS that makes the determination under the immigration laws whether to grant petitions filed by employers seeking CW-1 workers to perform temporary work in the Commonwealth.

vv. United States Worker

United States worker (U.S. worker) means a worker who is:

- A citizen or national of the United States;
- An alien lawfully admitted for permanent residence; or
- A citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, who has been admitted to the United States as a nonimmigrant and is employment-authorized under the Compacts of Free Association between the United States and those nations.

ww. Wages

Wages mean all forms of cash remuneration to a worker by an employer in payment for labor or services.

xx. Work Contract

Work contract means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, places of employment, and other benefits, including all assurances and obligations required to be included under this subpart.

4. Section 655.403, Persons and Entities Authorized To File

The employer, the employer's agent, or the employer's attorney is authorized to file *Applications for Prevailing Wage Determination* and/or *CW-1 Applications for Temporary Employment Certification*. To obtain a TLC, the employer must submit to OFLC a signed and dated Appendix C of the *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C) attesting to comply with all of the terms, assurances, and obligations of the CW-1 program, regardless of whether it is represented by an agent or attorney. If an agent or attorney is identified in the *CW-1 Application for Temporary Employment Certification*, that agent or attorney must also sign and date Appendix C, declaring that the employer has designated the agent or attorney to act on the employer's behalf in connection with the *CW-1 Application for Temporary Employment Certification*. Employers, their agents, and their attorneys are each responsible

for the truthfulness and accuracy of the information and documentation submitted with the *CW-1 Application for Temporary Employment Certification*.

5. Section 655.404, Requirements of Agents

In addition to signing Appendix C of the *CW-1 Application for Temporary Employment Certification*, an employer's agent is required to provide, as part of the *CW-1 Application for Temporary Employment Certification*, a copy of the current agreement, contract, or other document defining the scope of its relationship with the employer and demonstrating the agent's authority to represent the employer. The Department will review the agreement to determine if a bona fide relationship exists between the agent and the employer and, where the agent is also engaged in recruitment, review to ensure it includes language prohibiting the payment of fees by the worker, as required by § 655.423(n).

The Department reserves the right to further review the agreement in the course of an audit examination or other integrity measure and provide the agreement to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function. A certification of an employer's *CW-1 Application for Temporary Employment Certification* that includes such an agreement in no way indicates OFLC's approval of the agreement or the terms therein. The requirement does not obligate either the agent or the employer to disclose any trade secrets or other proprietary business information; rather it only requires the agent to provide sufficient documentation to demonstrate clearly the scope of the agent's relationship with the employer.

B. Prefiling Procedures

1. Section 655.410, Offered Wage Rate and Determination of Prevailing Wage

The Workforce Act requires that an employer must pay each CW-1 worker "a wage that is not less than the greater of—(i) the statutory minimum wage in the Commonwealth; (ii) the Federal minimum wage; or (iii) the prevailing wage in the Commonwealth for the occupation in which the worker is employed." 48 U.S.C. 1806(d)(2)(C). The Workforce Act further provides that "the Secretary of Labor shall use, or make available to employers, an occupational wage survey conducted by the Governor that the Secretary of Labor has determined meets the statistical standards for determining prevailing

wages in the Commonwealth on an annual basis." Id. at 1806(d)(2)(B)(i). Finally, under the statute, "[i]n the absence of an occupational wage survey approved by the Secretary of Labor . . . the prevailing wage for an occupation in the Commonwealth shall be the arithmetic mean of the wages of workers similarly employed in the territory of Guam according to the wage component of the Occupational Employment Statistics Survey conducted by the Bureau of Labor Statistics." Id. at 1806(d)(2)(B)(ii). Section 655.410 of this IFR establishes the procedures for wage determinations, how employers will obtain a PWD, and employers record retention requirements for the PWD.

Consistent with 48 U.S.C. 1806(d)(2)(C), § 655.410(a) of the IFR requires an employer seeking to employ CW-1 workers to offer and pay the highest of the prevailing wage, the Federal minimum wage,¹⁸ or the Commonwealth minimum wage to both CW-1 workers and workers in corresponding employment. While the statute does not expressly state that the employer must pay the offered wage to workers in corresponding employment, this requirement is necessary to prevent the employment of CW-1 workers from causing an adverse effect on the wages and working conditions of similarly employed U.S. workers. The statute prohibits the Department from approving an application for TLC unless the petitioner has demonstrated that there are not sufficient U.S. workers in CNMI and that employment of CW-1 workers will not adversely affect the wages of similarly employed U.S. workers. Without this wage requirement, U.S. workers performing the same work as the work requested in the job order, but earning less than the advertised wage, would be required to quit their current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to the CW-1 worker. Such a result is inconsistent with the requirement to protect against adverse effects on similarly employed U.S. workers. Section 655.410(a) also clarifies that the issuance of a PWD does not permit an employer to pay less than the highest wage required by any applicable Federal or Commonwealth law. This requirement is also consistent with similar requirements currently in place for other TLC programs.¹⁹

¹⁸ Effective October 1, 2018, the full Federal minimum wage of \$7.25 per hour applies to workers in the Commonwealth.

¹⁹ 20 CFR part 655, subpart A; While this requirement is true also for 20 CFR part 655, subpart B, in terms of the offered wage requirement,

As required by the Workforce Act, § 655.410(b)(1) provides that if the Governor conducts an annual survey for an occupational classification, and the survey meets the statistical requirements set forth in § 655.410(e), as determined by the OFLC Administrator, the wage reported by the Governor's survey must be the prevailing wage for the occupational classification. The regulation requires that the survey must include a mean hourly wage. The requirement that the Governor's survey reports a mean hourly wage provides consistency between prevailing wages issued from the Governor's survey and prevailing wages issued from the OES survey, which by statute must use the mean wage. See 48 U.S.C. 1806(d)(2)(B)(ii).

After the NPWC reviews the Governor's survey for consistency with the statistical standards in § 655.410(e), discussed below, OFLC will make available on its website a listing of all occupational classifications for which it has determined there is a valid Governor's survey wage with the accompanying prevailing wage. This will allow employers to determine the potential wage obligation associated with the CW-1 program, even before submitting a PWD request.

In the absence of an approved wage survey, the Department will establish the prevailing wage using the mean wage of workers similarly employed in Guam from the OES survey. The OES survey is among the largest continuous statistical wage survey programs and is cooperatively administered between BLS and the State Workforce Agencies (SWAs). For the territory of Guam, the OES survey is administered by BLS and the Guam Department of Labor. BLS funds the OES survey and provides the statistical procedures and technical support, while the SWAs and Guam Department of Labor collect most of the data. BLS creates a national sampling frame by combining the administrative lists of unemployment insurance (UI) program reports from all of the SWAs into a single database called the Quarterly Census of Employment and Wages.²⁰ Because the territory of Guam does not report data to the UI program, the Guam Department of Labor administers an Annual Census of Establishments survey program to create a database of employers in all industries

employers do not receive a PWD from DOL's NPWC for the H-2A program.

²⁰ See Bureau of Labor Statistics, "Survey Methods and Reliability Statement for the May 2017 Occupational Employment Statistics Survey for a comprehensive and technical discussion of the OES survey methodology," https://www.bls.gov/oes/current/methods_statement.pdf.

for use in the OES survey.²¹ The OES survey sample is stratified by metropolitan and nonmetropolitan area, industry, and size, and the survey reports wage estimates based on geographic areas at the national and State levels and for certain territories in which the OES survey can report statistically valid data, including Guam, but not the CNMI.

Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. For purposes of the OES survey, “pay” includes base rate; cost-of-living allowances; guaranteed pay; hazardous duty pay; incentive pay, including commissions and production bonuses; piece-rates; tips; and on-call pay.²² The OES survey is a comprehensive and statistically valid wage survey and is widely used in the DOL’s nonagricultural foreign labor certification programs (H–2B, H–1B, and PERM). The frequency and precision of the data collected, as well as the comprehensive nature of the occupations for which such data are collected, make it an appropriate data source for determining applicable wages across the range of occupations found in the CW–1 program.

The OES prevailing wage that will be used for the CW–1 program is the mean wage paid to workers in a particular SOC in Guam. The use of the mean wage in this IFR is required by the Workforce Act. See 48 U.S.C. 1806(d)(2)(B)(ii). The Department will therefore issue prevailing wages at the mean of all workers “similarly employed in the territory of Guam” in the relevant SOC from the OES survey, without regard to industry, experience, or skill level.

The Workforce Act requires employers to pay a wage that is the highest of the Commonwealth minimum wage, the Federal minimum wage, or the prevailing wage in the Commonwealth. 48 U.S.C. 1806(d)(2)(C). However, the statute is silent about how the Department must set the prevailing wage if both: (1) The Governor’s annual survey for the occupation does not meet the Department’s statistical standards or the Governor does not submit a survey covering a given occupation; and (2) the

OES survey does not report a mean of the wages paid to workers in the SOC in Guam due to insufficient data. In the event this situation occurs, the Department remains statutorily bound to issue a prevailing wage given that the statute requires the employer to pay the highest of the statutory minimum wage, the Federal minimum wage, or the prevailing wage in the Commonwealth. See 48 U.S.C. 1806(d)(2)(C).

When the OES survey cannot produce a statistically valid wage estimate for a given geographic area, BLS reports a wage at the next largest geographic area until it reaches an area large enough that it has enough data to report.²³ As a result, when the BLS cannot produce a statistically valid wage rate for Guam in a given SOC, the reported wage rate is a national wage for the SOC. OFLC uses that national wage rate to establish the prevailing wage in Guam in the other foreign labor certification programs when BLS cannot report a mean wage based on wages paid to workers in Guam for a given SOC. However, the Workforce Act’s mandate for the Department to base prevailing wage rates on wages paid to workers in the Commonwealth or Guam as the first and second prevailing wage options establishes a clear preference in the CW–1 program for prevailing wage rates to be based on wages paid in these islands, rather than other geographic areas. As a result, the Department concludes that it would be inappropriate to require an employer to pay a prevailing wage that is based only on the national wage for the SOC from the OES survey, without adjustment, in the CW–1 program. Accordingly, if both prevailing wage sources expressly provided in the statute do not report a wage, the Department will base the prevailing wage on the national mean wage for the SOC from the OES, but will adjust the national SOC wage by the percentage difference between the mean wage paid to workers in all SOCs for which the OES survey can produce an average wage paid to workers in Guam compared with the national mean wage paid to workers in all SOCs in the United States. Given the lack of available, comprehensive, and reliable alternative data sources, this method will best meet: (1) The statutory requirement for the Department to require employers to pay a prevailing wage; and (2) the statutory intent for the Department to issue prevailing wage rates based on wages paid to similarly employed workers in the Commonwealth or Guam. The

Department requests comments on its use of an adjusted national wage to establish the prevailing wage for the CW–1 program if a mean wage is not available for the occupational classification from both a survey conducted by the CNMI Governor and from the OES for workers in Guam, as well as on alternative sources it might use to establish the prevailing wage in these circumstances.

Section 655.410(b)(2) provides that if the job duties on the *Application for Prevailing Wage Determination* do not fall within a single occupational classification, the NPWC will determine the prevailing wage by assigning the highest prevailing wage for all applicable occupational classifications. This approach ensures that employers do not adversely affect wages or discourage U.S. workers from applying for a job by advertising a job which contains the duties of distinct occupations, and asking workers to perform the duties of a higher wage occupation while being paid for the duties of a lower wage occupation. This is codifies existing NPWC procedures and practice for determining prevailing wages for other foreign labor certification programs (*i.e.*, H–1B, H–2B, and PERM) and protects against occupational misclassification.²⁴

Section 655.410(c) requires an employer to electronically request and obtain a PWD from the NPWC before electronically submitting its CW–1 *Application for Temporary Employment Certification*. The PWD must be valid on the day the employer submits the CW–1 *Application for Temporary Employment Certification*. To avoid delays, the Department encourages employers to request a PWD in the CW–1 program at least 90 calendar days before the date the employer plans to file its CW–1 *Application for Temporary Employment Certification*.

CW–1 employers that lack adequate access to electronic filing, either due to lack of internet access or physical disability precluding electronic filing, may file the *Application for Prevailing Wage Determination* by mail with a statement of why it qualifies to file by mail. There is no specific format for the statement but it must accompany the application at the time of filing. The NPWC will return without review any application submitted by mail or any method other than the designated electronic method(s) provided in this regulation, unless the employer submits the application package in accordance

²¹ The Bureau of Labor Statistics within the Guam Department of Labor is responsible for administering the Annual Census of Establishments, which is funded in part by the Department’s Employment and Training Administration under the Workforce Information Grants, <http://bls.guam.gov/annual-census-of-establishments/>.

²² See “Occupational Employment Report Form, Instructions for Reporting Wage Information,” p. 2, available at https://www.bls.gov/respondents/oes/pdf/forms/uuuuuu_fillable.pdf.

²³ The BLS practice of survey expansion is generally described in GAL 2–98, at p. 4.

²⁴ See OFLC Frequently Asked Questions and Answers, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>.

with paragraph (c)(1)(ii) of § 655.410 and with the statement of the need to file by mail. If an employer files its *Application for Prevailing Wage Determination* by mail with the required statement of need, the employer may file its *CW-1 Application for Temporary Employment Certification* by mail without a statement of need. This statement must be updated each fiscal year.

Section 655.410(d) provides that when the NPWC issues the prevailing wage, it must provide the following information: The prevailing wage, the source of the prevailing wage, and the *Application for Prevailing Wage Determination*, with the NPWC's endorsement to the employer.

Section 655.410(e) establishes the "statistical standards" the Department will use to evaluate a survey conducted by the Governor under 48 U.S.C. 1806(d)(2)(B)(i). The Department will use a survey conducted by the Governor to establish the prevailing wage for an occupational classification only if the survey meets the following requirements: (1) The survey must be independently conducted and issued by the Governor, including through any Commonwealth agency, Commonwealth college, or Commonwealth university; (2) the survey must provide the arithmetic mean of the wages of workers in the occupational classification in the Commonwealth; (3) the independent surveyor must either make a reasonable, good faith attempt to contact all employers in the Commonwealth employing workers in that occupation or conduct a randomized sampling of such employers, which means the surveyor must collect the wages of workers performing the job duties covered by the survey's occupational classification without regard to the education, experience, or immigration status of the workers in the occupational classification or the size of the employer; (4) if used, the randomized survey must include the wages of at least 30 workers in the Commonwealth; (5) if used, the randomized survey must include the wages of workers in the Commonwealth employed by at least 3 employers; (6) if used, the randomized survey must be conducted across industries that employ workers in the occupational classification;²⁵ (7) the wage reported in the survey must include all types of pay, consistent with the OES definition of "pay," as discussed above; (8) the survey must be based on wages paid to workers in the

occupational classification not more than 12 months before the date the survey is submitted to the OFLC Administrator for consideration; and (9) the Governor of the Commonwealth must submit the survey to the OFLC Administrator, with specific information about the survey methodology, including such items as sample size and source, sample selection procedures, types of payments (e.g., overtime, weekend or holiday pay premiums) included in the survey, and survey job descriptions, to allow a determination to be made about the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey.

The statistical standards in this IFR for surveys conducted by the Governor in the CW-1 program are generally consistent with the regulatory standards for prevailing wage surveys in the H-2B program. See 20 CFR 655.10(f).²⁶ Adherence to the H-2B survey standards will promote consistency in the wage rates that apply to similarly employed workers across nonimmigrant programs in the Commonwealth. This alignment will also make the CW-1 regulation easier to implement because the Commonwealth government has experience in conducting prevailing wage surveys under the H-2B standards.

The CW-1 program is based on the statutory requirement that the Governor's survey must be conducted "on an annual basis." 48 U.S.C. 1806(d)(2)(B)(i). In comparison to the H-2B program, there are two notable changes. First, a survey for the CW-1 program must report the mean and cannot report only the median, unlike in the H-2B program, which permits a survey to report either a mean or a median only. As discussed above, this CW-1 requirement will align the survey methodology for the Governor's survey with the OES methodology required by the Workforce Act. Either a mean or median rate can be calculated from the underlying survey data, so limiting CW-1 surveys to those that produce a mean wage requires no change in the practice of conducting surveys that is used for H-2B. In addition, past prevailing wage surveys conducted by the

Commonwealth government for the H-2B program have reported a mean wage, and so the CW-1 regulation will not require a change to existing practice. Second, § 655.410(e)(8) of this IFR requires that the survey is based on wages paid to workers in the occupational classification not more than 12 months before the survey is submitted to OFLC, while the H-2B regulation permits employers to submit surveys based on wages paid no more than 24 months before the survey is submitted. This difference for the CW-1 program is based on the statutory requirement that the Governor's survey must be conducted "on an annual basis."

As provided in § 655.410(f), the OFLC Administrator will review the survey for compliance with the regulatory requirements. If the OFLC Administrator finds the wage reported for any occupational classification is unacceptable, the OFLC Administrator must inform the Governor in writing of the reasons for the finding. The Governor may respond to the finding by submitting corrected wage data or by conducting a new wage survey, and may submit the revised wage data to the OFLC Administrator for consideration.

Under § 655.410(g), a PWD issued based on either the Governor's survey or the OES survey will be valid for at least 90 calendar days and as many as 365 days, the same validity period used by the NPWC across programs. See, e.g., 20 CFR 656.40(c). The length of the validity period for the survey will depend, in part, on when the prevailing wage source used to establish the prevailing wage will be updated.

As provided in § 655.410(h), employers must retain the PWD for 3 years from the date of issuance if not used in support of a TLC application or if used in support of a TLC application that is denied, or 3 years from the end date of the validity period of the *CW-1 Application for Temporary Employment Certification*, whichever is later. The employer must submit the PWD to the CO if requested and to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

Employers may request review of a PWD only through the appeals process described in § 655.411 of this IFR.

2. Section 655.411, Review of Prevailing Wage Determinations

Paragraph (a) of this section requires an employer that wants to appeal a PWD to make a written request to the NPWC Director within 7 business days from the date the PWD was issued. Requests made more than 7 business days after

²⁵ The occupational classification for the survey is based on the job duties performed and need not be identical to an SOC.

²⁶ The H-2B regulatory survey standards are discussed in depth in the 2015 H-2B Rule, 80 FR 24146 (Apr. 29, 2015). Except for limitations on who may conduct a survey—which are not relevant here because 48 U.S.C. 1806(d)(2)(B)(i) allows only for surveys conducted by the Governor and the BLS—the regulatory H-2B survey standards are unaffected by current appropriations riders in the H-2B program. See "Effects of the 2016 Department of Labor Appropriations Act" (Dec. 29, 2015), https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf.

the issuance of a PWD will be considered time barred. The request for review must clearly identify the PWD for which review is sought, set forth the particular grounds for the request, and include any materials submitted to the NPWC for the purposes of securing the PWD.

Under paragraph (b), the employer may submit supplementary material with its request for review by the NPWC Director. The NPWC Director will review the employer's request and accompanying documentation, including supplementary material provided. After performing a review of the documentation, the NPWC Director will issue a Final Determination letter to the employer and, if applicable, to the employer's agent or attorney, either affirming the PWD as issued or modifying the PWD.

If the employer desires review of the NPWC Director's decision, paragraph (c) establishes the process the employer must follow to request review by BALCA. Specifically, the employer must make a written request for review that must be received by BALCA within 10 business days from the date the Final Determination letter was issued by the NPWC Director, and the employer must simultaneously send a copy to the NPWC Director who issued the Final Determination. Upon receipt of the request, the NPWC will prepare an Appeal File and submit it to BALCA. The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may only refer to evidence that was within the record upon which the decision on the PWD by the NPWC Director was based. BALCA will then handle the appeal in accordance with § 655.461 as explained further in the preamble to that section.

C. CW-1 Application for Temporary Employment Certification Filing Procedures

1. Section 655.420, Application Filing Requirements

In accordance with Section (2)(A)(i) of the Workforce Act, an employer must first obtain a TLC from the Department before filing a CW-1 petition with DHS. Public Law 115-218 sec. 3(a)(3)(B), 48 U.S.C. 1806(d)(2)(A). This section establishes the standards, timeframes, and procedures for employers to request TLC under the CW-1 program, including the requirement that the employer must file the TLC application electronically unless the employer has submitted a statement when filing the PWD request or files a statement when submitting the TLC application

indicating that it qualifies for one of the regulatory exemptions in the IFR. The Department believes that the below regulatory requirements will advance the Department's statutory obligations. Based on the Department's experience administering other TLC programs, the requirements outlined below appropriately ensure that U.S. workers have equal access to job opportunities and protect their wages and working conditions from adverse effect.

a. Paragraphs (a) and (b), What To File and Statutory Timeframes for Filing an CW-1 Application for Temporary Employment Certification

Paragraph (a) specifies that an employer seeking TLC must file a completed *CW-1 Application for Temporary Employment Certification*—consisting of the Form ETA-9142C, appropriate appendices, and a valid PWD—and all supporting documentation and information that this subpart requires at the time of filing. Incomplete applications will not be accepted for processing; OFLC will return them without review. In accordance with the Workforce Act, 48 U.S.C. 1806(d)(3)(D)(i), paragraph (b)(1) provides that an employer seeking to hire CW-1 workers must file a completed *CW-1 Application for Temporary Employment Certification* no more than 120 calendar days before the employer's date of need. However, where the employer is seeking TLC to support a petition to renew a visa (extending the employment of a CW-1 worker), paragraph (b)(2) requires that the employer file the application no more than 180 calendar days before the date on which the CW-1 status expires. See id.

b. Paragraph (c), Location and Methods of Filing

Paragraph (c) of this section establishes the location and method by which an employer may file a *CW-1 Application for Temporary Employment Certification* under the CW-1 program. In paragraph (c)(1), the Department requires an employer to submit the Form ETA-9142C and all required supporting documentation to the NPC using an electronic method(s) designated by the OFLC Administrator. Unless the employer qualifies to file by mail, the NPC will return, without review, any *CW-1 Application for Temporary Employment Certification* submitted using a method other than the electronic method(s) designated by the OFLC Administrator.

c. Paragraph (c)(1), Procedures for Electronic Filing of the CW-1 Application for Temporary Employment Certification

Absent an exemption employers or, if applicable, their agents or attorneys will prepare and electronically submit *CW-1 Applications for Temporary Employment Certification* using OFLC's new Foreign Labor Application Gateway (FLAG) System at <https://flag.dol.gov>. E-filing will be required for the Form ETA-9142C, applicable appendices, and all supporting documentation required by this subpart. All of these documents must be electronically submitted at the time of filing to constitute a complete, properly filed application. In addition, DOL's forms, will require employers and, if applicable, their authorized representatives, to designate a valid email address for sending and receiving official correspondence concerning the processing of these e-filings by the NPC.

d. Justification for Mandatory Electronic Filing of CW-1 Applications for Temporary Employment Certification

For the reasons discussed below in the preamble, the Department has concluded that the e-filing requirement for employers will modernize the end-to-end electronic processing of *CW-1 Applications for Temporary Employment Certification* and create significant administrative efficiencies for employers in the CNMI and the Department. The Department has also estimated that mandating e-filing should minimize costs and burdens for employers and the Department, improve the quality of the information collected by minimizing errors through system-generated prompts, ensure required information and document uploads are provided to reduce the frequency of delays related to filing applications, improve the quality of information collected, and promote administrative efficiency and accountability.

Electronic submissions do not require manual data entry by NPC staff and can be instantaneously categorized and assigned for review by the NPC. If an electronic *CW-1 Application for Temporary Employment Certification* requires amendments or other corrections, those amendments and corrections can be automatically entered by NPC staff. Furthermore, as previously stated, electronic submissions are more likely to include all necessary documentation and information because the system will require electronic validation of the form entries and supporting documentation prior to acceptance. Again, employers will have an immediate opportunity to correct the

errors or upload the missing documentation. Electronic filing also expedites the process of addressing any potential problems with an application because the NPC is able to email an employer or their representative directly from the electronic filing module to alert it of information which must be corrected or if it needs clarification about something. Electronic contact with the employer or their representative allows for instantaneous delivery of questions to employers and allows employers to respond quickly as well, which is much faster than transmitting questions by mail. The electronic system will also allow an employer or their representative to upload necessary documentation directly to their case file, which expedites review of applications and the issuance of final determinations. The Department's e-filing requirement will improve the customer experience by permitting more prompt adjudication of applications and reducing paperwork burdens and mailing costs. This approach should reduce processing delays and costs employers with access to the internet, as they would otherwise need to pay for expedited mail or private courier services to submit corrected applications, as has been OFLC's experience in connection with its other temporary labor certification programs.²⁷

The Department's e-filing requirement is consistent with several Federal statutes. First, the Government Paperwork Elimination Act (GPEA), Public Law 105-277, Title XVII (secs. 1701-1710), 112 Stat. 2681-749 (Oct. 21, 1998), 44 U.S.C. 3504 note, was enacted to improve customer service and governmental efficiency through the use of information technology. The GPEA directs federal agencies, when possible, to use electronic forms, e-filing, and electronic submissions to conduct agency business with the public. Second, the E-Government Act of 2002, Public Law 107-347, 116 Stat. 2899 (Dec. 17, 2002), 44 U.S.C. 3601 note, was enacted to encourage use of technology to enhance governmental functions and services, integrate related interagency functions, achieve more efficient agency performance, increase public access to Government information, and reduce costs and burdens for businesses and other Government entities. Third, the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, was enacted with the goal of reducing paperwork burdens imposed by Government information

collections, improving the efficiency of Government information collection and the quality of information collected, and minimizing Government costs associated with the creation, collection, maintenance, use, and disposition of information. Finally, this e-filing requirement is consistent with several other open Government initiatives and information technology modernization policies expressed in memoranda and Executive Orders, such as E.O. 13571,²⁸ which require agencies to use innovative technology to reduce costs and streamline customer service processes.

The Department is aware that some employers in the CNMI, especially those located on islands without adequate technological infrastructure, may be unable to take advantage of the more efficient e-filing process. Therefore, the Department will permit these employers to file using a paper-based process if they lack adequate access to e-filing. This IFR also establishes that individuals with disabilities may file by mail.

e. Paragraphs (c)(2) and (3), Alternative Filing Procedures for Employers Lacking Adequate Access to Electronic Filing or Due to a Disability in the CNMI

The Department is also establishing procedures allowing employers in the CNMI that lack adequate access to e-filing to file by mail and, for those employers who are unable or limited in their ability to use or access the electronic application due to a disability, file the application through other means.

f. Paragraph (d), Original Signature and Acceptance of Electronic Signatures

Paragraph (d) of this section requires that the *CW-1 Application for Temporary Employment Certification*, as filed, contains an electronic (scanned) copy of the employer's original signature (and that of the employer's authorized attorney or agent, if the employer is represented by an attorney or agent) or, in the alternative, use a verifiable electronic signature method, as directed by the OFLC Administrator. If the employer, under paragraph (c) of this section, is permitted to file by mail, the *CW-1*

²⁸ E.O. 13571, Streamlining Service Delivery and Improving Customer Service (Apr. 27, 2011) (requiring agencies to enhance customer service by "identifying ways to use innovative technologies . . . [to] lower[] costs, decreas[e] service delivery times, and improve[e] the customer experience."); see also OMB Memorandum M-11-24, "Implementing Executive Order 13571 on Streamlining Service Delivery and Improving Customer Service" (June 13, 2011) (implementing E.O. 13571).

Application for Temporary Employment Certification, when filed, must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

When electronically filing the *CW-1 Application for Temporary Employment Certification*, the FLAG System will require the employer and, if applicable, the employer's authorized attorney or agent to digitally sign the Form ETA-9142C, Appendix C,²⁹ or require the system account holder to upload an electronic (scanned) copy of the originally signed and dated Appendix C. In the case of a job contractor filing as a joint employer with its employer-client, a separate signed and dated Appendix C for the employer-client must also be submitted concurrently with the *CW-1 Application for Temporary Employment Certification*, as required by § 655.421 of this subpart. The Appendix C is a crucial component of the *CW-1 Application for Temporary Employment Certification* because it contains the requisite program assurances and obligations an employer must provide to the Department. An employer that fails to provide a signed and dated Appendix C at the time of filing the *CW-1 Application for Temporary Employment Certification*, in accordance with the original signature requirements of this paragraph, is ineligible to file and its application will be returned by the NPC without review.

The Department has concluded that this provision will maximize efficiencies in the application process and establish parity between paper and electronic documents by expanding the ability of employers, agents, and attorneys to use electronic methods to comply with signature requirements for the *CW-1* program. As a matter of longstanding policy, the Department considers an original signature to be legally binding evidence of the intention of a person with regard to a document, record, or transaction. Since the implementation of an e-filing option in late 2012 for the H-2A and H-2B programs, the Department also has considered a signature valid where the employer's original signature on a document retained in the employer's file is photocopied, scanned, or similarly reproduced for electronic transmission to the Department, whether at the time of filing or during the course of processing a *CW-1 Application for Temporary Employment Certification*. Although acceptance of

²⁹ Appendix C includes a declaration to be signed by the employer's attorney or agent, and a separate, lengthier declaration to be signed by the employer.

²⁷ 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

electronic (scanned) copies of original signatures on documents generates efficiencies in the application process, modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete. The Department and employers can achieve even greater efficiencies using and accepting electronic signature methods.

Under this provision, the Department will permit an employer, agent, or attorney to sign or certify a document required under this subpart using a valid electronic signature method. This proposal is consistent with the principles of two Federal statutes that govern an agency's implementation of electronic document and signature requirements. First, the GPEA requires Federal agencies to allow individuals or entities that deal with the agencies, when practicable, the option to submit information or transact with the agencies electronically and to electronically maintain those records. The GPEA and e-Gov also specifically states that electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form, and encourages Federal Government use of a range of electronic signature alternatives. See sections 1704, 1707 of the GPEA. Second, the Electronic Signatures in Global and National Commerce (E-SIGN) Act, Public Law 106-229, 114 Stat. 464 (June 30, 2000), 15 U.S.C. 7001 *et seq.*, generally provides that electronic documents have the same legal effect as their hard copy counterparts.

The GPEA and E-SIGN Act adopt a "functional equivalence approach" to electronic signature requirements where the purposes and functions of the traditional paper-based requirements for a signature must be considered, together with how those purposes and functions can be fulfilled in an electronic context. The functional equivalence approach rejects the precept that Federal agency requirements impose on users of electronic signatures more stringent standards of security than required for handwritten or other forms of signatures in a paper-based environment.

Consistent with the GPEA, the Department will accept an electronic signature on CW-1 applications as long as it: (1) Identifies and authenticates a particular person as the source of the electronic communication; and (2) indicates such person's approval of the information contained in the electronic

communication.³⁰ In addition, OMB guidelines state that a valid and enforceable electronic signature would require satisfying the following signing requirements: (1) The signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.³¹ The Department will rely on best practices for electronic signature safety and integrity, such as these five signing requirements. Consistent with the GPEA and E-SIGN Act, the Department adopts a technology "neutral" policy with respect to the requirements for electronic signature. That is, the employer, agent, or attorney can apply an electronic signature required on a document using any available technology that meets the five signing requirements.

The Department concludes that these standards for electronic signature are reasonable and accepted by Federal agencies. Promoting the use of electronic signatures will enable employers, agents, and attorneys to reduce printing, paper, and storage costs. For employers that need to retain and refer to multiple *CW-1 Applications for Temporary Employment Certification*, the time and costs savings can be considerable. Since the CW-1 program serves employers located thousands of miles from the continental United States on the westward side of the International Date Line, implementing electronic signatures will help reduce operational costs and maximize processing efficiency for the Department.

g. Paragraph (e), Requests for Multiple Positions on the CW-1 Application for Temporary Employment Certification

Similar to the Department's administration of other TLC programs,³² paragraph (e) of this section permits an employer to request certification of

³⁰ Section 1710(1) of the GPEA. The definition of electronic signature in the E-SIGN Act essentially is equivalent to the definition in the GPEA. The E-SIGN Act defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. 7006(5).

³¹ Federal Chief Information Council, "Use of Electronic Signatures in Federal Organization Transactions," Version 1.0 (Jan. 25, 2013).

³² 20 CFR part 655, subparts A and B.

more than one position on its *CW-1 Application for Temporary Employment Certification* as long as all CW-1 workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment, and at a location (or locations) covered by the application. The Department's experience in managing similar programs demonstrates this policy reduces the paperwork and advertising burden on employers while also preventing the NPC from receiving and processing multiple applications for the same employer and job opportunity. Filing more than one *CW-1 Application for Temporary Employment Certification* is necessary when an employer needs CW-1 workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or needs workers to perform the same full-time work, but in different areas of intended employment or with different starting and ending dates.

h. Paragraph (f), Scope of CW-1 Applications for Temporary Employment Certification

Paragraph (f) of this section specifies the scope of all *CW-1 Applications for Temporary Employment Certification* submitted by employers to the NPC. First, paragraph (f)(1) provides that each *CW-1 Application for Temporary Employment Certification* must be limited to places of employment within the Commonwealth. In circumstances where the job opportunity covers places of employment located on more than one of the islands within the Commonwealth, the employer may submit a single *CW-1 Application for Temporary Employment Certification* to the NPC. However, an employer submitting a *CW-1 Application for Temporary Employment Certification* containing places of employment outside the Commonwealth, regardless of the period of employment, will not be accepted by the CO.

The CO will use the places of employment identified in the *CW-1 Application for Temporary Employment Certification* for the purpose of determining the recruitment requirements employers must follow to locate qualified and available U.S. workers, and to aid the CO in assessing whether the wages, job requirements, and terms and conditions of the job opportunity will adversely affect U.S. workers similarly employed within the Commonwealth.

Second, paragraph (f)(2) prohibits an association or other organization of employers from filing a *CW-1*

Application for Temporary Employment Certification on behalf of more than one employer-member under the CW-1 program. An association or other organization of employers is permitted by this subpart to file *CW-1 Applications for Temporary Employment Certification* as either a sole employer of CW-1 workers, or as an agent representing one employer-member seeking to employ CW-1 workers.

However, this subpart does not permit an association or other organization of employers to file *CW-1 Applications for Temporary Employment Certification* on behalf of multiple employer-members, each seeking to employ CW-1 workers in full-time employment. This type of filing is often referred to as a “master” application and is likewise prohibited in the H-2B program. Only an agricultural association seeking to employ H-2A workers jointly with its employer-members is expressly permitted by the INA to file an *Application for Temporary Employment Certification* in this manner. Accordingly, except where otherwise permitted under § 655.421 of this subpart governing job contractors, each employer-member of an association or other organization of employers seeking to employ CW-1 workers in full-time employment within the Commonwealth must submit separate *CW-1 Applications for Temporary Employment Certification* to the NPC.

i. Paragraph (g), Maximum Period of Employment on the CW-1 Application for Temporary Employment Certification

Under paragraph (g) of this section, an employer seeking to employ a CW-1 worker is permitted to identify a period of employment lasting not more than 1 year. However, an employer seeking to employ a long-term CW-1 worker, as defined under § 655.402 of this subpart, is permitted to identify a period of employment lasting not more than 3 years. The effect of these provisions is that the period of employment on the *CW-1 Application for Temporary Employment Certification* will be consistent with the maximum periods of admission permitted by the Workforce Act,³³ regardless of whether the employer’s need for the services or labor

to be performed is temporary or permanent in nature.

Under this provision, an employer seeking a TLC would be required to disclose the period of employment for the job opportunity in the *CW-1 Application for Temporary Employment Certification*. Generally, the employer will be held to recruiting and filling with a CW-1 worker(s) a job opportunity that lasts no longer than 1 year. If, however, the employer attests in the *CW-1 Application for Temporary Employment Certification* that it intends to employ a long-term CW-1 worker, and that the period of employment will be longer than 1 year, the CO would approve a labor certification lasting no longer than 3 years, the maximum period permitted by the statute.

Before issuing a NOA under § 655.433, the Department would review the expected start and end dates of work identified in the *CW-1 Application for Temporary Employment Certification* as discussed above. The Department’s NOA would not serve as an approval that the application demonstrated the work under the certification will be performed by a long-term CW-1 worker. As the Department does not have access to the identities of CW-1 beneficiaries, only USCIS is able to make a determination with respect to whether the CW-1 beneficiary involved in the petition qualifies as a long-term worker.

j. Paragraph (h), Return of CW-1 Applications for Temporary Employment Certification Based on USCIS Reaching Statutory Cap

The Workforce Act raised the annual numerical limits, or “visa caps,” on the total number of foreign nationals who may be issued a CW-1 visa or otherwise granted CW-1 status by DHS for FY 2019, and established new, annually reduced caps for subsequent fiscal years. See 48 U.S.C. 1806(d)(3)(B).³⁴ As employer demand for foreign workers in the CNMI could remain high in relation to these statutory visa caps, the Department anticipates receiving more requests for TLC than will result in CW-1 visas in some fiscal years. Based on OFLC’s experience administering the H-1B and H-2B programs, both of which are subject to statutory visa caps, the Department has determined that an effective and efficient administration of the CW-1 program must provide for the suspension of the acceptance of employer applications for TLC as soon

as the statutory visa cap in a fiscal year is reached.

Accordingly, if USCIS issues a public notice stating that it has received a sufficient number of CW-1 petitions to meet the statutory numerical limit on the total number of foreign nationals who may be issued a CW-1 visa or otherwise granted CW-1 status for the fiscal year, paragraph (h)(1) of this section authorizes the OFLC Administrator to return without review any *CW-1 Applications for Temporary Employment Certification* with dates of need in that fiscal year and received on or after the date that the OFLC Administrator provides public notice.

Paragraph (h)(2) of this section specifies that the OFLC Administrator will announce, through a notice on OFLC’s website, the last receipt date of the applications OFLC will review, and the return of *CW-1 Applications for Temporary Employment Certification* received after that date reflecting dates of need in the fiscal year for which the statutory limit has been met. This notice will be effective on the date it is posted on OFLC’s website and will remain in effect until the close of the fiscal year, unless: (1) USCIS subsequently issues a public notice stating additional CW-1 visas are available for that fiscal year; and (2) the OFLC Administrator publishes a new notice announcing that OFLC will accept additional TLCs with dates of need in the fiscal year. This provision provides the OFLC Administrator with flexibility to adapt to future changes DHS may announce in the availability of CW-1 visas within a fiscal year. The Department reminds employers that the notices issued under this paragraph are premised on interagency consultation and visa cap processing considerations by DHS. Except where a qualifying exemption applies, the Department will not suspend filing or lift a suspension of filing notice due to the individual circumstances of employers, workers, or other interested stakeholders.

Finally, paragraph (h)(3) of this section establishes the two instances when the OFLC Administrator’s notice to return *CW-1 Applications for Temporary Employment Certification* filed after the effective date, will not be applied. First, OFLC will not return, but will continue to process *CW-1 Applications for Temporary Employment Certification* filed before the last receipt date listed on the notice in accordance with all requirements of this subpart. Second, OFLC will continue to accept the filing of *CW-1 Applications for Temporary Employment Certification* by employers that identify in the *CW-1 Application*

³³ See 48 U.S.C. 1806(d)(7)(A)(i) (generally limiting CW-1 permit validity to a period not to exceed 1 year, renewable for no more than 2 consecutive 1-year periods) and 1806(d)(7)(B) (a long-term worker may receive a permit that is valid for a period not to exceed 3 years, renewable for additional 3-year periods during the transition period).

³⁴ The fiscal year in which the annual statutory numerical limits apply spans October 1 through September 30.

for *Temporary Employment Certification* that the CW-1 workers to be employed under the application will be exempt from the statutory visa cap for that fiscal year.³⁵ Since DHS is the agency responsible for administering the annual CW-1 visa cap and for making final determinations regarding any exemptions to the visa cap, the designation of cap-exempt status in the *CW-1 Application for Temporary Employment Certification* is an attestation by the employer at the TLC stage. Even when an application is prepared by an authorized agent or attorney, the Department reminds employers that they are obligated to read and review the *CW-1 Application for Temporary Employment Certification* prior to its submission to OFLC, including every page of the Form ETA-9142C and any applicable appendices and supporting documentation, as they will be held, through their original signature, to the assurance that the information contained therein is true and accurate, subject to penalties contained in this rulemaking and otherwise according to law.

2. Section 655.421, Job Contractor Filing Requirements

This section establishes the requirements under which job contractors may file *CW-1 Applications for Temporary Employment Certification* in the CW-1 program. Generally, a job contractor, as defined under § 655.402, has no need for workers itself. Rather, its need for labor is based on the underlying need of its employer-clients. A job contractor generally has an ongoing business of supplying workers to its employer-clients.

Paragraph (a) of this section provides that a job contractor may file an application on behalf of itself and an employer-client. When the job contractor does so, the Department will deem the job contractor a joint employer. Pursuant to paragraph (b), job contractors must also have a separate contract with each employer-client, and each agreement may only support one *CW-1 Application for Temporary Employment Certification*. While either a job contractor or the employer-client may file an *Application for Prevailing Wage Determination*, paragraph (c) specifies that each of the joint employers is separately responsible for

ensuring that the wage offer(s) listed in the *CW-1 Application for Temporary Employment Certification* and related recruitment at least equals the prevailing wage obtained from the NPWC, or the Federal or Commonwealth minimum wage, whichever is higher, and that all other wage obligations are met.

As required by paragraph (d) of this section, a job contractor filing as a joint employer with its employer-client must submit to the NPC a completed *CW-1 Application for Temporary Employment Certification* clearly identifying its employer-client. This must be accompanied by the contract or agreement establishing the employers' relationship to the workers sought. Consistent with the requirements for original signature explained in further detail under § 655.420(d), the *CW-1 Application for Temporary Employment Certification* must bear the original signature of both the job contractor and the employer-client, or use a verifiable electronic signature method. By signing the *CW-1 Application for Temporary Employment Certification*, each employer independently attests to the conditions of employment required of an employer participating in the CW-1 program. Each employer assumes full responsibility for the accuracy of the representations made in the application and for an employer's obligations in the CW-1 program, as defined in this IFR. If a violation of these obligations has occurred, either or both employers may be found to be responsible for attendant penalties and for remedying the violation.

To ensure an adequate level of transparency in the recruitment of U.S. workers in the CNMI, paragraph (e) establishes standards related to advertising the job opportunity, interviewing prospective U.S. workers, and preparing the recruitment report. Specifically, although either the job contractor or its employer-client may place advertisements for the job opportunity, conduct the recruitment required by the CO, and assume responsibility for interviewing U.S. workers who apply, both joint employers must sign the recruitment report that is submitted to the NPC as a condition of receiving a final determination. All recruitment conducted by the joint employers must satisfy the job-offer-assurance and advertising content requirements, as specified and further explained under § 655.441.

In order to fully inform prospective applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two

employers, paragraph (e) also requires that the advertisements clearly identify both employers (the job contractor and its employer-client) by name and the place(s) of employment where workers will perform labor or services. In situations where all of the employer-clients' job opportunities are in the same occupation and have the same requirements and terms and conditions of employment (including dates of employment), this paragraph permits a job contractor to combine more than one of its joint-employer employer-clients' job opportunities in a single advertisement. The regulation provides a sample format to assist job contractors in properly disclosing the job opportunities and creates standard language that job contractors must use in their advertisements to inform U.S. workers fully on how to apply for the job opportunities.

Finally, paragraph (f) of this section provides that if a TLC for the joint employers is granted by the CO, the Final Determination notice certifying the *CW-1 Application for Temporary Employment Certification* will be sent to both the job contractor and its employer-client, in accordance with the procedures set forth under § 655.452, governing approved certifications.

3. Section 655.422, Emergency Situations

This section provides an employer in a qualifying emergency situation with some flexibility to participate in the CW-1 program without first obtaining a PWD from the NPWC. Specifically, paragraph (a) permits the CO to waive the requirement for an employer to obtain a PWD prior to filing a *CW-1 Application for Temporary Employment Certification*, provided the employer can demonstrate good and substantial cause and meets the requirements of subpart E. The requirement to obtain a PWD prior to filing the TLC application is the only provision of this rule that is waived by the emergency situation procedures. If the employer's request for emergency situation procedures is granted, it must comply with all other requirements under this subpart. To rely on this provision, paragraph (b) requires the employer to submit to the NPC a completed *Application for Prevailing Wage Determination*, a completed *CW-1 Application for Temporary Employment Certification*, and a detailed statement describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include the substantial loss of U.S. workers due to Acts of God, similar unforeseeable man-made catastrophic events (such as a

³⁵ As currently, designed, the form will ask the employer (or preparer) to indicate the type of CW-1 application it is filing: Whether it will support a petition for a new visa or a renewal and, separately, whether it involves long-term workers, cap-exempt workers, or an emergency situation.

hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside the employer's control.

However, an employer may not justify an emergency situation based on the Department's promulgation of this IFR and the associated timeframes for requesting prevailing wage and TLC determinations, which are foreseeable events required by the statute. A denial of a previously submitted *CW-1 Application for Temporary Employment Certification* or *CW-1* petition with USCIS also does not constitute good and substantial cause. Consistent with OFLC's treatment of emergency requests for the H-2B program, another program subject to a visa cap, the *CW-1* visa cap does not constitute "good and substantial cause" justifying an emergency application. Unlike the H-2B regulations, however, the *CW-1* regulation makes explicit that the visa cap may not be the basis for such an application, thus clarifying that the Department does not consider an impending visa cap to be an unforeseeable event beyond the employer's control. Finally, an employer may also not use the procedures contained in this section to either request a waiver of the timeframe for filing an *CW-1 Application for Temporary Employment Certification* earlier than that permitted under § 655.420(b) or request an amendment to the date of need for an *CW-1 Application for Temporary Employment Certification* that has already been submitted to the NPC for processing.

Paragraph (c) of this section establishes the procedures under which the CO will handle the employer's requests for a waiver. Upon receipt of the request, the CO will process the *Application for Prevailing Wage Determination* and *CW-1 Application for Temporary Employment Certification* concurrently and in a manner consistent with the provisions of this subpart E. While § 655.420(a) states that incomplete applications are to be returned unprocessed, in the case of applications which request emergency situation procedures at the time of filing and do not provide good and substantial cause for doing so, the application will be returned unprocessed, but with an explanation as to why the employer failed to justify good and substantial cause for the use of the procedures. Prior to returning the application, the CO at its discretion, may request additional details about the employer's good and substantial cause.

CW-1 Applications for Temporary Employment Certification processed under the emergency situation provision are subject to the same recruitment requirements, audit processes, and other integrity measures as nonemergency *CW-1 Applications for Temporary Employment Certification*. However, DOL intends to subject emergency applications to a higher level of scrutiny than nonemergency applications in order to ensure that this provision is not misused. The regulation provides the CO with the discretion to reject the emergency filing based on the totality of the circumstances and documentation provided in the *CW-1 Application for Temporary Employment Certification*. The CO will determine the foreseeability of the emergency based on the precise circumstances of each situation presented. The burden is on the employer to demonstrate the unforeseeability of the events leading to a request for a filing on an emergency basis.

4. Section 655.423, Assurances and Obligations of *CW-1* Employers

This section contains the terms, assurances, and obligations of the *CW-1* program, similar to requirements for the H-2A and H-2B TLC programs the Department administers, that will be enforced to ensure the employment of *CW-1* workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The terms, assurances, and obligations contained in this section are essential for the protection of U.S. workers from adverse effects related to the hiring of *CW-1* workers. As participants in the *CW-1* program, employers are required to review and comply with program provisions to protect similarly employed U.S. workers. Further, employers are to ensure that their hiring of *CW-1* workers will not disadvantage the U.S. workers in their employ. Requiring employers to comply with these terms, assurances, and obligations, which are incorporated into the Form ETA-9142C, Appendix C, is the most effective way to meet the requirements of the Workforce Act. The Form ETA-9142C, Appendix C, reiterates necessary worker protections for the *CW-1* program and by completing Appendix C the employer attests its agreement to ensuring the protection of *CW-1* workers and, further, ensuring that U.S. workers are both protected and not disadvantaged by the employer's *CW-1* employment. As discussed in the preamble to § 655.402, workers engaged in corresponding employment are entitled to the same protections and

benefits, set forth below, that are provided to *CW-1* workers.

a. Paragraph (a), Rate of Pay

Paragraph (a)(1) of this section, consistent with the Workforce Act, provides that to protect U.S. worker wages the offered wage in the work contract must equal or exceed the highest of the prevailing wage or Federal minimum wage, or Commonwealth minimum wage. If, during the course of the period certified in the *CW-1 Application for Temporary Employment Certification*, the Federal or Commonwealth minimum wage increases to a level higher than the prevailing wage certified in the *CW-1 Application for Temporary Employment Certification*, then the employer is obligated to pay that higher rate for the work performed after the new minimum wage takes effect. It also requires the employer to pay such wages, free and clear, during the entire period of the *CW-1 Application for Temporary Employment Certification* granted by OFLC. See 29 CFR 531.35. In addition, to ensure the wage equals or exceeds the highest of the prevailing wage, Federal minimum wage, or Commonwealth minimum wage, paragraph (a)(2) provides that the wage may not be based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

If one or more minimum productivity standards is required of workers as a condition of job retention, paragraph (a)(3) requires the employer to disclose the minimum productivity standards in the work contract and the employer must be able to demonstrate that such standards are normal and usual for non-*CW-1* employers for the same occupation in the Commonwealth. Productivity standards must be expressed in objective and quantifiable terms based on the hours or days of work needed to produce a unit of production, and the standards must be specified in a manner that is easily understood by the worker. The CO will not accept productivity standards that fail to quantify specifically the expected output per worker or do not clearly communicate to the worker the output required for job retention. For example, requiring workers to "perform work in a timely and proficient manner," "perform work at a sustained, vigorous pace," "make bona fide efforts to work efficiently and consistently considering climatic and other working conditions," "keep up with the work crew," "produce at a rate that does not

detrimentally affect other workers' productivity," or "perform work in the amount, quality, and efficiency of other workers" are unacceptable because such statements lack objectivity, quantification, and clarity regarding job performance expectations for workers.

Consistent with the Department's administration of the H-2B program, if an employer wishes to provide productivity standards as a condition of job retention, the burden of proof rests with the employer to show that such productivity standards are normal and usual for employers in the same occupation that are not employing CW-1 workers, in order to ensure there is no adverse effect on similarly employed U.S. workers. Some examples of evidence that may be used to prove that productivity standards are normal and usual include industry-level reports of typical production standards for a job, copies of production reports from other employers, and copies of job advertisements from employers with similar production requirements.

Finally, pursuant to paragraph (a)(4), an employer that pays on a piece-rate basis must demonstrate that the piece-rate is no less than the normal rate paid by non-CW-1 employers to workers performing the same activity in the Commonwealth, and that each workweek the average hourly piece-rate earnings result in an amount at least equal to the offered wage (or the employer must make up the difference).

b. Paragraph (b), Wages Free and Clear

To protect the wages of CW-1 workers and workers in corresponding employment, paragraph (b) requires the employer to timely pay wages either in cash or in negotiable instrument payable at par. The payment of wages to workers must also be made finally and unconditionally and "free and clear," in accordance with WHD regulations at 29 CFR part 531. This assurance clarifies the preexisting obligation for both employers and employees to ensure that wages are not reduced below the required rate.

c. Paragraph (c), Deductions

Paragraph (c) of this section ensures workers are paid the wage offered in the job opportunity by limiting deductions that reduce wages to below the offered wage indicated on the *CW-1 Application for Temporary Employment Certification*. Specifically, this section requires the employer make all deductions required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due under a court order. The section also limits other authorized

deductions to those that are for the reasonable cost or fair value of board, lodging, or facilities furnished that primarily benefit the employee, or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. The work contract must specify all deductions not required by law that the employer will make from the worker's pay. Any such deductions not disclosed in the work contract are prohibited.

The section also specifies deductions that are never permissible to the extent they reduce the actual wage below the offered wage. Additionally, these deductions are always prohibited: those for costs that are primarily for the benefit of the employer; those not specified in the work contract; "kick-backs" of worker wages, directly or indirectly, to the employer or to another person for the employer's benefit; and amounts paid to third parties which are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent, or affiliated person benefits.

Consistent with the FLSA and 29 CFR part 531, for deductions not required by law to be permissible, they must, among other requirements, be truly voluntary, and may not be a condition of employment as determined under the totality of the circumstances. Moreover, for purposes of paragraph (c), a deduction for any cost that is primarily for the benefit of the employer is never permitted under this IFR. Some examples of costs that the Department has long held to be primarily for the benefit of the employer are tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by and for the employer; the cost of required uniforms (whether purchased or rented) and their laundering; and transportation charges where such transportation is an incident of and necessary to the employment. 29 CFR 531.3(d)(1). This list is not all-inclusive. Further, the concept of de facto deductions initially developed under the FLSA, where employees are required to purchase items like uniforms or tools that are employer business expenses, is equally applicable to purchases that bring CW-1 workers' wages below the required wage, as the payment of the prevailing wage is necessary to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. Allowing worker deductions for business expenses would undercut the prevailing wage and, as a result, would hurt U.S. workers.

d. Paragraph (d), Job Opportunity Is Full-Time

Paragraph (d) of this section requires that the job opportunity for which the employer is seeking to employ CW-1 workers is a full-time position, and that the employer use a single workweek as its standard for computing wages due. Additionally, consistent with the FLSA, this section provides that the workweek must be a fixed and regularly recurring period of 168 hours, *i.e.*, 7 consecutive 24-hour periods, which may start on any day and any hour of the day. This establishment of a clear period for determining whether wages are properly paid by the employer will help workers understand their wage guarantees and aid the Department in determining compliance during the audit examination process.

The requirement that the position be full-time is for the protection of U.S. workers in the CNMI and for the protection of U.S. workers in corresponding employment. By virtue of the CW-1 TLC, the Department requires the employer to ensure that the employment of CW-1 workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. Comparably, the full-time requirement is consistent with the Department's administration of its other TLC programs, the H-2B and H-2A programs, both of which require full-time positions for issuance of the labor certification.³⁶ Most similar to the H-2B program, the CW-1 program has a statutory numerical visa cap, which limits the number of annually available visas. As with the capped H-2B program, the Department believes that allowing CW-1 employers to hire part-time workers in instances in which an employer could, instead, choose to hire one or more full-time workers, could serve to dissuade U.S. workers from the job opportunity or place U.S. workers, who may be less likely to seek part-time work, at a competitive disadvantage for employment compared to CW-1 workers. The Department believes such an allowance would undercut the law as intended, which serves to encourage the hiring of U.S. workers in the CNMI.

³⁶ See 20 CFR part 655, subpart A (governing H-2B temporary nonagricultural workers); 20 CFR part 655, subpart B (governing H-2A temporary agricultural workers). The TLC programs are unlike the Department's H-1B program, which is a labor condition application program, for which the U.S. labor market is only tested in very limited circumstances for H-1B dependent employers and willful violators not claiming an exemption, and for which certification is granted unless the application is obviously inaccurate or incomplete. See 20 CFR part 655, subpart H (governing H-1B labor condition applications for H-1B workers).

e. Paragraph (e), Job Qualifications and Requirements

Paragraph (e) of this section requires that each qualification and requirement for the job be listed in the work contract, and be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-CW-1 employers in the same occupation and in the CNMI. This protects U.S. workers and is consistent with requirements for the Department's administration of similar TLC programs.³⁷ Further, the employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on CW-1 workers. The CO has the authority to require the employer to provide sufficient justification for any job qualification or requirement imposed for the particular job opportunity.

Consistent with the Department's administration of similar TLC programs,³⁸ job qualifications and requirements must be customary, *i.e.*, they may not be used to discourage applicants capable of performing the needed work from applying for the job opportunity. The standard for employment of CW-1 workers is that there are not sufficient U.S. workers in the CNMI who are able, willing, and qualified, and who will be available to perform such services or labor. For purposes of complying with this statutory mandate, the Department has clarified the meaning of qualifications and requirements. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. Such characteristics include the ability to use specific equipment or any education or experience required for performing a certain job task. A requirement, on the other hand, means a term or condition of employment that a worker must accept in order to obtain or retain the job opportunity.

To the extent an employer has requirements that are related to the U.S. workers' qualifications or availability, the Department uses the Occupational Information Network database (O*NET) as a primary source for occupational qualifications and requirements, and will therefore consult O*NET when making a determination as to whether qualifications or requirements are normal for a specific job. For example, the Department recognizes that

background checks are used in private industry, so employers may conduct them to the extent that the requirement is a bona fide, normal, and accepted requirement applied by non-CW-1 employers for the occupation in the area of employment, and the employer applies the same criteria to both CW-1 and U.S. workers. However, where such job requirements are included in the recruitment materials, the Department may inquire further as to whether such requirements are normal and accepted by non-CW-1 employers in the CNMI and by which methods the employer will use such requirements.

f. Paragraph (f), Three-Fourths Guarantee

To ensure CW-1 workers and workers in corresponding employment are provided full-time employment under the work contract, the employer must guarantee under paragraph (f)(1) to offer each worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period of employment specified in the work contract, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

Paragraph (f)(1)(i) defines a workday to mean the number of hours in a workday as stated in the work contract. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO. In the event the worker begins working later than the specified beginning date, paragraph (f)(1)(ii) clarifies that the guarantee period begins with the first workday after the arrival of the worker at the place of employment and continues until the last day during which the work contract and all extensions thereof are in effect. To assist employers in complying with the three-fourths guarantee, paragraph (f)(1)(iii) provides a practical example of how to calculate the guaranteed total number of work hours for a 10-week work contract period.

Paragraph (f)(1)(iv) establishes additional standards for employers to comply with this provision. Specifically, although a worker may be offered more than the specified hours of work on a single workday, the worker

cannot be required to work for more than the number of hours specified in the work contract for a workday. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays of the work contract period if each workday did not consist of a full number of hours of work time as specified in the work contract.

To ensure workers are not adversely impacted in their employment, if during the total work contract period the employer affords the U.S. or CW-1 worker less employment than that required under the three-fourths guarantee, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. For workers that are paid on a piece-rate basis, paragraph (f)(2) specifies that the employer must use the worker's average hourly piece-rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee in accordance with paragraph (f)(1) of this section.

Pursuant to paragraph (f)(3), any hours the worker fails to work, up to a maximum of the number of hours specified in the work contract for a workday, when the worker has been offered an opportunity to work, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this subpart.

Based on its experience with administering TLC programs, the Department has concluded that a three-fourths guarantee strikes an appropriate balance of guaranteeing the benefits of full-time employment to workers, while providing employers with sufficient flexibility to spread the required work contract hours over a sufficiently long period of time such that the vagaries of the weather or other events out of their control that affect their need for labor do not prevent employers from fulfilling their guarantee. When employers file applications for CW-1 TLCs, they represent that they have a need for full-time workers during the entire certification period. Therefore, it is important to the integrity of the program, which is a capped visa

³⁷ 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

³⁸ 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

program, to have a methodology for ensuring that employers have fairly and accurately estimated their temporary need.

The guarantee also deters employers from misusing the program by overstating their need for full-time workers. This will prevent employers from overestimating the hours of work needed per week, or the total number of workers required to do the work available. The guarantee will not only result in U.S. and CW-1 workers actually working most of the hours promised in the work contract, but also free up capped CW-1 visas for other employers whose businesses need CW-1 workers.

g. Paragraph (g), Impossibility of Fulfillment

Paragraph (g) of this section allows an employer to terminate the work contract in certain narrowly prescribed circumstances where the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God, or similar unforeseeable man-made catastrophes (such as oil spills or controlled flooding) wholly outside the employer's control that makes fulfillment of the work contract impossible. In such an event, the employer must fulfill the three-fourths guarantee for the time that has elapsed from the start date listed in the work contract or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination.

To safeguard the employment of the workers, this paragraph also requires the employer to make efforts to transfer the CW-1 worker (to the extent permitted by DHS) and worker in corresponding employment to other comparable employment acceptable to the worker. Actions employers could take include contacting any known CW-1 employers with comparable employment or the CNMI Department of Labor for assistance in placing workers with other CNMI employers with comparable job vacancies. Absent such placement, the employer is required to comply with the transportation requirement, as set forth under § 655.423(j), to return the worker to the place from which the worker came prior to entering the Commonwealth (disregarding intervening employment³⁹) or transport

³⁹ In terms of the referenced transportation requirements in an intervening employment situation for the CW-1 worker, where there is an initial CW-1 employer and a subsequent non-CW-1 employer, the obligation to pay for the transportation costs between the place of employment with the CW-1 employer and the

the worker to the worker's next certified CW-1 employer,⁴⁰ whichever the worker prefers. CO approval is required before terminating the work contract with the workers. Simply submitting a request to the CO is insufficient to terminate the work contract and absolve the employer of the three-fourths guarantee.

h. Paragraph (h), Frequency of Pay

Paragraph (h) of this section requires that the employer indicate the frequency of pay in the work contract, and guarantee to pay workers at least every 2 weeks and when wages are due. The requirement that workers be paid at least every 2 weeks is designed to protect financially vulnerable workers. Allowing an employer to pay less frequently than every 2 weeks would impose an undue burden on workers who are often paid low wages and may lack the means to make their income last through a month until they get paid.

i. Paragraph (i), Earnings Statements

To ensure compliance with the wage requirements of this subpart and transparency of the requirement to workers, paragraph (i)(1) of this section requires the employer to maintain accurate and adequate records with respect to the workers' earnings and to specify the minimum amount of information to be retained. The employer is further required under paragraph (i)(2) to furnish to each worker an appropriate written earnings statement on or before each payday, specifying the information that the employer must include in such a statement (*e.g.*, the worker's total earnings for each workweek in the pay period, the hourly rate or piece-rate of pay, the hours of employment offered and hours actually worked by the worker, and an itemization of all deductions from the worker's wages).

The Department notes that this paragraph also requires employers to maintain records of any additions made to a worker's wages and to include such

subsequent place of employment with the non-CW-1 employer depends on the subsequent employer's work contract. In the absence of a contractual agreement to pay for travel costs, the CW-1 employer is obligated to pay the travel expenses between its place of employment and the immediate subsequent place of employment with the non-CW-1 employer.

⁴⁰ In terms of the referenced transportation requirements in an intervening employment situation for the CW-1 worker, where there is an initial CW-1 employer and a subsequent CW-1 employer, the initial CW-1 employer is responsible for transporting the CW-1 worker from its place of employment to the subsequent CW-1 employer's place of employment, but the subsequent CW-1 employer is responsible for reimbursing the initial CW-1 employer with transportation costs.

information in the earnings statements furnished to the worker. Such additions could include performance bonuses, cash advances, or reimbursements for costs incurred by the worker. This requirement is consistent with the recordkeeping requirements under the FLSA in 29 CFR part 516. See 29 CFR part 785 for guidance regarding what constitutes hours worked.

The Department has concluded that any administrative burden resulting from this provision is outweighed by the importance of providing workers with this crucial information, especially because an earnings statement provides workers with an opportunity to quickly identify and resolve any anomalies with the employer and will hold employers accountable for proper payment. Similar to § 655.20(i) in the H-2B program, this IFR requires an employer to record the reasons why a worker declined any offered hours of work, which will support the Department's audit examination activities related to the three-fourths guarantee previously discussed under paragraph (f) of this section.

j. Paragraph (j), Transportation and Visa Fees

Consistent with the Department's transportation provisions in similar TLC programs, paragraph (j)(1)(i) of this section requires an employer to provide inbound transportation and subsistence during transportation to CW-1 employees and to U.S. employees in corresponding employment who have traveled to take the position from such a distance that they are not reasonably able to return to their residence each day, if the workers complete 50 percent of the period of employment covered by the work contract (not counting any extensions). Before the 50 percent point, employers have no responsibility under the CW-1 program to pay these expenses. Transportation and subsistence costs must be paid for travel between the place from which the worker has come to work for the employer, whether in the United States, including another part of the CNMI, or abroad, to the place of employment. This paragraph provides that employers may arrange and pay for the transportation and subsistence directly; advance, at a minimum, the most economical and reasonable common carrier cost and subsistence; or reimburse the worker's reasonable costs. If the employer advances or provides transportation and subsistence costs to foreign workers, or it is the prevailing practice of non-CW-1 employers in the CNMI to do so, the employer must advance such costs or provide the

services to workers in corresponding employment traveling to the place of employment. The Department has concluded that this approach is appropriate and adequately protects the interests of both U.S. and CW-1 workers and employers because it does not require employers to pay the inbound transportation and subsistence costs of U.S. workers recruited pursuant to CW-1 job offers who do not remain on the job for more than a very brief period.

Paragraph (j)(1)(ii) requires the employer, at the end of the employment, to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place from which the worker departed to work for the employer, if the worker has no immediate subsequent approved CW-1 employment. However, this obligation attaches only if the worker completes the period of employment covered by the work contract or if the worker is dismissed from employment for any reason before the end of the certified period of employment. The employer is required to provide or pay for the return transportation and daily subsistence of a worker who has completed the period of employment listed on the certified CW-1 Application for Temporary Employment Certification, regardless of any subsequent extensions of the work contract for that worker. An employer is not required to provide return transportation if separation is due to a worker's voluntary abandonment or termination for cause, as set forth under § 655.423(v). If the worker has been contracted to work for a subsequent and certified employer, the last CW-1 employer to employ the worker is required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers are not obligated to pay for such return transportation costs.

Paragraph (j)(1)(iii) of this section requires that all employer-provided transportation—including transportation to and from the place of employment, if provided—comply with all applicable Federal and Commonwealth laws and regulations including vehicle safety standards, driver licensure requirements, and vehicle insurance coverage.

And finally, to protect CW-1 workers from predatory and abusive labor practices, paragraph (j)(2) of this section requires the employer to pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the CW-1 worker, but not for passport expenses or

other charges primarily for the benefit of the worker.

Under the FLSA and as the Department has explained in Wage and Hour's Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009), transportation, subsistence, and visa and related expenses for CW-1 workers are for the primary benefit of employers. The employer primarily benefits because it obtains foreign workers where the employer has demonstrated that there are not sufficient qualified U.S. workers available to perform the work; the employer has demonstrated that unavailability by engaging in prescribed recruiting activities that do not yield sufficient U.S. workers.

The CW-1 workers, on the other hand, only receive the right to work for a particular employer, in a particular location, and for a particular period of time. If they leave that specific job, they generally must leave the country. Transporting these CW-1 workers from remote locations to the workplace thus primarily benefits the employer who has sought authority to fill its workforce needs by bringing in workers from foreign countries. Similarly, because a CW-1 worker's visa (including all the related expenses, which vary by country, including the visa processing interview fee and border crossing fee) is an incident of and necessary to employment under the program, the employer is the primary beneficiary of such expenses. The visa does not allow the employee to find work in the United States generally, but rather permits the visa holder to apply for admission in CW-1 nonimmigrant status in the CNMI, which restricts the worker to the employer with an approved TLC and petition to the particular approved work described in the employer's application.

In addition, the FLSA applies independently of the CW-1 requirements and imposes obligations on employers regarding payment of wages. Employers covered by the FLSA must generally pay such expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage. *See, e.g., Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 898-99 (9th Cir. 2013); *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002); *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003); *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 2011 WL 806792 (E.D.N.C. 2011); *Teoba v. Trugreen Landcare LLC*, 2011 WL 573572 (W.D.N.Y. 2011); *DeLeon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich.

2008); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. 2008). *But see Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc). Payment sufficient to satisfy the FLSA in the first workweek is also required because § 655.423(w) specifically requires employers to comply with all applicable Federal and Commonwealth employment-related laws and regulations, including health and safety laws. Furthermore, because U.S. workers are entitled to receive at least the same terms and conditions of employment as CW-1 workers, in order to prevent adverse effects on U.S. workers from the presence of foreign workers, employers must provide the same reimbursement for U.S. workers in corresponding employment who are unable to return to their residence each workday, such as those from another U.S. State or territory who saw the position advertised on the CNMI Department of Labor's job listing system.

The Department has determined these provisions fulfill its statutory mandate to protect U.S. workers from adverse effects due to the presence of temporary foreign workers. As discussed above, under the FLSA, numerous courts have held in the context of both H-2B and H-2A workers that the inbound and outbound transportation costs associated with employing workers are an inevitable and inescapable consequence of employers choosing to participate in these visa programs. Moreover, the courts have held that such transportation expenses are not ordinary living expenses, because they have no substantial value to the employee independent of the job and do not ordinarily arise in an employment relationship, unlike normal daily home-to-work commuting costs.

Therefore, the courts view employers as the primary beneficiaries of such expenses under the FLSA; in essence the courts have held that inbound and outbound transportation are employer business expenses. A similar analysis applies to the CW-1 required wage. This requirement ensures the integrity of the full CW-1 required wage, over the full term of employment. Both CW-1 workers and U.S. workers in corresponding employment will receive the CW-1 required wage they were promised, as well as reimbursement for the reasonable transportation and subsistence costs that primarily benefit the employer, over the full period of employment.

Finally, to comply with the provisions of this section, transportation must be reimbursed from wherever the place from which the worker has come to

work for the employer to the place of employment; therefore, the employer must pay for transportation from the place of recruitment to the city with the consulate that adjudicates the worker's visa application and then on to the place of employment. Similarly, the employer must pay for subsistence during that period, so if an overnight stay at a hotel in the consular city is required while the employee is interviewing for and obtaining a visa, that subsistence must be reimbursed.

k. Paragraph (k), Employer-Provided Items

Consistent with the requirement under the FLSA regulations at 29 CFR part 531, paragraph (k) of this section requires the employer provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may not shift to the employee the burden to pay for damage to, loss of, or normal wear and tear of, such items. This provision gives workers additional protections against improper deductions for the employer's business expenses from required wages.

Section 3(m) of the FLSA (29 U.S.C. 203(m)) prohibits employers from making deductions for items that are primarily for the benefit of the employer if such deductions reduce the employee's wage below the Federal minimum wage. Therefore, an employer that does not provide tools but requires its employees to bring their own would already be required under the FLSA to reimburse its employees for the difference between the weekly wage minus the cost of equipment and the weekly minimum wage. Paragraph (k) simply extends this protection in a manner that protects the integrity of the required CW-1 wage rate and thereby avoids adverse effects on the wages of U.S. workers. However, this requirement does not prohibit employees from voluntarily choosing to use their own specialized equipment; rather, it simply requires employers to make available to employees adequate and appropriate equipment.

l. Paragraph (l), Disclosure of Work Contract

Paragraph (l) of this section requires the employer to provide a copy of the work contract, including any subsequent approved modifications, to a CW-1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences. To clarify, the time at

which the worker applies for the visa should be read as the time before the worker has made any payment, whether to a recruiter or directly to the consulate, to initiate the visa application process. The Department has concluded that it is most practical to require disclosure of the work contract at the time the worker applies for a visa, to ensure that workers fully understand the terms and conditions of their job offer before they make a commitment to come to the United States.

For CW-1 workers who are moving to a subsequent CW-1 employer, the work contract must be provided no later than the time the subsequent offer of employment is made. At a minimum, the work contract must contain all of the provisions required to be included by this section and must be in a language understood by the worker. In the absence of a separate, written work contract between the employer and the worker, the required terms of the certified *CW-1 Application for Temporary Employment Certification* are those in the work contract.

The Department has determined that the disclosure required by this paragraph is a vital component of strengthening program compliance and provides workers with sufficient notice of the terms and conditions of the job so that they can make an informed decision of the terms under which they are accepting the job. In addition, providing the terms and conditions of employment to each worker in a language that the individual understands protects those workers.

m. Paragraph (m), No Unfair Treatment

To protect vulnerable U.S. workers and CW-1 workers, paragraph (m) of this section provides nondiscrimination and nonretaliation protections for workers. Workers are protected from retaliation, including retaliation based on contact or consultation with an employee of a legal assistance program, labor union, workers' center, or community organization, or an attorney on matters related to perceived violations. These entities frequently have the first contact with temporary foreign workers when they seek help to correct or report perceived violations. This provision applies to oral complaints and complaints made internally to employers, and it also applies to current, former, and prospective workers.

This provision protects workers from discrimination and retaliation for asserting rights under any applicable Federal or Commonwealth law or regulation, including the CW-1

program. For example, if workers sought legal assistance relating to the terms and conditions of employment, such as employer-provided housing because an employer charged for housing that was listed as free of charge in the work contract, this serves as a protected act; however, a routine landlord-tenant dispute may not fall under the protections of this section. This section provides protection to U.S. workers and CW-1 workers alike.

n. Paragraph (n), Comply With the Prohibitions Against Employees Paying Fees

Paragraph (n), similarly to the Department's H-2B regulation at 20 CFR 655.20(o), of this section prohibits the employer and its attorneys, agents, or employees from seeking or receiving payment of any kind from workers for any activity related to obtaining CW-1 labor certification or employment, including payment of the employer's attorney or agent fees, application and *CW-1 Petition* fees, recruitment costs, or any fees attributed to obtaining the approved *CW-1 Application for Temporary Employment Certification*. Payments under this provision include but are not limited to monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. However, this provision allows employers and their agents to receive reimbursement for fees that are primarily for the benefit of the worker, such as Government-required passport fees, which can be used for personal travel or for travel to another job. This provision also reiterates that employers must pay all wages to workers free and clear. *Paragraph (o), Contracts with Third Parties to Comply with Prohibitions.*

Paragraph (o) of this section requires that an employer contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of CW-1 workers to seek or receive payments or other compensation from prospective workers. For employers' convenience, this paragraph contains the exact language of the required contractual prohibition that must appear in such agreements.

o. Paragraph (p), Prohibition Against Preferential Treatment of Foreign Workers

For the protection of U.S. workers, paragraph (p) of this section requires the employer to offer and provide to U.S. workers no less than the same benefits, wages, and working conditions that the

employer is offering, intends to offer, or will provide to CW-1 workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's CW-1 workers. Employers are required to offer and provide CW-1 workers at least the minimum benefits, wages, and working conditions outlined in this paragraph. This provision will protect U.S. workers by ensuring that employers do not understate wages and/or benefits in an attempt to discourage U.S. applicants or to provide preferential treatment to temporary foreign workers.

The employer is not precluded from offering a higher wage rate or more generous benefits or working conditions to U.S. workers, so long as the employer offers to U.S. workers all the wages, benefits, and working conditions offered to and required for CW-1 workers pursuant to the certified *CW-1 Application for Temporary Employment Certification*.

p. Paragraph (q), Nondiscriminatory Hiring Practices

For the protection of U.S. workers, paragraph (q) of this section sets forth a nondiscriminatory hiring provision by guaranteeing the job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. This paragraph works together with paragraph (p) of this same section, which specifies that job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on CW-1 workers. Thus, for example, an employer violates this provision if it requires drug tests or criminal background checks for U.S. workers but not for CW-1 workers.

Additionally, where an employer conducts criminal background checks on prospective employees, in order to be lawful and job-related, the employer's consideration of any arrest or conviction history must be consistent with applicable guidance from the Equal Employment Opportunity Commission on employer consideration of arrest and conviction history under Title VII of the Civil Rights Act of 1964. Thus, employers may reject U.S. workers solely for lawful, job-related reasons, and they must also comply with all applicable employment-related laws, as set forth under § 655.423(w). All U.S. workers not rejected on this basis must be hired. This paragraph also reminds the employer of its obligation to retain records of all hired workers as well as those rejected, as set forth under § 655.456.

q. Paragraph (r), Recruitment Requirements

Paragraph (r) of this section requires employers to assure the Department that they will conduct all recruitment for U.S. workers required by §§ 655.440 through 655.445, including any activities directed by the CO. Such required recruitment activities are discussed further in the preamble to those applicable sections.

r. Paragraph (s), No Strike or Lockout

Paragraph (s) of this section requires an employer to assure the Department that there is no strike or lockout at any of the employer's place(s) of employment within the Commonwealth for which the employer is requesting CW-1 certification. If there is a strike or lockout at the place(s) of employment when the employer requests CW-1 workers, the CO may deny the CW-1 certification to ensure that U.S. workers are not adversely impacted by the hiring of a CW-1 worker(s). This provision will protect U.S. workers in their employment by preventing employers from filling positions with CW-1 workers at places of employment where such positions are vacated by U.S. workers due to a strike or lockout.⁴¹

s. Paragraph (t), No Recent or Future Layoffs

Paragraph (t) of this section establishes the standards under which an employer cannot lay off similarly employed U.S. workers who would be considered in corresponding employment upon approval of a TLC. Specifically, the employer must assure the Department that it has not laid off any similarly employed U.S. worker in the occupation that is the subject of the *CW-1 Application for Temporary Employment Certification* in the Commonwealth within the period beginning 270 calendar days before the date of need and will not lay off any similarly employed U.S. worker in the occupation that is subject to the *CW-1 Application for Temporary Employment Certification* in the Commonwealth through the end of the period of certification. However, the provision specifically permits layoffs due to lawful, job-related reasons, such as lack of work or the end of a season, as long as, if applicable, the employer lays off its CW-1 workers first before any U.S. worker in corresponding employment.

The Department has determined that the 270-day period before the date of need is an appropriate timeframe to prohibit layoffs of similarly employed

U.S. workers, because it represents the earliest possible period the employer may request a PWD from the NPWC for a job opportunity that it may seek to fill with a nonimmigrant worker in CW-1 status. By extending this prohibition through the end of the certified period of employment, the Department is seeking to maximize the protection of U.S. workers in their employment and discourage employers from seeking to use the CW-1 program to displace their current U.S. workforce.

t. Paragraph (u), No Work Performed Outside the Commonwealth and Job Opportunity

Paragraph (u) of this section helps ensure integrity of the CW-1 program by prohibiting the employer from placing any CW-1 workers outside the Commonwealth or in a job opportunity not listed on the approved *CW-1 Application for Temporary Employment Certification*. The requirement that all work must be performed within the Commonwealth is consistent with the statutory mandate prohibiting individuals in CW-1 status from being present anywhere in the United States other than the Commonwealth, with limited exception. Furthermore, placing CW-1 workers to perform labor or services outside the scope of the job opportunity certified by the CO can depress the wages of similarly employed U.S. workers and undermines the labor market test upon which the CO granted TLC.

u. Paragraph (v), Abandonment/Termination of Employment

Paragraph (v) of this section requires the employer to notify OFLC within 2 working days of the separation of a CW-1 worker or worker in corresponding employment if the separation occurs before the end date of the period of employment certified in the *CW-1 Application for Temporary Employment Certification*. It also deems that an abandonment or abscondment begins after a worker fails to report for work at the regularly scheduled time without the employer's consent for 5 consecutive working days, and adds language relieving the employer of the subsequent transportation and subsistence requirements, previously discussed under § 655.423(j), only where the separation is due to a worker's voluntary abandonment or termination for cause. Additionally, the section clarifies that if a worker voluntarily abandons employment or is terminated for cause, and appropriate notification under this section is provided, an employer is not required to guarantee three-fourths of the work

⁴¹ This provision is consistent with the H-2B provisions at 20 CFR 655.20(u).

contract, as previously discussed under § 655.423(f).⁴²

OFLC's awareness of early separations is critical to program integrity, and timely notification of CW-1 workers who voluntarily abandon employment is likewise vital to identifying workers who are no longer covered by an approved temporary labor certification and no longer have a legal purpose for being in the CNMI. Timely notification also allows the agency to conduct audit examinations or refer matters for further investigation to DHS or any other Federal Government Office. Absent proper notification, employers with histories of frequent and unjustified early dismissals of workers could continue to have their *CW-1 Applications for Temporary Employment Certification* certified and a *CW-1 Petitions* approved.

v. Paragraph (w), Compliance With Applicable Laws

During the period of employment certified by the CO on the *CW-1 Application for Temporary Employment Certification*, paragraph (w) of this section requires CW-1 employers to comply with all applicable Federal and Commonwealth employment and labor laws and regulations, including health and safety laws. It also explicitly references 18 U.S.C. 1592(a), which prohibits holding or confiscating workers' immigration documents, such as passports or visas, under certain circumstances.

D. Processing of an *CW-1 Application for Temporary Employment Certification*

1. Section 655.430, Review of Applications

This section establishes requirements for the CO to review *CW-1 Applications for Temporary Employment Certification*, methods of communication between the CO and employer, and authority for the CO to share information with other Federal Government Officials performing enforcement and/or investigative activities.

Paragraph (a) requires the CO to conduct a comprehensive review of the *CW-1 Application for Temporary Employment Certification*, including all applicable addenda and supporting documentation, for compliance with all applicable program requirements. After performing a review, the CO will provide written notification to the employer and, if applicable, to the employer's agent or attorney indicating

whether the *CW-1 Application for Temporary Employment Certification* can be accepted for further processing. If the CO determines all applicable program requirements have been met, a NOA authorizing the recruitment of U.S. workers in the CNMI will be issued, as required by § 655.433. However, if the CO determines the *CW-1 Application for Temporary Employment Certification* contains one or more deficiencies, a NOD will be issued, as required by § 655.431, requiring a response from the employer addressing each deficiency before a NOA can be issued.

To ensure communications between the CO and employer are accomplished in a reliable and efficient manner, paragraph (b) of this section requires the CO to send all notices or requests to the employer electronically or using first class U.S. Mail based on address information supplied by the employer on the *CW-1 Application for Temporary Employment Certification*. Similarly, the employer's response to a notice or request received from the CO must be sent electronically or via traditional methods that assure expedited delivery. If the due date for the employer's response falls on a Saturday, Sunday or Federal Holiday, this paragraph requires the employer to send the response by the date due or the next business day.

To ensure program integrity and effective coordination with other Federal Government Officials, and consistent with how the Department administers other TLC programs, paragraph (c) provides that OFLC may forward to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function, the information that OFLC receives in the course of processing a request for an *CW-1 Application for Temporary Employment Certification* or of administering program integrity measures such as audits under this subpart.

2. Section 655.431, Notice of Deficiency

This section establishes the procedures under which the CO will issue a NOD after reviewing the employer's *CW-1 Application for Temporary Employment Certification*. The purpose of the NOD is to provide employers, especially those participating in the CW-1 program for the first time, an opportunity to comply with program requirements before a denial determination needs to be issued by the CO, thereby avoiding a burdensome and costly administrative judicial review process. Thus, paragraph (a) provides that a NOD will be issued to the employer where the CO

determines the *CW-1 Application for Temporary Employment Certification*, including the material terms and conditions of the job offer, contains errors or inaccuracies, or fails to comply with applicable requirements set forth in this subpart. A copy of the NOD will be sent to the employer's agent or attorney, as applicable.

Paragraph (b) of this section specifies the content requirements of the NOD. The NOD will include the specific reason(s) the *CW-1 Application for Temporary Employment Certification* fails to meet the criteria for acceptance and will identify the type(s) of response(s) or modification(s) needed for the CO to issue a NOA. The employer will be offered an opportunity to submit a modified *CW-1 Application for Temporary Employment Certification* within 10 business days from the date of the NOD addressing each deficiency noted by the CO. Finally, the NOD will state that if the employer does not submit a modified *CW-1 Application for Temporary Employment Certification*, in accordance with the standards and procedures set forth under § 655.432, the CO will deny the *CW-1 Application for Temporary Employment Certification*.

Based on the Department's experience administering other TLC programs, there are circumstances in which the modified *CW-1 Application for Temporary Employment Certification* submitted by the employer does not resolve the stated deficiency or creates a question or concern requiring additional clarification before a NOA can be issued. Therefore, as § 655.432(a) provides, the CO may issue one or more NODs, as necessary, to work with employers to resolve deficiencies that are preventing acceptance of their *CW-1 Application for Temporary Employment Certification* and achieve program compliance.

3. Section 655.432, Submission of Modified Applications

This section establishes the procedures under which the CO will handle responses to a NOD, including any modifications to the *CW-1 Application for Temporary Employment Certification*, submitted by an employer as well as other necessary modifications requested by the CO before a final determination is issued. Upon receipt of a response to a NOD, including any modifications to the *CW-1 Application for Temporary Employment Certification*, paragraph (a) specifies the CO will review the response and may issue one or more additional NODs to ensure compliance with regulatory

⁴² This provision is consistent with H-2B program requirements at 20 CFR 655.20(y).

requirements before issuing a decision under this section. However, an employer's failure to comply with a NOD, including not responding in a timely manner or not providing all required documentation requested by the CO, will result in a denial of the *CW-1 Application for Temporary Employment Certification*.

If the CO accepts the response submitted by the employer, paragraph (b) provides that the CO will issue a NOA. In the NOA, the CO directs the employer to conduct recruitment of U.S. workers for the job opportunity, in accordance with the procedures and requirements set forth under § 655.433. If the modified application fails to cure the deficiencies or otherwise comply with program requirements, and the CO finds the employer's response to the NOD unacceptable, paragraphs (c) and (d) provide that the CO will deny the *CW-1 Application for Temporary Employment Certification*, and offer the employer an opportunity to request administrative judicial review of the denial, in accordance with the procedures set forth under § 655.461.

Notwithstanding the decision to accept the *CW-1 Application for Temporary Employment Certification*, paragraph (e) of this section authorizes the CO to require additional modifications where the CO determines the job offer identified in the *CW-1 Application for Temporary Employment Certification* does not contain all the minimum benefits, wages, and working conditions specified under § 655.441. The CO's ability to require modification(s) of a job offer strengthens *CW-1* program integrity. In some cases, information may come to the CO's attention after acceptance indicating that the job offer does not contain all the applicable minimum benefits, wages, and working conditions that are required for certification. This provision enables the CO to ensure that the job offer meets all regulatory requirements before a decision to grant TLC is issued.

The CO may request additional modifications at any time after the NOA is issued and before the CO makes the final determination to grant or deny the *CW-1 Application for Temporary Employment Certification*. The employer must make the requested modifications, or the CO will deny the TLC in accordance with the procedures set forth under § 655.453. Once all requested modifications are made and approved by the CO, paragraph (e) requires that the employer provide to all workers recruited in connection with the job opportunity a copy of the modified *CW-1 Application for*

Temporary Employment Certification no later than the date work commences.

4. Section 655.433, Notice of Acceptance

This section establishes the procedures under which the CO will issue a NOA after reviewing the employer's *CW-1 Application for Temporary Employment Certification*. The purpose of the NOA is to provide the employer with specific instructions on where to conduct recruitment in the CNMI and the length of time advertisements for the job opportunity must appear to prospective U.S. workers. Paragraph (a) provides that a NOA will be issued to the employer where the CO determines the *CW-1 Application for Temporary Employment Certification*, including the material terms and conditions of the job offer, contains no errors or inaccuracies, and meets the requirements set forth in this subpart. A copy of the NOA will be sent to the employer's agent or attorney, as applicable.

Paragraph (b) of this section specifies the content requirements of the NOA. The NOA will direct the employer to recruit for U.S. workers by placing an advertisement on the CNMI Department of Labor's job listing system, as further explained under § 655.442; contacting its former U.S. employees employed during the previous year and soliciting their return to the jobs, as further explained under § 655.443; and posting notice of the job opportunity in at least two conspicuous locations at the place(s) of employment, as further explained under § 655.444. Additionally, the NOA may contain instructions for the employer to conduct additional recruitment where the CO determines qualified U.S. workers will be available for the work, as further explained under § 655.445.

To ensure employers initiate recruitment in a timely manner, the NOA will require all employer-conducted recruitment to begin within 14 calendar days from the date the NOA is issued. Finally, in the NOA the CO will require the employer to submit a report of its recruitment efforts by a specific date, as further explained under § 655.446, for the CO to determine whether there is a sufficient number of qualified U.S. workers in the CNMI who will be available for the employer's job opportunity.

5. Section 655.434, Amendments to an Application

This section establishes the standards and procedures under which the employer may request to amend its *CW-1 Application for Temporary*

Employment Certification to increase the number of workers requested, modify the period of employment, and/or request other minor changes to the application. All amendment requests must be made in writing and before a certification determination is issued on the employer's *CW-1 Application for Temporary Employment Certification* and will not be effective until approved by the CO.

Paragraph (a) permits the employer to request a minor amendment to increase the number of workers requested in the initial *CW-1 Application for Temporary Employment Certification*. The employer may request an increase of not more than 20 percent (50 percent for employers requesting less than 10 workers) of the number of workers requested on the initial application without requiring an additional recruitment period for U.S. workers. Requests for increases above the prescribed percentages, which are similar to other TLC programs⁴³ administered by the Department, may be approved without additional recruitment only when the employer demonstrates that the need for additional workers could not have been foreseen and is wholly outside of the employer's control.

Paragraph (b) permits the employer to request minor changes in the total period of employment in the initial *CW-1 Application for Temporary Employment Certification*. The employer may request an amendment of not more than 14 calendar days to the total period of employment without requiring an additional recruitment period for U.S. workers. Requests for minor changes to the period of employment must be in writing and may be approved by the CO only when the employer demonstrates that the need for such changes could not have been foreseen and is wholly outside of the employer's control. To ensure amendments to the period of employment are approved in a manner consistent with the statute, the CO will deny any request to change the period of employment where the total amended period of employment will exceed the maximum applicable duration permitted under § 655.420(g). Additionally, the Department does not intend for employers to use this provision to amend their dates of need in order to gain a competitive advantage with respect to accessing the USCIS-administered *CW-1* visa cap. Therefore, the Department will not approve cap-

⁴³ The H-2B provisions may be found at 20 CFR 655.35. The H-2A provisions may be found at 20 CFR 655.145.

related amendment requests on the *CW-1 Application for Temporary Employment Certification*.

Paragraph (c) permits the employer to request other minor changes to the initial *CW-1 Application for Temporary Employment Certification* before the CO's certification determination is issued. After reviewing an employer's request to amend its *CW-1 Application for Temporary Employment Certification*, the CO will approve these changes if the CO determines the proposed amendment(s) are justified after review of pertinent information, including what effect, if any, the proposed amendments have on the underlying labor market test in the CNMI for U.S. workers.

This provision provides clarity to employers and workers alike of the limitations on and processes for amending a *CW-1 Application for Temporary Employment Certification* and the need to inform any U.S. workers already recruited of the changed job opportunity. For any amendments approved by the CO under this section, the employer is required to promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer. These provisions also recognize that business operations are dynamic and employers can face changed circumstances from varying sources—from climatic conditions to cancelled contracts. Accordingly, the Department includes these provisions to provide a limited degree of flexibility to enable employers to assess and respond to such changes. However, as provided for in paragraph (d) of this section, these provisions permit an employer to seek such amendments only prior to the CO issuing a determination to certify the *CW-1 Application for Temporary Employment Certification*, not after certification.

E. Post-Acceptance Requirements

1. Section 655.440, Employer-Conducted Recruitment

This section establishes the requirements for employers to conduct recruitment for U.S. workers in the CNMI and provides that such recruitment may occur only after the employer files a *CW-1 Application for Temporary Employment Certification* and receives a NOA from the CO. To carry out the statutory requirement that certifications be granted only if no U.S. workers are available, paragraph (a) contains the general requirement that employers must conduct recruitment in the CNMI to ensure that there are not able and qualified U.S. workers who

will be available for the positions listed in the *CW-1 Application for Temporary Employment Certification*. The requirement that employers seeking TLC conduct a thorough test of the CNMI labor market is an essential requirement to ensure that the importation of foreign workers will not have an adverse effect on U.S. workers.

Paragraph (b) requires that the employer begin specific recruitment steps outlined in §§ 655.442 through 655.445 within 14 calendar days from the date the NOA is issued, unless the CO provides different instructions to the employer in the NOA. This requirement provides the employer with time to initiate all recruitment steps and ensures all advertisements and notices of the job opportunities appear to prospective U.S. workers in the same time period. To ensure U.S. workers are fully considered for the job opportunities, this paragraph also requires that all employer-conducted recruitment be completed before the employer submits the recruitment report to the CO as specified in the NOA and required in § 655.446.

Where the employer desires to conduct interviews with U.S. workers for the job opportunity, paragraph (c) requires that such interviews with U.S. workers be done by telephone or at a location where workers can participate at little or no cost to the workers. This provision does not require employers to conduct employment interviews under this provision. Rather, where employers choose to conduct interviews, employers are barred from offering preferential treatment to potential *CW-1* workers, including any requirement to interview for the job opportunity. In addition, this provision ensures that employers conduct a fair labor market test by requiring employers to conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Accordingly, an employer who requires a U.S. worker to undergo an interview must provide such worker with a reasonable opportunity to meet such a requirement. The purpose of these requirements is to ensure that the employer does not use the interview process to the disadvantage of U.S. workers.

To ensure no adverse effect to U.S. workers, paragraph (d) requires the employer to consider all U.S. applicants interested in the position, and hire all U.S. applicants who are qualified and who will be available for the job opportunity. This paragraph further provides that U.S. applicants can be

rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired by the employer.

And finally, in order for the CO to issue a final determination on the *CW-1 Application for Temporary Employment Certification*, paragraph (e) requires the employer to prepare and submit a written report of its recruitment activities, in accordance with the requirements set forth under § 655.446.

2. Section 655.441, Job Offer Assurances and Advertising Contents

This section establishes the standards and minimum content requirements for an employer to advertise the job opportunity to U.S. workers for employment in the CNMI. The job offer is essential for U.S. workers to make informed employment decisions. The job offer serves to apprise U.S. workers of the available job opportunity and, further, provides U.S. and *CW-1* workers with the material terms and conditions of employment under this program. To apprise both U.S. and *CW-1* workers, it must include not only standard information about the job opportunity, including wage information to avoid any U.S. worker wage depression, but also key assurances to which the employer is committed by filing an *CW-1 Application for Temporary Employment Certification* to employ *CW-1* workers and to which U.S. workers are also entitled. Accordingly, paragraph (a) provides that all recruitment contain terms and conditions of employment that are not less favorable than those offered to the *CW-1* workers and comply with the assurances applicable to job offers, as set forth in § 655.423.

Paragraph (b) provides a list of the minimum terms and conditions of employment that must be included in all advertising, including a requirement that the employer make the appropriate disclosure when it is offering or providing board, lodging or other facilities, as well as identify any deductions not required by law, if applicable, that will be applied to the employee's pay for the provision of such accommodations. The terms and conditions of employment, as well as the required disclosures, serve to inform U.S. workers of the available job opportunity. In requiring that advertisements comply with minimum content requirements, but not requiring that advertisements contain all the text of the applicable regulatory assurances associated with these terms and conditions of employment under § 655.423, the Department is striking an appropriate balance between the

employer's cost in placing potentially lengthy advertisements and the need to ensure consistent disclosure of all necessary information to prospective U.S. workers. In addition, as a continuing practice in other TLC programs administered by the Department, employers will be able to use abbreviations in the advertisements so long as they clearly and accurately capture the underlying content requirement.

In order to help employers comply with these requirements, the Department provides specific language which is sufficient on the material terms and conditions of employment related to transportation; the three-fourths guarantee; availability of overtime; availability of on-the-job training; and tools, equipment, and supplies to apprise U.S. applicants of those required items in the advertisement. As provided above, the employer may abbreviate some of this language so long as the underlying guarantee is clearly stated for U.S. workers and can be clearly understood by a prospective applicant. To apprise U.S. workers of the available job opportunity, the following statements in an employer's advertisements are permitted:

1. **Transportation:** Transportation (including meals and, to the extent necessary, lodging) to the place of employment will be provided, or its cost to workers reimbursed, if the worker completes half the employment period. Return transportation will be provided if the worker completes the employment period or is dismissed early by the employer.

2. **Three-fourths guarantee:** Employment will be offered for a total number of work hours equal to at least three fourths of the workdays of the total period of employment.

3. **Availability of overtime:** Overtime hours may be available and will be paid at \$ ___ per hour.

4. **Availability of on-the-job training:** Employer will provide on-the-job training to perform the duties safely and effectively.

5. **Tools, equipment, and supplies:** Employer will provide workers at no charge all tools, supplies, and equipment required to perform the job.

To afford U.S. workers access to available job opportunities, this paragraph also requires all advertisements include the name and contact information of the employer, and a statement directing applicants to apply for the job with the employer using two verifiable methods, one of which must be electronic, and the time applicants will be considered for the job opportunity. Contact information of the

employer must be a person employed by the employer with authority to consider U.S. workers who apply for the job opportunity. Electronic methods by which applicants may apply for the job can include a telephone number, electronic mail address, or website where applications or resumes can be submitted for the specific job opportunity. At any time during the processing of a *CW-1 Application for Temporary Employment Certification* or a post-certification audit examination, the CO has the authority to verify the methods by which applicants apply for the job opportunity to ensure each is bona fide.

3. Section 655.442, Place Advertisement With CNMI Department of Labor

This section requires the employer to place an advertisement with the CNMI Department of Labor. Specifically, paragraph (a) requires the employer to place an advertisement with the CNMI Department of Labor that satisfies the requirements set forth in § 655.441 and remains open to prospective U.S. workers for 21 consecutive calendar days, which is similar to the H-2B program. Also similar to other TLC programs,⁴⁴ the advertisement must be sufficient under § 655.441 to ensure that the advertisement informs U.S. workers of the employer's available job opportunity and to ensure that U.S. workers are not placed at a competitive disadvantage. Further, the advertisement provides the means by which U.S. workers will contact employers for the available job opportunity. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on *CW-1* workers.

The CNMI Department of Labor is the government agency responsible for providing employment and training services, and maintaining an electronic system for registered and approved employers to post job vacancy announcements and receive referrals of qualified U.S. workers in the CNMI. Registration for employers to post vacancy announcements on the job listing system is a one-time, free process, and readily accessible through the CNMI Department of Labor's website. Consistent with the requirements in other TLC programs⁴⁵ for employers to place job orders with

SWAs, the Department has concluded that the requirement for employers to place an advertisement with the CNMI Department of Labor represents a reliable method of recruitment for the job opportunity with a capacity to reach a large number of prospective U.S. workers in the CNMI.

Paragraph (b) also requires the employer to maintain documentation that the advertisement was placed with the CNMI Department of Labor to establish compliance with the requirements of this section. The employer's documentation must include printouts of web pages in which the advertisement appeared on the CNMI Department of Labor job listing system, or other verifiable evidence from the CNMI Department of Labor containing the text of the advertisement. The documentation must also clearly show the dates on which the advertisement appeared on the CNMI Department of Labor's job listing system in order to establish compliance with the 21-day recruitment period. The Department reminds employers that the CO may request this documentation during the course of processing the *CW-1 Application for Temporary Employment Certification* or a post-certification audit examination.

4. Section 655.443, Contact With Former U.S. Workers

This section requires the employer to make reasonable efforts to contact by mail or other effective means its former U.S. workers, including those who were laid off within 270 calendar days before the date of need listed in the *CW-1 Application for Temporary Employment Certification*, employed by the employer in the occupation and at the places of employment listed in the application during the previous year to solicit their return to the job. However, employers are not required to contact U.S. workers who were dismissed for cause or who abandoned the places of employment. The dismissal-for-cause exception does not apply to workers improperly fired in retaliation for their exercise of rights protected under the program. The Department has concluded that this provision will help ensure that the greatest number of U.S. workers, particularly those who have previously held these positions, have awareness of and access to these job opportunities.

Each employer must provide its former U.S. workers with a full disclosure of the material terms and conditions of the job offer and solicit the U.S. workers' return to the job. This contact must occur during the period of time that the job offer is being advertised on the CNMI Department of

⁴⁴ 20 CFR 655.41; 20 CFR 655.18; 20 CFR 655.151; 20 CFR 655.122.

⁴⁵ 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

Labor's job listing system, and the employer must maintain documentation sufficient to prove such contact in the event of an investigation, inspection, audit, or law enforcement function performed by the Department, DHS, or any Federal Government Official. This documentation may consist of a dated copy of a form letter or other written notification sent to all former U.S. workers, along with evidence of its transmission (postage account, address list, etc.).

The Department recognizes that collective bargaining agreements may exist between employers and workers and contain requirements for the employer to contact laid-off workers in accordance with specific terms governing recall and a recall period. The requirement in this section that the employer contact former U.S. workers employed by the employer during the 270 calendar days before the date of need would not substitute for the terms in a collective bargaining agreement. The employer is separately obligated to comply with the terms and conditions of the bargaining agreement, which may include recall provisions that cover workers employed by the employer beyond the 270 calendar day period.

5. Section 655.444, Notice of Posting Requirement

Consistent with the Department's TLC programs, for the protection of U.S. workers, this section requires employers to post notice of the job opportunity sufficient to apprise U.S. workers of the available opportunity. For this notice requirement, the employer must post a copy of the *CW-1 Application for Temporary Employment Certification* in at least two conspicuous locations at all places of employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW-1 workers. The notice must be posted at all places of employment for a period of 21 consecutive calendar days. Posting on a website may fulfill this requirement in some circumstances.

The posting of the notice at the employer's place(s) of employment is intended to provide notice that all the employer's U.S. workers are afforded the same access to the job opportunities for which the employer intends to hire CW-1 workers. In addition, the posting of the notice may result in the sharing of information between the employer's unionized and nonunionized workers and therefore result in more referrals and a greater pool of qualified U.S. workers. This IFR provides flexibility for complying with this requirement;

specifically, the regulation includes the language "or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW-1 workers." This permits the employer to devise an alternative method for disseminating this information to the employer's U.S. workers, for example, by posting the notice in the same manner and location as for other notices, such as safety and health occupational notices, that the employer is required by law to post. This provision further provides that electronic posting, such as displaying the notice prominently on any internal or external website that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as the posting otherwise meets the requirements of this section. Finally, this section requires the employer maintain proof the *CW-1 Application for Temporary Employment Certification* was posted and identify the location(s) and the specific period of time on which the notice appeared to U.S. workers, in accordance with § 655.456.

6. Section 655.445, Additional Employer-Conducted Requirement

Where the CO determines that the employer-conducted recruitment described in §§ 655.442 through 655.444 is not sufficient to attract qualified U.S. workers, this section provides the CO with discretion to require the employer to engage in additional recruitment activities. Paragraph (a) provides the CO with discretion to order additional reasonable recruitment where the CO has determined that there is a likelihood that U.S. workers who are qualified will be available for the work. This discretion may be exercised where additional recruitment efforts will likely result in more opportunities for and a greater response from available and qualified U.S. workers. The additional recruitment ordered by the CO under this section will be conducted within the same time period as placement of the advertisement with the CNMI Department of Labor and the other mandatory employer-conducted recruitment described above.

Paragraph (b) provides that, if the CO elects to require additional recruitment, the CO will describe the number and type of additional recruitment efforts required. This paragraph also provides a nonexhaustive list of the types of additional recruitment that may be required by the CO, including advertising on the employer's website or

another website, with community-based organizations, local unions or trade unions, or via a professional, trade, or other publication where such a publication is appropriate for the workers likely to apply for the job opportunity. When assessing the appropriateness of a particular recruitment method, the CO will take into consideration all options at her/his disposal, and will consider both the cost and the likelihood that the additional recruitment will identify qualified and available U.S. workers, and will, where appropriate, opt for the least burdensome method(s).

The Department recognizes that the increased rate of technological innovation, including its implications for communication of information about job opportunities, is changing the way many U.S. workers search for and find jobs. In part due to these changes, the inclusion of this requirement is intended to allow the CO flexibility to keep pace with the ever-changing labor market trends. To administer this provision effectively, the Department intends to leverage its relationship with the CNMI Department of Labor to obtain information on the primary sources and methods of recruitment that are reasonable and most likely to attract U.S. workers in the CNMI for those jobs employers who are seeking CW-1 workers.

Paragraph (c) provides that, where the CO requires additional recruitment, the CO will specify the documentation or other supporting evidence that must be retained by the employer as proof that the additional recruitment requirements were met, as required in § 655.456.

7. Section 655.446, Recruitment Report

This section establishes the requirements that all employers must meet in order for the CO to issue a final determination on the *CW-1 Application for Temporary Employment Certification*. Specifically, paragraph (a) requires the employer to submit to the NPC a signed and dated recruitment report, by the date specified in the NOA, which accounts for its recruitment efforts for U.S. workers in the CNMI. Where recruitment was conducted by a job contractor or its employer-client, then both joint employers named in the *CW-1 Application for Temporary Employment Certification* must sign the recruitment report, as specified under § 655.421(e)(1). To ensure all U.S. workers who apply for the job are fully considered, paragraph (a) specifies that the employer must not prepare, sign, and date the recruitment report until 2 calendar days after the last date on which the last advertisement appeared.

Except in circumstances where an employer may be required to do assisted recruitment under § 655.471, the last day on which the last advertisement appears will generally be the 21st consecutive calendar day of the recruitment period.

The minimum content recruitment report must contain, the name of each recruitment activity or source, confirmation that each recruitment step required by the CO in the NOA was completed and when, and the results of the recruitment effort. The employer must provide the name and contact information of each U.S. worker who applied or was referred to the job opportunity as well as the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to each U.S. worker applicant and whether each U.S. worker accepted or declined employment. This reporting allows the Department to ensure the employer has met its recruitment obligations whether there were insufficient U.S. workers who are able, qualified and available to perform the job for which the employer seeks TLC. In addition, the NPC may contact U.S. workers listed in the recruitment report, either prior to issuing a final determination or during the course of a post-certification audit examination, to verify the reasons given by the employer as to why they were not hired, where applicable.

To ensure all U.S. applicants are considered for the job opportunity and the outcome of each worker's application are recorded timely and accurately, paragraph (b) of this section requires employers to update the recruitment report throughout the recruitment period. In a joint employment situation, either the job contractor or the employer-client may update the recruitment report throughout the recruitment period.

F. Labor Certification Determinations

1. Section 655.450, Determinations

This section generally authorizes the OFLC Administrator and NPC-based COs, by virtue of delegation from the OFLC Administrator, to make the determinations to certify or deny *CW-1 Applications for Temporary Employment Certification*. The CO will certify the *CW-1 Application for Temporary Employment Certification* only if the employer has met all requirements, including the criteria established at § 655.451, thus demonstrating that there is an insufficient number of U.S. workers in the Commonwealth who are able, willing, qualified, and available for the

job opportunity for which certification is sought and that the employment of the *CW-1* workers will not adversely affect the wages and working conditions of U.S. workers similarly employed in the Commonwealth.

2. Section 655.451, Criteria for Temporary Labor Certification

This section requires, as a condition of certification, that the employer demonstrate full compliance with the requirements of this subpart. The CO will determine whether the employer has successfully established that there are insufficient U.S. workers in the Commonwealth to fill the employer's job opportunity. In making a determination about the availability of U.S. workers in the Commonwealth for the job opportunity, the CO will consider individuals whom the employer rejected for any reason that was not lawful or job-related to be willing, able, available, and qualified U.S. workers. Since the individuals will be considered willing, able, available, and qualified U.S. workers who were unlawfully rejected, if the application is certified, the number of certified *CW-1* workers will be reduced by the number of unlawfully rejected U.S. workers. If the number of unlawfully rejected U.S. workers exceeds the number of *CW-1* workers requested, the application will be denied. This new section furthers the explicit Congressional intent to require a TLC in connection with the *CW-1* visa program, as expressly mandated in Sec. (2)(A) of the Workforce Act, which seeks to protect U.S. workers by means of adding this requirement to the program, in addition to mandating a prevailing wage survey, and an alternate method for determining a prevailing wage, as well as requiring that a minimum wage is paid. See also 48 U.S.C. 1806 (d)(2)(A)-(C).

3. Section 655.452, Approved Certification

In cases where the CO grants TLC, the CO will electronically transmit a Final Determination notice and certified *CW-1 Application for Temporary Employment Certification* to the employer and USCIS. In cases where an employer is permitted to file by mail, the CO will use the same electronic method to transmit the certification documentation directly to USCIS electronically, but will deliver certification documentation to the employer using first class mail.

Consistent with current practices in other TLC programs, the Department will send a copy of all certification documentation to the employer and, if applicable, to the employer's agent or

attorney. The Department has determined that that even when an employer is represented, the employer should directly receive notification from OFLC, and maintain the Final Determination notice, as well as the certified *CW-1 Application for Temporary Employment Certification*, because the employer attests to, and is primarily responsible for, meeting the obligations and requirements.

Due to the geographic location of the CNMI, the Department has concluded that the use of an electronic method to issue approved certification approvals will be most efficient. The Department anticipates these procedures will also promote program integrity and expedite the processing of *CW-1* petitions at USCIS, in part, by providing certification information directly from OFLC to USCIS electronically.

Finally, the employer is required to retain a copy of the certified *CW-1 Application for Temporary Employment Certification*, including the original signed Appendix C, as required under the record keeping provisions at § 655.456.

4. Section 655.453, Denied Certification

In cases where the CO denies TLC, the CO issues a Final Determination notice to the employer and, if applicable, to the employer's agent or attorney. Consistent with the procedural requirements for issuing approved certifications, the CO is required to send the Final Determination notice to the employer using an electronic method authorized by the OFLC Administrator, except where the Department has permitted an employer to file by mail as set forth in § 655.420(c), in which case the CO will send the Final Determination notice using first class mail.

The Final Determination notice will state the reason(s) for denying the employer's request for TLC, and cite the relevant regulatory provisions governing the stated grounds for denial. The Final Determination notice will also advise the employer of its right to seek administrative review of the final determination. The Final Determination notice will notify the employer that failure to timely request administrative judicial review will result in the denial of the application for labor certification becoming final and the Department will not accept any appeal on such application.

5. Section 655.454, Partial Certification

This section provides the CO with authority to issue a partial TLC reflecting either a shorter-than-requested period of employment or a lower-than-requested number of *CW-1*

workers, or both. A partial certification may be issued based upon information the CO receives during the course of processing the *CW-1 Application for Temporary Employment Certification*. For example, the period of employment will be reduced where the employer is unable to demonstrate that full-time employment will be available beginning on the date of need through the entire period of employment identified on the application. The number of workers requested for certification will be reduced by one for each able, willing, qualified, and available U.S. worker the CNMI Department of Labor refers or who applies directly with the employer, and who the employer has rejected for reasons that are unlawful or unrelated to the job. In other words, the CO can issue a full certification only where the employer has fully considered each U.S. worker who applied, whether directly or through referral from the CNMI Department of Labor, and has identified a lawful, job-related reason for each U.S. worker not hired.

If a partial labor certification is issued, the CO will send the Final Determination notice and certified *CW-1 Application for Temporary Employment Certification* electronically, except where the employer is permitted to file by mail as set forth in § 655.420(c). The Final Determination notice will state the reasons why either the period of need or the number of *CW-1* workers requested has been reduced. The Final Determination notice will also offer the employer an opportunity to request administrative judicial review using the procedures further explained under § 655.461. Where the employer does not timely request administrative judicial review, the partial certification determination will be final on the date the CO issued the certification, and the Department will not accept any appeal on that *CW-1 Application for Temporary Employment Certification*.

6. Section 655.455, Validity of Temporary Labor Certification

This section provides that a TLC granted by the CO is valid only for the period of employment identified in the certified *CW-1 Application for Temporary Employment Certification* and for the number of *CW-1* positions, the places of employment, the job classification, the specific services or labor to be performed, and the employer(s), including any modifications approved by the CO. Finally, a TLC is prohibited from being transferred from one employer to another unless the employer to which the TLC is being transferred is a

successor in interest to the employer that received the TLC.

These limitations protect the integrity of the labor certification process and are consistent with the other labor certification programs administered by the Department.

7. Section 655.456, Document Retention Requirements for *CW-1* Employers

CW-1 employers filing an *CW-1 Application for Temporary Employment Certification* must retain the documents and records to demonstrate compliance for 3 years from the date on which the *CW-1 Application for Temporary Employment Certification* expires, or 3 years from the date of the final determination if the *CW-1 Application for Temporary Employment Certification* is denied, or 3 years from the date the Department receives the request for withdrawal of the *CW-1 Application for Temporary Employment Certification*. Employers may maintain these documents and records electronically.

The documents and records required to be retained include: Proof of efforts to recruit U.S. workers in the Commonwealth; documentation supporting the recruitment report, including justification for failure to contact former U.S. workers, and any supporting resumes and contact information; and records of each worker's earnings, hours offered and worked, location(s) where work is performed, if applicable, records of reimbursement of transportation and subsistence costs incurred by the workers during transportation; copies of written contracts with third parties demonstrating compliance with the prohibitions to seek or receive payments or other compensation of any kind from prospective workers; evidence of the employer's contact with U.S. workers who applied for the job opportunity, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons; copies of written notices informing OFLC of each *CW-1* worker or worker in corresponding employment who separate from employment; and a copy of the *CW-1 Application for Temporary Employment Certification* (including the original signed Form ETA-9142C, Appendix C) and all accompanying appendices, including any modifications, amendments or extensions approved by the CO.

Based on the Department's experience administering other TLC programs, the documents and records to be retained by the employer are critical to ensuring an appropriate level of integrity and accountability in the *CW-1* program.

Thus, paragraph (d) of this section requires employers to make all documents and records required to be retained under this subpart available to the Department, DHS or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function for purposes of copying, transcribing, or inspecting them to verify employer compliance with program requirements.

G. Post Certification Activities

1. Section 655.460, Extensions

This section establishes the standards and procedures for employers to request extensions of the period of employment on the certified *CW-1 Application for Temporary Employment Certification*. Extensions differ from amendments to the period of employment in that extensions are requested after certification, while amendments are requested before the CO issues a final determination. The Department's experience administering other TLC programs demonstrates that some employers, due to unforeseen circumstances, need some degree of flexibility in the authorized period of employment after the *CW-1 Application for Temporary Employment Certification* is granted.

Therefore, employers may request extensions to the period of employment related solely to weather conditions or other factors beyond their control (which may include unforeseen changes in market conditions). The employer must submit the request to the CO documenting that the extension is needed and that it could not have been reasonably foreseen by the employer. The CO will not grant an extension where the total period of employment with the extension would exceed the maximum applicable duration permitted under § 655.420(g). The Department has concluded that this requirement provides employers with important flexibility to address unforeseen circumstances while maintaining the integrity of the certification decision issued by the Department, including the labor market test to ensure U.S. worker access to the job opportunities.

Upon review of the employer's extension request, the CO will provide notification to the employer and, if applicable, to the employer's agent or attorney of the decision. Where the CO denies the extension request, the employer has the right to request administrative review using the procedures under § 655.461. Where the CO approves the employer's request for an extension, the written notification

the employer receives from the CO will constitute an amended Final Determination notice.

The employer must immediately provide to its CW-1 workers and workers in corresponding employment a copy of any approved extension, especially since the CO's determination may have an impact on the duration of the CW-1 visa status of the workers.

2. Section 655.461, Administrative Review

This section establishes the standards and procedures under which an employer may request administrative review of a determination issued by the CO, as well as the procedures BALCA must follow in conducting such a review. An employer may request administrative review of a determination issued by the CO with respect to a PWD under § 655.411; denial of a modified *CW-1 Application for Temporary Employment Certification* under § 655.432; denial of TLC under § 655.453; issuance of a partial certification under § 655.454; denial of a request for an extension under § 655.460; imposition of assisted recruitment under § 655.471. In addition, an employer may request administrative review of a revocation of an approved TLC by the OFLC Administrator under § 655.472.

An employer wishing review of a determination by the CO must request an administrative review before BALCA to exhaust its administrative remedies within 10 business days from the date of the CO's determination. This allows for prompt processing while providing employers with sufficient time to prepare their requests. Additionally, this paragraph sets forth the various requirements for requests for review. Such requests must clearly identify the particular determination for which review is sought and include a copy of that determination, and set forth the grounds for the request, including the specific factual issues the employer wishes BALCA to examine, but may contain only evidence that was actually before the CO at the time of the determination.

To facilitate the timely preparation of the Appeal File, the employer must also send a copy of its request for review to the CO. Upon the receipt of the request for review, paragraph (b) of this section requires the CO to assemble and submit the Appeal File to BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor as soon as practicable by means normally assuring expedited delivery. If applicable, a copy

of the Appeal File will also be sent to the employer's agent or attorney. Pursuant to paragraph (c), once BALCA receives the Appeal File, the Chief ALJ will assign either a single ALJ or a panel of three ALJs to consider the case.

Paragraph (d)(1) explains the briefing schedules for appeals under this section. If the employer wishes to submit a brief, it must do so with its request for review. The CO may submit a brief within 7 business days of receipt of the Appeal File. Under this schedule, within the timeframe permitted for the submission of a request for review, the employer may develop a brief that sets forth the specific grounds for its request and corresponding legal arguments. In turn, the CO may respond to those arguments within a set timeframe. This procedure assists the ALJ's decision-making process by allowing for a complete set of arguments by the employer and responses by the CO while providing the parties a predictable, yet expedited, briefing schedule.

Paragraph (d)(2) sets forth the standard of review that applies to requests for administrative review. When reviewing such requests, the ALJ must uphold the CO's decision unless the employer shows that the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Including this standard in the IFR will make clear what employers must prove in order to receive a favorable decision. It will also ensure BALCA is conducting its administrative review in a consistent manner.

To ensure an administrative judicial decision is rendered as expeditiously as possible, paragraph (e) specifies that BALCA must review the CO's determination only on the basis of the documents in the Appeal File that were before the CO at the time of the CO's determination, the request for review, and any legal briefs submitted. Sometimes, the Appeal File contains new evidence submitted by the employer to the CO after the CO has issued his or her decision, such as when the employer submits a request for review with new evidence, or a corrected recruitment report with new information, after the CO has denied certification. Although such evidence is in the Appeal File, BALCA may not consider this new evidence because it was not before the CO at the time of the CO's determination. Similarly, BALCA may not consider evidence not before the CO by the time the CO's determination was issued, even if such evidence is in the request for review or legal briefs. This provision reflects

longstanding principles in the administrative review of H-2A and H-2B cases, and provides for fair determinations of these matters.

Finally, paragraphs (e) and (f) states that BALCA must notify all parties of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, of its decision to: (1) Affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case back to the CO for further action. This timeline provides BALCA with a reasonable timeframe in which to render a decision, while ensuring prompt resolution of employers' review requests.

3. Section 655.462, Withdrawal of an CW-1 Application for Temporary Employment Certification

Paragraph (a) permits an employer to submit a request to withdraw an *CW-1 Application for Temporary Employment Certification* at any time after the application is submitted to the NPC for processing, including after the CO grants TLC under § 655.450. However, the employer must continue to comply with the terms and conditions of employment contained in the *CW-1 Application for Temporary Employment Certification* and work contract for all workers recruited and hired in connection with that application. In accordance with paragraph (b), the employer must submit a withdrawal request in writing to the NPC, clearly identifying the *CW-1 Application for Temporary Employment Certification* to be withdrawn and stating the reasons for requesting withdrawal.

4. Section 655.463, Public Disclosure

This section provides that the Department will maintain a publicly accessible electronic file with information on all employers who voluntarily elect to request TLC under the CW-1 program. The database will include nonprivileged information extracted from the *CW-1 Applications for Temporary Employment Certification* including, but not limited to, the number of workers requested for TLC, the date an application is filed, the date an application is decided, and the final disposition of an application. Providing this information electronically will enhance transparency of the CW-1 program and of OFLC's processing of these applications. It will also make certain that such information is readily available to those who seek it from the Department.

H. Integrity Measures

1. Section 655.470, Audits

This section outlines the process under which the CO will conduct audits of certified *CW-1 Applications for Temporary Employment Certification*. The statutory mandate to ensure that a sufficient number of qualified U.S. workers in the CNMI are not available and that employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers serves as the basis for the Department's authority to conduct audit examinations. There is real value in auditing certified *CW-1 Applications for Temporary Employment Certification* because they can establish a record of employer compliance or noncompliance with program requirements, and they contain information that assists the Department in determining whether it needs to refer findings to other Federal agencies for further investigation or, depending on the nature of the violations, initiate debarment proceedings to prohibit an employer, agent, or attorney, or their successors in interest, from participating in the *CW-1* program.

Paragraph (a) provides that the CO has sole discretion to choose the certified *CW-1 Applications for Temporary Employment Certification* that will be audited, which includes the selection of applications using a random assignment method. When a certified *CW-1 Application for Temporary Employment Certification* is selected for audit, paragraph (b) requires the CO to issue an audit letter to the employer and, if appropriate, a copy of such letter to the employer's attorney or agent, listing the documentation the employer must submit and the date (no more than 30 calendar days from the date the audit letter is issued) by which the documentation must be sent to the CO. Additionally, paragraph (b) requires that the audit letter issued by the CO advise the employer that failure to fully comply with the audit process may result in the revocation of its certification or in debarment, under §§ 655.472 and 655.473, respectively, or require the employer to undergo assisted recruitment in future filings of a *CW-1 Application for Temporary Employment Certification*, under § 655.471.

Paragraph (c) permits the CO to request additional information and/or documentation from the employer as needed in order to complete the audit. Paragraph (d) provides the CO with authority to provide the audit findings and underlying documentation to DHS

or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

2. Section 655.471, Assisted Recruitment

This section protects the integrity of the *CW-1* program by requiring the employer to follow special requirements during its recruitment process where the CO determines the employer committed one or more violations that do not warrant program debarment. Specifically, paragraph (a) permits the CO to require an employer to participate in assisted recruitment for any future *CW-1 Application for Temporary Employment Certification*, if the CO determines as a result of an audit, or otherwise, that a violation not warranting debarment from the *CW-1* program has occurred. Assisted recruitment ordered by the CO can also be an effective tool to help employers that, due to either program inexperience or confusion, commit unintentional violations in their *CW-1 Application for Temporary Employment Certification* and indicate a need for further assistance from the Department.

Paragraph (b) of this section requires the CO to provide written notification to the employer and, if applicable, to the employer's agent or attorney, of the requirement to participate in assisted recruitment for any future filed *CW-1 Application for Temporary Employment Certification*. The CO may require the employer to follow special requirements during its recruitment process for a period of up to 2 years from the date the notice is issued. The nature of the assisted recruitment will be at the discretion of the CO, and such requirements will be based on the totality of the circumstances of the employer. The notification issued by the CO will state the reasons for the imposition of the additional requirements and explain that the employer's agreement to accept the conditions related to the assisted recruitment process will constitute their inclusion as *bona fide* conditions and terms of a *CW-1 Application for Temporary Employment Certification*. In the notice, the CO must also offer the employer an opportunity to request an administrative judicial review, in accordance with the procedures further explained under § 655.461.

As set forth in paragraph (c), the assisted recruitment process will be in

addition to any recruitment required of the employer under §§ 655.442 through 655.445 of this subpart. This paragraph also provides a nonexhaustive list of special requirements the CO may order the employer to undertake during its recruitment process, such as requiring submission to the CO of draft advertisements at the time of filing the *CW-1 Application for Temporary Employment Certification*, designating specific sources of recruitment for U.S. workers, extending the period of time advertisements are available to U.S. workers, requiring the employer to either notify the CO when advertisements are placed and/or provide proof of publication of all advertisements, or other requirements verifying the employer conducted the assisted recruitment ordered by the CO.

To ensure employers comply with these assisted recruitment requirements, paragraph (d) provides that, where the employer materially fails to comply with the requirements of this section, the CO will deny the *CW-1 Application for Temporary Employment Certification* and may initiate debarment proceedings against the employer, agent, or attorney, or their successors in interest, in accordance with the standard and procedures under § 655.473.

3. Section 655.472, Revocation

This section outlines the process by which the OFLC Administrator may revoke an approved *CW-1* TLC. The ability to revoke an approved labor certification is a critical tool for enabling the Department to protect the integrity of the *CW-1* program and stems from the agency's inherent authority to reconsider its decisions.

As set forth in paragraph (a) of this section, the OFLC Administrator will only revoke TLCs under certain circumstances: (1) When the OFLC Administrator finds that the issuance of the TLC was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in at § 655.473(d); (2) when the OFLC Administrator finds that the employer substantially failed to comply with any of the terms and conditions of the TLC, as defined in § 655.473(d) and (e); or (3) when the OFLC Administrator determines that the employer is impeding the Department's audit examination authority under § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function under this subpart.

Paragraph (b) of this section outlines the procedures OFLC will use when the OFLC Administrator decides to revoke

an approved TLC for CW-1 workers. If the OFLC Administrator decides to revoke an approved TLC, paragraph (b)(1) provides that it will send a Notice of Revocation to the CW-1 employer, and a copy to its attorney or agent, if applicable. The notice will contain a detailed statement of the grounds for the revocation and inform the employer, and its agent or attorney if applicable, of the employer's rights. Upon receiving the Notice of Revocation, the CW-1 employer has two options if it wishes to challenge the revocation: (1) It may submit rebuttal evidence to the OFLC Administrator; or (2) it may request Administrator review of the Notice of Revocation by BALCA pursuant to the procedures detailed in § 655.461. As set forth in paragraph (b)(2) of this section, if the employer does not submit rebuttal evidence or file a request for Administrator review within 10 business days of the date of the Notice of Revocation, the notice will be deemed the final agency action and will take effect immediately at the end of the 10 business days. If the employer chooses to file rebuttal evidence, and the employer timely files that evidence, the OFLC Administrator will review it and provide the employer with a final determination on revocation within 10 business days of receiving the rebuttal evidence.

If the OFLC Administrator decides to uphold the revocation, it will inform the CW-1 employer of its right to request administrative review by BALCA according to the procedures set forth at § 655.461. The CW-1 employer must appeal OFLC's determination within 10 business days; otherwise, OFLC's decision becomes the final agency action by the Secretary and will take effect immediately at the end of the 10 business days.

If the CW-1 employer chooses to request administrative review, either in lieu of submitting rebuttal evidence, or after the OFLC Administrator makes a determination on the rebuttal evidence, paragraph (b)(3) of this section explains that such requests must be submitted according to the appeal procedures of § 655.461. Paragraph (b)(4) provides that the timely filing of either the rebuttal evidence or a request for administrative review stays the revocation pending the outcome of the applicable proceeding. If the TLC is ultimately revoked, paragraph (b)(5) provides that OFLC will notify DHS and the Department of State.

Finally, paragraph (c) of this section lists a CW-1 employer's continuing obligations to its CW-1 and corresponding workers if the employer's CW-1 certification is revoked. The

obligations include reimbursement of actual inbound transportation, visa, and other expenses (if they have not been paid), payment of the workers' outbound transportation expenses, payment to the workers of the amount due under the three-fourths guarantee; and payment of any other wages, benefits, and working conditions due or owing to workers under this subpart.

When an employer's certification is revoked, the revocation applies to that particular certification only; violations relating to a particular certification will not be imputed to other certifications issued to the same employer for which there has been no finding of employer culpability. In some situations, however, OFLC may revoke all of an employer's existing labor certifications where the underlying violation applies to all of the employer's certifications. For instance, if OFLC finds that the employer meets either the basis for revocation in paragraph (a)(3) of this section (*i.e.*, failure to cooperate with a Department's investigation or with a Department official performing an investigation, inspection, audit, or law enforcement function), this finding could provide a basis for revoking any and all of the employer's existing TLCs approved under this subpart. Additionally, where OFLC finds that violations of paragraph (a)(1) or (2) of this section affect all of the employer's certifications, such as where an employer misrepresents its legal status, OFLC also may revoke all of that employer's certifications. Lastly, where an employer's certification has been revoked, OFLC may take a more careful look at the employer's other certifications to determine if similar violations exist that would warrant revocation.

The Department recognizes the seriousness of revocation as an administrative remedy; accordingly, the grounds for revocation reflect violations that significantly undermine the integrity of the CW-1 program. OFLC intends to use the authority to revoke only when an employer's actions warrant such a severe consequence.

4. Section 655.473, Debarment

This section outlines the process under which the OFLC Administrator may debar an employer, agent, attorney, or their successors in interest, from participation in the CW-1 program. The ability to suspend and debar entities from participating in the labor certification program is necessary to encourage compliance with program requirements and maintain the integrity of the program. Suspension and debarment authority is a critical tool for

enabling the Department to protect both U.S. and foreign workers, and to fulfill its statutory mandate to prevent adverse effects on U.S. workers due to the presence of temporary foreign labor.

The Department has repeatedly recognized its inherent suspension and debarment authority in the foreign labor certification context. As the Second Circuit found in *Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing the Department's authority to debar violators, the court found that "[t]he Secretary may . . . make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions . . . as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business." *Id.* at 89 n.6. In that case, the implied authority to debar existed even though the statute in question "specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment." *Id.* at 89. The court held that debarment may be necessary to "effective enforcement of a statute." *Id.* at 91.

The power to debar is also a function of a Federal agency's general authority to prescribe rules of procedure to determine who can practice and participate in administrative proceedings before it. *Koden v. DOJ*, 546 F.2d 228, 232-33 (7th Cir. 1977) (citing *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117 (1926)). Such power exists even if the agency does not have express statutory authority to prescribe the qualifications of those entities. *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979). An agency with the power to determine who may practice before it also has the authority to debar or discipline such individuals for unprofessional conduct. See *Koden*, 546 F.2d at 233. The Department has exercised such authority in the past in prescribing the qualifications, and procedures for denying the appearance, of attorneys and other representatives before the Department's OALJ under 29 CFR 18.34(g). See also *Smiley v. Director, OWCP*, 984 F.2d 278, 283 (9th Cir. 1993).

In order to encourage compliance, the regulations for the CW-1 program incorporate attestations, audits, and the remedial measure of debarment. Use of debarment as a mechanism to encourage compliance has been used by the

Department in its other foreign labor certification and attestation programs.⁴⁶ Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission.

Paragraph (a) of this section provides that the OFLC Administrator may debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under this subpart, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*. This section also notes that copies of final debarment decisions will be forwarded to DHS and DOS promptly. Paragraph (b) explains that the debarred employer, agent, attorney, or any successor in interest to any debarred employer, agent, or attorney, will be disqualified not only from filing under this subpart, but also from filing any labor certification applications⁴⁷ or labor condition applications⁴⁸ with the Department. If such an application is filed, it will be denied without review. The debarred party will be unable to file, or have filed on its behalf, labor certification applications in connection with not only the CW-1 program, but also applications under any other program managed by OFLC.

Paragraph (c) limits any period of debarment under paragraphs (a) and (b) to not more than 5 years for a single violation. This means that the total debarment period may exceed 5 years if more than one violation has occurred. For example, if the OFLC Administrator finds that an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, has committed two violations warranting debarment, the OFLC Administrator may impose two periods of debarment that will run consecutively, for a total of up to 10 years. The first period of

debarment would run from the date of the final agency decision, and the second period of debarment would run from the end of the first period of debarment.

Paragraph (d) of this section defines a violation for purposes of debarment. It explains that a violation includes one or more acts of commission or omission on the part of the employer, agent, or attorney, which involve: Failure to pay or provide the required wages, benefits, or working conditions to the employer's CW-1 workers and/or workers in corresponding employment; failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought; failure to comply with the employer's obligations to recruit U.S. workers; improper layoff or displacement of U.S. workers or workers in corresponding employment; failure to comply with the NOD process, as set forth in § 655.431, or the assisted recruitment process, as set forth in § 655.471; impeding the audit process, as set forth in § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function; employing a CW-1 worker outside of the Commonwealth, in an activity/activities not listed in the work contract, or outside the validity period of employment of the work contract, including any approved extension thereof; a violation of the requirements of § 655.423(n) or (o); a violation of any of the provisions listed in § 655.423(q); or any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected. For debarment purposes, a violation also includes fraud involving the *Application for Prevailing Wage Determination* or the *CW-1 Application for Temporary Employment Certification*, or a material misrepresentation of fact during the course of processing the *CW-1 Application for Temporary Employment Certification*. It is important to emphasize that debarment in the context of the CW-1 program can be triggered by a single act or omission, as opposed to a pattern or practice of such actions or omissions.

Paragraph (e) provides the standard for determining whether a violation is so substantial as to merit debarment. This section provides a nonexhaustive list of factors that the OFLC Administrator may consider in determining whether a violation is substantial, including: A previous history of violations under the CW-1

program; the number of CW-1 workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violations; the gravity of the violations; and the extent to which the violator achieved a financial gain due to the violations, or the potential financial loss or potential injury to the workers. This list provides comprehensive, but not exhaustive, grounds or factors that may advise the OFLC Administrator when making a determination as to whether the substantiality standard has been met. In assessing whether debarment is appropriate, the OFLC Administrator may also consider any mitigating facts the employer, agent, or attorney wishes to provide, such as efforts made in good faith to comply with the CW-1 program, an explanation from the person charged with the violation or violations, or a commitment to future compliance, taking into account the public health, interest, or safety, and previous history of violations under the CW-1 program.

Paragraph (f) provides the procedures for debarment. The procedures for debarment are similar to the debarment procedures that are currently in place in other temporary employment programs, particularly the H-2B program. See 20 CFR 655.73. As provided in paragraph (f)(1), the debarment process begins when the OFLC Administrator makes a determination to debar an employer, agent, attorney, or any successor in interest to the employer, agent, or attorney, and issues the party a Notice of Debarment. The notice must state the reasons for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and must inform the party subject to the notice of its right to submit rebuttal evidence or to request administrative review of the debarment by BALCA. If the party does not file rebuttal evidence or a request for BALCA review within 30 calendar days, the Notice of Debarment will take effect on the date specified in the notice or, if no date is specified, at the end of the 30-day period. If the party timely files rebuttal evidence or a request for review, the debarment will be stayed pending the outcome of the appeal as provided in paragraphs (f)(2) through (6) of this section.

If the party who received the Notice of Debarment wishes to file rebuttal evidence, paragraph (f)(2) provides that the OFLC Administrator will review any timely filed rebuttal evidence and will inform the party of the Final Determination on debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party must be

⁴⁶ 20 CFR 655.73; 20 CFR 655.182; and 20 CFR 656.31(f).

⁴⁷ See 20 CFR part 655, subpart A (governing H-2B temporary nonagricultural workers); 20 CFR part 655, subpart B (governing H-2A temporary agricultural workers); 20 CFR part 655, subpart F (governing the temporary employment of D-1 crewmembers on foreign vessels to perform longshore work at U.S. ports); and 20 CFR part 656 (permanent labor certification).

⁴⁸ 20 CFR 655, subpart H (governing labor condition applications for H-1B foreign nationals entering the U.S. on a temporary basis to work in specialty occupations or as fashion models, H-1b1 professionals entering under the U.S.-Chile or U.S.-Singapore Free Trade Agreements, and E-3 professionals entering under the U.S.-Australia Free Trade Agreement).

debarred, OFLC will inform the party of its right to request administrative review by BALCA. The party must request review within 30 calendar days after the date of the Final Determination, or the Final Determination becomes the final agency order and the debarment will take effect on the date specified in the Final Determination or, if no date is specified, at the end of that 30-day period.

Paragraph (f)(3) explains the process for requesting review of a Notice of Debarment or Final Determination. Paragraph (f)(3)(i) instructs the party requesting review of a debarment to file a written request with the Chief ALJ and simultaneously serve a copy on the OFLC Administrator. The request for review must clearly identify the particular debarment determination for which review is sought and must set forth the particular grounds for the request. If no request for review is filed, or if such a request is filed untimely, the debarment will take effect on the date specified in the Notice of Debarment or Final Determination or, if no date is specified, 30 calendar days from the date the Notice of Debarment or Final Determination is issued.

Paragraph (f)(3)(ii) explains that upon receipt of the request for review, the OFLC Administrator will promptly send a certified copy of the ETA case file to the Chief ALJ by means normally assuring expedited delivery. The Chief ALJ will immediately assign an ALJ to conduct the review. Paragraph (f)(3)(iii) states that the submissions of the parties must contain only legal argument and evidence that was within the record upon which the debarment was based. This ensures that all parties have fair notice of the facts potentially at issue during the review.

Paragraph (f)(4) explains the procedures for the ALJ's review. In considering requests for review, the ALJ must provide all parties with 30 calendar days to submit legal briefs. The ALJ must review the debarment determination on the basis of the record upon which the determination was made, the request for review, and any briefs submitted. The ALJ's decision must affirm, reverse, or modify the OFLC Administrator's determination, and provide the decision to the parties by means normally assuring expedited delivery. The ALJ's decision will become the final agency action, unless either party timely seeks review of the decision with the Administrative Review Board (ARB).

As set forth in paragraph (f)(5)(i), either party wishing review of the ALJ's decision must, within 30 calendar days of the decision, file a petition with the

ARB requesting review of the decision. Copies of the petition request must be served on all parties and on the ALJ. If the ARB declines to accept the petition or does not issue a notice accepting the petition for review within 30 calendar days after the receipt of a timely filed petition, the ALJ's decision becomes the final agency action. If the ARB accepts the petition for review, the ALJ's decision will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding. Paragraphs (f)(5)(ii) and (iii) provide that, upon receipt of the ARB's notice to accept the petition, the OALJ will promptly forward a copy of the complete appeal record to the ARB. Where the ARB has determined to review the decision and order, the ARB will notify each party of the issues raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which the presentation must be submitted. Paragraph (f)(6) requires the ARB's final decision to be issued within 90 calendar days from the notice granting the petition, and to be served upon all parties and the ALJ.

IV. Rulemaking Analyses and Notices

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects 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 (also referred to as "economically significant"); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. Id. OMB has

determined that this IFR is significant regulatory action under section 3(f) of E.O. 12866.

E.O. 13563 directs agencies to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; (2) tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and (3) in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This IFR is an E.O. 13771 regulatory action.

1. Summary of the Economic Analysis

The Department anticipates that the IFR will result in benefits, costs, and transfer payments, and will benefit U.S. workers and their wages, as described in more detail below. In particular, and as presented in Exhibit 1 below, U.S. workers are estimated to receive wage transfer payments of approximately \$102,042,965⁴⁹ from employers over the 11.25-year period that the IFR is in effect (from FY 2019 through FY 2030 Q1).

The benefits of the IFR are described qualitatively in section IV.A.2 (Benefits). The estimated costs and transfer payments are explained in sections IV.A.3 (Quantitative Analysis Considerations) and IV.A.4 (Subject-by-Subject Analysis).

The costs of the IFR are associated with rule familiarization and recordkeeping requirements for CW-1 employers, as well as the new processes by which employers will obtain a PWD and TLC from the Department. The estimated transfer payments reflect the requirement that employers pay for transportation, lodging, and subsistence for CW-1 workers traveling between the workers' country of origin and the CNMI. In addition, the estimated transfer payments include the anticipated impact on the wages of CW-1 workers and corresponding U.S. workers.

Exhibit 1 shows the total estimated costs and transfer payments of the IFR. The IFR is expected to have first-year costs of \$4,359,067 and first-year

⁴⁹For purposes of this economic analysis the Department has conservatively estimated a constant number of U.S. workers and corresponding total wage transfer to those U.S. workers in the CNMI throughout the life of the program.

transfer payments of \$42,286,653 (= \$28,877,022 to CW-1 workers + \$13,409,631 to U.S. workers). Over the 11.25-year period that the IFR is in effect, the annualized costs are estimated at \$3,190,028 and the

annualized transfer payments are estimated at \$35,522,023 (= \$22,117,381 to CW-1 workers + \$13,404,642 to U.S. workers) at a discount rate of 7 percent. In total, the IFR is estimated to result in a cost of \$24,284,121 and transfer

payments of \$270,411,736 (= \$168,368,772 to CW-1 workers + \$102,042,965 to U.S. workers) at a discount rate of 7 percent.

EXHIBIT 1—ESTIMATED COSTS AND TRANSFER PAYMENTS
[2018 dollars]

	Costs	Transfer payments		
		Total transfer payments	Transfer payments to CW-1 workers	Transfer payments to U.S. workers
First Year Total	\$4,359,067	\$42,286,653	\$28,877,022	\$13,409,631
Annualized, 3% discount rate, 11.25 years	3,086,620	34,794,484	21,387,623	12,406,860
Annualized, 7% discount rate, 11.25 years	3,190,028	35,522,023	22,118,381	13,404,642
Total, 3% discount rate, 11.25 years	29,106,568	328,109,108	201,683,522	126,425,586
Total, 7% discount rate, 11.25 years	24,284,121	270,411,736	168,368,772	102,042,965

2. Benefits

The purposes of the Workforce Act are (1) to increase the percentage of U.S. workers in the CNMI while maintaining the minimum number of foreign workers to meet the changing demands of the CNMI economy; (2) to encourage the hiring of U.S. workers; and (3) to ensure that no U.S. worker is at a competitive disadvantage for employment compared to a foreign worker or is displaced by a foreign worker. The Department anticipates that the provisions of this IFR will engender the benefits for U.S. workers that Congress intended in passing the Workforce Act. For example, the mandated payment of transportation and subsistence costs for CW-1 workers and corresponding U.S. workers will help ensure that U.S. workers are not placed at a competitive disadvantage compared to foreign workers. Additionally, the requirement to advertise the job opportunity on the CNMI Department of Labor's job listing system will improve the visibility of job openings to U.S. workers, thus expanding employment opportunities for U.S. workers. The requirement of a supervised labor market test and required submission of supporting documents by the employer will further provide that CW-1 workers are only hired if there are not sufficient U.S. workers in the Commonwealth who are able, willing, qualified, and available to perform the work for which CW-1 workers are sought. In addition, employers seeking to employ CW-1 workers must pay the highest of the prevailing wage, the Commonwealth minimum wage, or the Federal minimum wage; and corresponding U.S. workers must be offered at least the same wages, benefits, and working

conditions offered to foreign workers. These protections, and others in this regulation, will provide that the employment of nonimmigrant workers will not adversely affect the wages and working conditions of U.S. workers.

According to the BEA, the GDP of the CNMI increased 25.1 percent in 2017 after increasing 28.2 percent in 2016.⁵⁰ The most significant contributor to GDP growth was the accommodations and amusement industry, which includes tourism as well as the casino sector. The CNMI experienced substantial growth in visitor spending, particularly on casino gambling. The number of visitors to the CNMI grew 11 percent in 2016 and 24 percent in 2017.⁵¹ CW-1 workers are heavily employed in these sectors. The CNMI's Bureau of Environmental and Coastal Quality estimates that at least 8,124 employees will be needed to operate new hotels and casinos.⁵² The island of Tinian's labor demand alone is expected to be 6,359 workers for operation, more than twice the Tinian island population in 2016.⁵³ The 2017 "Report to the President on 902 Consultations" estimates that 11,613 workers will be needed to operate the new facilities by 2021.⁵⁴ This would be

⁵⁰ Source: U.S. Department of Commerce, Bureau of Economic Analysis, "CNMI GDP Increases in 2017: Growth Led by Tourism and Gaming Industry Revenue," https://www.bea.gov/system/files/2018-10/cnmigdp_101718.pdf.

⁵¹ Id.

⁵² Source: U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands Implementation of Federal Minimum Wage and Immigration Laws" (May 2017), <https://www.gao.gov/assets/690/684778.pdf>.

⁵³ Ibid.

⁵⁴ Source: Special Representatives of the United States and the Commonwealth of the Northern Mariana Islands, "Report to the President on 902 Consultations" (January 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/902-consultations-report-january-2017.pdf>.

a substantial increase from the 3,226 workers in the accommodation and food services industry in 2014 (80 percent of whom were not U.S. citizens) and 928 workers in the arts, entertainment, and recreation industry (78 percent of whom were not U.S. citizens).⁵⁵

Available CNMI labor could be recruited from recent graduates. CNMI high schools graduated 678 students in 2016, while the Northern Marianas College graduated 204 students, although this increase by new entrants may be somewhat offset by people who are retiring from the workforce.⁵⁶ Additionally, there were nearly 2,400 unemployed persons in the CNMI domestic workforce in 2016.⁵⁷ Workers could also be recruited from U.S. States, territories, and freely associated States. Higher prevailing wages and employer-provided transportation and subsistence costs may make relocation to the CNMI more attractive and feasible for workers in U.S. States, territories and freely associated States. Thus, the Department anticipates that the IFR will increase the percentage of U.S. workers employed in the CNMI.

3. Quantitative Analysis Considerations

The Department estimated the costs and transfer payments of the IFR relative to the existing baseline (*i.e.*, the current practices for complying with the CW-1 program as currently codified at 8 CFR 214.2(w)). In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in

⁵⁵ Source: U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands Implementation of Federal Minimum Wage and Immigration Laws" (May 2017), <https://www.gao.gov/assets/690/684778.pdf>.

⁵⁶ Id.

⁵⁷ Id.

previous rulemakings, this regulatory analysis focuses on the likely consequences of the IFR (*i.e.*, the costs and transfer payments that are expected to accrue to the affected entities). The analysis covers 11.25 years (from FY 2019 through FY 2030 Q1) to ensure it captures the major costs and transfer payments that are likely to accrue over time. The Department expresses all quantifiable impacts in 2018 dollars and uses discount rates of three and seven percent, pursuant to Circular A-4.

a. Estimated Number of CW-1 Employers, Applications, and Workers

To calculate the annual costs and transfer payments, the Department first needed to estimate the number of CW-1 employers, CW-1 TLC applications, and CW-1 workers (beneficiaries) in the 11.25-year period from FY 2019 through the first quarter of FY 2030. Both the

projected number of CW-1 employers and the projected number of CW-1 TLC applications are based on the projected number of CW-1 workers. The projected number of CW-1 workers is equivalent to the annual statutory limit (numerical cap) on the number of CW-1 beneficiaries.

To estimate the number of CW-1 employers, the Department identified the total number of unique employers in the USCIS beneficiary data over the FY 2012-2018 period, which was 2,404 employers.⁵⁸ Then, the Department calculated the ratio of projected CW-1 workers to employers for FY 2019, which is 5.4 (= 13,000 ÷ 2,404). Next, the Department divided the numerical cap of CW-1 workers for each fiscal year by 5.4 to project the number of CW-1 employers for each year in the analysis period. For example, the numerical cap

for FY 2020 is 12,500, so the projected number of CW-1 employers in FY 2020 is 2,315 (= 12,500 ÷ 5.4).

To estimate the number of CW-1 TLC applications, the Department calculated the average annual ratio of CW-1 beneficiaries to CW-1 petitions filed with DHS over the FY 2012-2018 period, which was 1.5 (rounded).⁵⁹ Then, the Department divided the numerical cap of CW-1 workers for each fiscal year by 1.5 to project the number of CW-1 applications for each year in the analysis period. For example, the numerical cap for FY 2019 is 13,000, so the projected number of CW-1 labor certification applications for FY 2019 is 8,636 (= 13,000 ÷ 1.5054).

Exhibit 2 presents the projected number of CW-1 employers, applications, and workers for each year in the analysis period.

EXHIBIT 2: PROJECTED NUMBER OF CW-1 EMPLOYERS, APPLICATIONS, AND WORKERS [FY 2019-FY 2030 Q1]

Fiscal year	Projected CW-1 employers	Projected CW-1 applications	Projected CW-1 workers (equivalent to numerical cap)
2019	2,404	8,636	13,000
2020	2,315	8,303	12,500
2021	2,222	7,971	12,000
2022	2,130	7,639	11,500
2023	2,037	7,307	11,000
2024	1,852	6,643	10,000
2025	1,667	5,979	9,000
2026	1,481	5,314	8,000
2027	1,296	4,650	7,000
2028	1,111	3,986	6,000
2029	926	3,321	5,000
2030 Q1	185	664	1,000

To estimate the number of CW-1 workers who will need to be provided with transportation, lodging, and subsistence payments, the Department used petition renewal data from USCIS.⁶⁰ The data reveal that employers filed extension-of-stay petitions for 63 percent of CW-1 workers in FYs 2016-18, indicating that those CW-1 workers were already living in the CNMI. Therefore, the DOL projects that 37 percent of CW-1 workers will travel to the CNMI from their country of origin in FY 2019 through the first quarter of FY 2030.

b. Estimated Number of Corresponding U.S. Workers

To estimate the number of corresponding U.S. workers in the CNMI in FY 2019 through the first quarter of FY 2030, the Department used 2016 data from the CNMI Department of Commerce on the number of U.S. citizens and non-U.S. citizens by major occupation.⁶¹ The Department calculated the ratios of the number of U.S. citizens to non-U.S. citizens by major occupation, and then applied those ratios to the pertinent number of CW-1 workers in each detailed occupation in FY 2018. Totaling these

results, the Department estimates that there were 8,353 corresponding U.S. workers in FY 2018.⁶² This estimate remains constant throughout the analysis because the Department does not expect the number of corresponding U.S. workers to decrease; in fact, the number may increase.

c. Compensation Rates

Exhibit 3 presents the hourly compensation rates for the occupational categories that are expected to experience an increase in workload due to the provisions of the IFR. The Department used the mean hourly wage rate for private sector Human Resources

⁵⁸ Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table. In accordance with 8 CFR 214.2(w)(9), a petitioning employer may include more than one beneficiary in a CW-1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location.

⁵⁹ Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table.

⁶⁰ Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table.

⁶¹ CNMI Department of Commerce, Statistical Yearbook 2017, Table 5.24 "Average Hourly Wages

by Occupation and Citizenship, CNMI: 2016," <http://ver1.cnmicommerce.com/sy-2017-table-5-17-31-wage-survey/>.

⁶² Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table.

Managers and Translators in the CNMI.⁶³ These hourly wage rates include benefits. The Department adjusted the 2016 CNMI wages to 2018 dollars, and then increased them by 17 percent to account for overhead costs

such as rent, utilities, and office equipment.⁶⁴ The wage rates of Federal employees at NPWC and NPC in Chicago were estimated using the midpoint (Step 5) for Grade 12 of the General Schedule in the Chicago locality area.⁶⁵ The Department multiplied the hourly wage

rate by 2 to account for a fringe benefits rate of 69 percent⁶⁶ and an overhead rate of 31 percent.⁶⁷

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 3—COMPENSATION RATES
[2018 dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Hourly compensation rate a × b
<i>CNMI Private Sector Employees:</i>				
Human Resources Manager	N/A	\$20.08	1.17	\$23.49
Translator	N/A	\$16.01	1.17	18.73
<i>Federal Government Employees:</i>				
NPWC Staff	12	44.02	2	88.04
NPC Staff	12	44.02	2	88.04

4. Subject-by-Subject Analysis

The Department’s subject-by-subject analysis covers the estimated costs and transfer payments of the IFR. In accordance with Circular A–4, the Department considers transfer payments to be payments from one group to another that do not affect the total resources available to society.

a. Costs

The following sections describe the costs of the IFR. The costs of the IFR may vary with the size of the CW–1 employers in the CNMI. As such, the Department requests comments from the public on the distribution of participating CW–1 firms by size.

(1) Rule Familiarization

When the IFR takes effect, employers of CW–1 workers will need to familiarize themselves with the new regulations, thereby incurring a one-time cost in the first year. To estimate the first-year cost of rule familiarization, the Department multiplied the estimated number of unique CW–1 employers in FY 2019 (2,404) by the estimated amount of time required to review the rule based on the

Department’s experience with other TLC programs (1 hour) and by the hourly compensation rate of Human Resources Managers (\$23.49 per hour). This calculation results in a one-time undiscounted cost of \$56,470 (= 2,404 employers × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$5,814 at a discount rate of 3 percent and \$6,933 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$54,825 at a discount rate of 3 percent and \$52,776 at a discount rate of 7 percent.

(2) Recordkeeping

The IFR requires that all CW–1 employers filing a CW–1 Application for Temporary Employment Certification retain documents and records for a period of 3 years from the date of certification. Employers may keep these documents and records electronically. Based on the Department’s experience administering other TLC programs, the documents and records to be retained by the employer are critical to ensuring an appropriate level of integrity and accountability in the CW–1 program, and to protecting the wages, benefits,

and other guarantees afforded to CW–1 workers and workers in corresponding employment. For purposes of this analysis, the Department assumes that employers will not retain these documents and records electronically, although they are permitted to do so. Therefore, the following recordkeeping costs may be an overestimation.

To calculate the estimated recordkeeping costs associated with purchasing a filing cabinet for document retention, the Department multiplied the number of unique CW–1 employers in FY 2019 (2,404) by the estimated cost of a filing cabinet (\$89.99),⁶⁸ which equals \$216,336. This cost is assumed to be a one-time cost in the first year. The annualized cost over the 11.25-year period is estimated at \$22,273 at a discount rate of 3 percent and \$26,559 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$210,035 at a discount rate of 3 percent and \$202,183 at a discount rate of 7 percent.

To estimate the recordkeeping costs associated with printing CW–1 applications, the Department multiplied the number of projected CW–1 applications in each year by the

⁶³ Source: CNMI Department of Commerce, “2016 CNMI Prevailing Wage and Workforce Assessment Study,” <http://i2io42u7ucg3bwn5b3l0fquc.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/2016-PWWAS-Report-One-Full-Report-v1.1-1.pdf>. The wage rates used here “include all applicable fringe benefits.”

⁶⁴ Source: Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program” (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

⁶⁵ Source: Office of Personnel Management, “2018 General Schedule (GS) Locality Pay Tables,” <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2018/general-schedule/>.

⁶⁶ Source: Congressional Budget Office, “Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015” (April 2017), <https://www.cbo.gov/publication/52637>. The wages of Federal workers averaged \$38.30 per hour over the study period, while the benefits averaged \$26.50 per hour, which is a benefits rate of 69 percent.

⁶⁷ Source: U.S. Department of Health and Human Services, “Guidelines for Regulatory Impact

Analysis” (2016), https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf. On page 30, HHS states, “As an interim default, while HHS conducts more research, analysts should assume overhead costs (including benefits) are equal to 100 percent of pretax wages. . . .” To isolate the overhead rate, the Department subtracted the benefits rate of 69 percent from the recommended rate of 100 percent.

⁶⁸ Source: https://www.staples.com/staples-2-drawer-vertical-file-cabinet-charcoal-letter-18-d-52143/product_2806760.

estimated number of pages in a CW-1 application (30 pages) and by the estimated paper and printing cost (\$0.09 per page) to estimate the total cost of printing applications. For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$23,317 (= 8,636 applications × 30 pages × \$0.09 per page). The annualized cost over the 11.25-year period is estimated at \$17,354 at a discount rate of 3 percent and \$17,925 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$163,647 at a discount rate of 3 percent and \$136,454 at a discount rate of 7 percent.

To calculate the estimated recordkeeping costs associated with a Human Resources Manager printing and filing documents, the Department multiplied the projected number of CW-1 applications in each year by the estimated time required to print and file documents (20 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$66,944 (= 8,636 applications × 20 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$49,824 at a discount rate of 3 percent and \$51,462 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$469,832 at a discount rate of 3 percent and \$391,758 at a discount rate of 7 percent.

(3) Applications

(a) Electronic Filing of Request for Prevailing Wage Determination

The IFR establishes the process by which employers obtain a TLC from the Department for use in petitioning DHS to employ a nonimmigrant worker in CW-1 status, which involves four basic steps. First, the employer must request and obtain a PWD from the Department's OFLC NPWC before filing a *CW-1 Application for Temporary Employment Certification*. To make this request, the employer will submit a completed *Application for Prevailing Wage Determination* to the NPWC containing information about the job opportunity in which the nonimmigrant workers will be employed. Based on a review of the information provided by the employer, the NPWC will issue a PWD, indicate the source and validity period for its use, and return the application with its endorsement to the employer.

To estimate the labor costs to employers associated with electronically filing a PWD request, the

Department multiplied the number of projected CW-1 applications in each year by the estimated time required to file the request based on the Department's experience with other TLC programs (46 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$156,202 (= 8,636 applications × 46 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$116,255 at a discount rate of 3 percent and \$120,079 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,096,274 at a discount rate of 3 percent and \$914,102 at a discount rate of 7 percent.

To estimate the labor costs to the Federal Government associated with reviewing PWD requests and issuing PWDs, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to review a PWD request and issue a PWD (1 hour) and by the hourly compensation rate for NPWC staff (\$88.04 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$760,313 (= 8,636 applications × 1 hour × \$88.04 per hour). The annualized cost over the 11.25-year period is estimated at \$565,871 at a discount rate of 3 percent and \$584,485 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$5,336,117 at a discount rate of 3 percent and \$4,449,397 at a discount rate of 7 percent.

(b) Appealing a Prevailing Wage Determination

An employer that does not agree with a PWD may appeal under 20 CFR 655.411. The employer must make a written request to the NPWC Director within 7 business days from the date the PWD was issued.

To estimate the labor costs associated with filing an appeal of a PWD, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will involve an appeal based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so

the estimated FY 2019 cost is \$10,143 (= 8,636 applications × 5 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$7,549 at a discount rate of 3 percent and \$7,797 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$71,187 at a discount rate of 3 percent and \$59,357 at a discount rate of 7 percent.

(c) Electronic Filing of CW-1 Application

Next, the IFR requires the employer to file a completed *CW-1 Application for Temporary Employment Certification* with the OFLC NPC no more than 120 calendar days before the date of need or, for employers seeking to extend the employment of a CW-1 worker, no more than 180 calendar days before the date on which the CW-1 status expires. The NPC CO will review the employer's application for compliance with all applicable program requirements and issue either a NOD or NOA. Where deficiencies in the application are discovered, the NOD will provide the employer with 10 business days to correct the deficiencies.

To calculate the estimated labor costs associated with electronically filing a CW-1 application, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to file the application (45 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$152,145 (= 8,636 applications × 45 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$113,235 at a discount rate of 3 percent and \$116,960 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,067,799 at a discount rate of 3 percent and \$890,359 at a discount rate of 7 percent.

To estimate the labor costs to the Federal Government associated with reviewing applications and issuing initial determinations, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to review an application and issue an initial determination (1 hour) and by the hourly compensation rate for OFLC NPC staff (\$88.04 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$760,313 (= 8,636 applications × 1 hour × \$88.04 per hour). The annualized cost over the 11.25-year period is estimated at

\$565,871 at a discount rate of 3 percent and \$584,485 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$5,336,117 at a discount rate of 3 percent and \$4,449,397 at a discount rate of 7 percent.

(d) Proof of Agent Relationship

The IFR requires all agents who file CW-1 applications on behalf of employers to demonstrate that a bona fide relationship exists between them and the employer. The Department will accept a copy of the agent agreement or any other document demonstrating the agent's authority to act on behalf of the employer.

To estimate the labor costs associated with creating, printing, signing, and delivering a document confirming the agent relationship, the Department multiplied the number of projected CW-1 employers in each year by the estimated percentage of employers that will be represented based on the Department's experience with other TLC programs (25 percent of employers). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 employers in FY 2019 is 2,404, so the estimated FY 2019 cost is \$7,059 (= 2,404 employers × 25 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$5,260 at a discount rate of 3 percent and \$5,433 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$49,603 at a discount rate of 3 percent and \$41,359 at a discount rate of 7 percent.

(e) Contracts With Third Parties To Comply With Prohibitions

The IFR requires employers to prohibit in a written contract any agent or recruiter whom the employer engages in recruitment of CW-1 workers, from seeking or receiving payments or other compensation from prospective workers. The required contractual prohibition applies to the agents and employees of the recruiting agent, and encompasses both direct and indirect fees.

To estimate the labor costs associated with creating, printing, signing, and delivering the written contract, the Department multiplied the number of projected CW-1 employers in each year by the estimated percentage of employers that will use an agent or recruiter based on the Department's

experience with other TLC programs (55 percent of employers). Then, the Department multiplied this number by the estimated time required to comply with this provision (15 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 employers in FY 2019 is 2,404, so the estimated FY 2019 cost is \$7,765 (= 2,404 employers × 55 percent × 15 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$5,786 at a discount rate of 3 percent and \$5,976 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$54,564 at a discount rate of 3 percent and \$45,495 at a discount rate of 7 percent.

(f) Appendix A of Form ETA-9142C, Employer-Client Information of Job Contractor

The IFR requires an employer filing as a job contractor and acting as a joint employer with its employer-client to submit a single application. In filing the application, the job contractor must disclose the identity and contact information of its employer-client by completing Appendix A.

To estimate the labor costs associated with completing Appendix A, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will include Appendix A based on the Department's experience with other TLC programs (35 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (15 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$17,750 (= 8,636 applications × 35 percent × 15 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$13,211 at a discount rate of 3 percent and \$13,645 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$124,577 at a discount rate of 3 percent and \$103,875 at a discount rate of 7 percent.

(g) Appendix B of Form ETA-9142C, Additional Place(s) of Employment and Wage Information

If work needs to be performed at worksite locations other than the primary one identified on Form ETA-9142C, the employer must complete Appendix B identifying all places of employment and details about the wage

offers for each of those places of employment. OFLC will use this information to ensure all places of employment are located within the CNMI and that the employer is offering wages that are at least equal to the prevailing wage covering each place of employment.

To estimate the labor costs associated with completing Appendix B, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will include Appendix B based on the Department's experience with other TLC programs (70 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (20 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$46,861 (= 8,636 applications × 70 percent × 20 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$34,876 at a discount rate of 3 percent and \$36,024 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$328,882 at a discount rate of 3 percent and \$274,231 at a discount rate of 7 percent.

(h) Appendix C of Form ETA-9142C, Attorney/Agent/Employer Declarations

The IFR requires an employer to complete Appendix C to attest to compliance with all of the terms, assurances, and obligations of the CW-1 program. The agent or attorney identified in the *CW-1 Application for Temporary Employment Certification* must also sign and date Appendix C, declaring that it has been designated by the employer to act on the employer's behalf.

To estimate the labor costs associated with completing Appendix C, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to comply with this provision (20 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$66,944 (= 8,636 applications × 20 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$49,824 at a discount rate of 3 percent and \$51,462 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$469,832 at a discount rate

of 3 percent and \$391,758 at a discount rate of 7 percent.

(i) Request for Waiver of Obtaining PWD Due to Emergency Situation

The IFR permits an employer that is unable to obtain a PWD prior to filing an application to request a waiver by submitting a letter of explanation along with the completed application. The employer must provide a detailed statement describing the good and substantial cause that necessitated the waiver request. This provision provides an employer experiencing a qualifying emergency situation with some degree of flexibility to participate in the CW-1 program without first obtaining a PWD from the NPWC.

To estimate the labor costs associated with composing and submitting a waiver request, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will include a waiver request based on the Department's experience with other TLC programs (10 percent of applications). (10 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$10,143 (= 8,636 applications × 10 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$7,549 at a discount rate of 3 percent and \$7,797 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$71,187 at a discount rate of 3 percent and \$59,357 at a discount rate of 7 percent.

(j) Submission of a Modified Application

The IFR permits an employer to modify and resubmit its application to address insufficiencies listed in the NOD. The employer must respond to the NOD and correct any deficiencies within 10 business days of issuance.

To estimate the labor costs associated with modifying an application, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be modified based on the Department's experience with other TLC programs (one-third of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly

compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$67,620 (= 8,636 applications × 33.3 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$50,327 at a discount rate of 3 percent and \$51,982 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$474,577 at a discount rate of 3 percent and \$395,715 at a discount rate of 7 percent.

(k) Amending the Application

The IFR permits an employer to request to amend its application at any time before the Department makes a final determination to grant or deny the application. The employer may request to increase the number of workers requested, modify the period of employment, or request other minor changes to the application.

To estimate the labor costs associated with amending an application, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be amended based on the Department's experience with other TLC programs (15 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$15,214 (= 8,636 applications × 15 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$11,324 at a discount rate of 3 percent and \$11,696 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$106,780 at a discount rate of 3 percent and \$89,036 at a discount rate of 7 percent.

(l) Posting the Job With the CNMI Department of Labor

If all program requirements are met, the employer will receive a NOA from the CO directing the recruitment of U.S. workers for the job opportunity and requesting a written report of the employer's recruitment efforts. To encourage the hiring of U.S. workers for employment in the CNMI, the employer will be required to advertise the job opportunity on the CNMI Department of Labor's job listing system.

To calculate the estimated labor costs associated with posting a job

opportunity with the CNMI Department of Labor, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to post the job ad (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$202,860 (= 8,636 applications × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$150,980 at a discount rate of 3 percent and \$155,947 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,423,732 at a discount rate of 3 percent and \$1,187,146 at a discount rate of 7 percent.

(m) Contacting Former U.S. Employees

As part of an employer's recruitment efforts and to encourage the hiring of U.S. workers, the IFR requires employers to contact former U.S. employees and solicit their return to the job.

To estimate the labor costs associated with contacting former U.S. employees regarding the job opportunity, the Department multiplied the number of projected CW-1 applications in each year by the estimated number of former U.S. employees that will be contacted based on the Department's experience with other TLC programs (an average of 1.5 former U.S. employees per application). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$304,289 (= 8,636 applications times; 1.5 former U.S. employees × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$226,471 at a discount rate of 3 percent and \$233,920 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$2,135,598 at a discount rate of 3 percent and \$1,780,719 at a discount rate of 7 percent.

(n) Posting a Job Notice

As part of an employer's recruitment efforts and to encourage the hiring of U.S. workers, the IFR requires employers to post a copy of the *CW-1 Application for Temporary Employment Certification* in at least two conspicuous locations at the place(s) of employment or in some other manner that provides reasonable notification to all employees

in the area in which the work will be performed by the CW-1 workers.

To estimate the labor costs associated with posting a notice of the job, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to post the notice (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$101,430 (= 8,636 applications × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$75,490 at a discount rate of 3 percent and \$77,973 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$711,866 at a discount rate of 3 percent and \$593,573 at a discount rate of 7 percent.

(o) Additional Recruitment

As part of an employer's recruitment efforts and to encourage the hiring of U.S. workers, the IFR requires employers to conduct other recruitment activities such as contacting community-based organization or trade unions when required by the CO.

To estimate the labor costs associated with conducting additional recruiting if ordered by the CO, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will require additional recruitment based on the Department's experience with other TLC programs (35 percent of applications). Then, the Department multiplied this number by the estimated time required to make the additional outreach based on the Department's experience with other TLC programs (15 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$17,750 (= 8,636 applications × 35 percent × 15 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$13,211 at a discount rate of 3 percent and \$13,645 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$124,577 at a discount rate of 3 percent and \$103,875 at a discount rate of 7 percent.

(p) Electronic Submission of Recruitment Report

The recruitment period will last approximately 21 calendar days and all employer-conducted recruitment must be completed before the written

recruitment report can be prepared, signed, and submitted to the NPC for review. Upon review of the recruitment report, the CO will make a determination either to certify or to deny the CW-1 *Application for Temporary Employment Certification*. The employer will use the Final Determination notice and any other required documentation to support the filing of a CW-1 petition with USCIS.

To estimate the labor costs associated with electronically submitting a recruitment report, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to file the report (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$202,860 (= 8,636 applications × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$150,980 at a discount rate of 3 percent and \$155,947 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,423,732 at a discount rate of 3 percent and \$1,187,146 at a discount rate of 7 percent.

To estimate the labor costs to the Federal Government associated with reviewing recruitment reports and issuing final determinations, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to review a recruitment report and issue a final determination (1 hour) and by the hourly compensation rate for OFLC NPC staff (\$88.04 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$760,313 (= 8,636 applications × 1 hour × \$88.04 per hour). The annualized cost over the 11.25-year period is estimated at \$565,871 at a discount rate of 3 percent and \$584,485 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$5,336,117 at a discount rate of 3 percent and \$4,449,397 at a discount rate of 7 percent.

(q) Translating the Work Contract

The IFR contains provisions related to the disclosure of the work contract. The employer is required to provide a copy of the work contract to a CW-1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day the work commences. For a CW-1 worker changing to another

CW-1 employer, the work contract must be provided no later than the time the subsequent offer of employment is made. The work contract must be provided in a language understood by the worker. The costs associated with the disclosure requirements include translating costs, time and materials costs, and postage costs.

To estimate the labor costs associated with translating the work contract, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to translate the work contract (1 hour) and by the hourly compensation rate for Translators (\$18.73 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$161,752 (= 8,636 applications × 1 hour × \$18.73 per hour). The annualized cost over the 11.25-year period is estimated at \$120,386 at a discount rate of 3 percent and \$124,346 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,135,228 at a discount rate of 3 percent and \$946,583 at a discount rate of 7 percent.

(r) Reproducing the Work Contract

To estimate the labor costs associated with reproducing the work contract, the Department added the projected number of CW-1 workers in each year to the estimated number of corresponding U.S. workers (8,353 U.S. workers). The Department then multiplied the estimated total number of workers in each year by the amount of time required to reproduce each work contract (5 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 workers in FY 2019 is 13,000 and the projected number of U.S. workers is 8,353, which totals 21,353 workers. So, the estimated FY 2019 labor cost is \$41,631 (= 21,353 workers × 5 minutes × \$23.49 per hour).

To estimate the materials costs associated with reproducing the work contract, the Department again added the projected number of CW-1 workers in each year to the estimated number of corresponding U.S. workers (8,353 U.S. workers). The Department then multiplied the estimated total number of workers in each year by the estimated length of a work contract (3 pages) and by the estimated per-page printing cost (\$0.09). For example, the projected number of CW-1 and U.S. workers in FY 2019 is 21,353, so the estimated FY 2019 materials cost is \$5,765 (= 21,353 workers × 3 pages × \$0.09 per page).

Combining the labor and materials costs for reproducing the work contract,

the first-year cost is estimated at \$47,397 (= \$41,631 + \$5,765). The annualized cost over the 11.25-year period is estimated at \$41,049 at a discount rate of 3 percent and \$41,529 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$387,085 at a discount rate of 3 percent and \$316,138 at a discount rate of 7 percent.

(s) Mailing the Work Contracts

To estimate the labor costs associated with mailing work contracts to workers, the Department first added the projected number of CW-1 workers in each year to the estimated number of corresponding U.S. workers (8,353 U.S. workers). The Department then multiplied the estimated total number of workers in each year by the amount of time required to mail each work contract (10 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 workers in FY 2019 is 13,000 and the projected number of U.S. workers is 8,353, which totals 21,353 workers. So, the estimated FY 2019 labor cost is \$83,764 (= 21,353 workers × 10 minutes × \$23.49 per hour).

To estimate the postage costs associated with mailing work contracts to CW-1 workers not living in the CNMI, the Department multiplied the projected number of CW-1 workers in each year by the estimated percentage of CW-1 workers not currently living in the CNMI (37 percent) and by the estimated international postage cost (\$1.15). For example, the projected number of CW-1 workers in FY 2019 is 13,000, so the estimated FY 2019 cost to employers for mailing work contracts to CW-1 workers not living in the CNMI is \$5,532 (= 13,000 CW-1 workers × 37 percent × \$1.15 per work contract).

To estimate the postage costs associated with mailing work contracts to workers currently in the CNMI, the Department multiplied the projected number of CW-1 workers by the estimated percentage of CW-1 workers currently in the CNMI (63 percent) and then added the estimated number of corresponding U.S. workers (8,353 U.S. workers) to obtain the total number of work contracts to be mailed within the CNMI. The Department multiplied this estimate by the current cost of a U.S. postage stamp (\$0.50). For example, the projected number of CW-1 workers in FY 2019 is 13,000, so the estimated number of CW-1 workers currently in the CNMI is 8,190 (= 13,000 × 63 percent). Combined with 8,353 U.S. workers, the total number of workers in the CNMI who would be mailed a work

contract in FY 2019 is estimated to be 16,543. Accordingly, the estimated FY 2019 cost to employers for mailing work contracts within the CNMI is \$8,272 (= 16,543 workers × \$0.50 per work contract).

Combining the labor and materials costs for mailing the work contract, the first-year cost is estimated at \$97,568 (= \$83,764 + \$5,532 + \$8,272). The annualized cost over the 11.25-year period is estimated at \$84,119 at a discount rate of 3 percent and \$85,152 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$793,235 at a discount rate of 3 percent and \$648,223 at a discount rate of 7 percent.

(t) Notification of Abandonment or Termination

The IFR requires employers to notify the Department when any of their CW-1 workers voluntarily abandons the job or is terminated before the certified end date of employment. This task involves writing an email message to the Department to meet this requirement.

To estimate the labor costs associated with notifying the Department of abandonment or termination of employment, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be affected by this requirement based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (10 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$1,694 (= 8,636 applications × 5 percent × 10 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$1,261 at a discount rate of 3 percent and \$1,302 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$11,888 at a discount rate of 3 percent and \$9,913 at a discount rate of 7 percent.

(u) Extension of the Certified Period of Employment

The IFR permits employers, under certain circumstances involving weather conditions or other factors beyond the control of the employer, to request in writing an extension of the certified period of employment. The employer must submit the written request to the CO with documentation showing that the extension is needed and that the

need could not have been reasonably foreseen by the employer.

To estimate the labor costs associated with requesting an extension of the certified period of employment, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications for which an extension will be requested based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$5,071 (= 8,636 applications × 5 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$3,775 at a discount rate of 3 percent and \$3,899 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$35,593 at a discount rate of 3 percent and \$29,679 at a discount rate of 7 percent.

(v) Administrative Appeals

The IFR permits an employer that has certification denied to request administrative review of the decision by BALCA. To do so, an employer must submit a written request for review within 10 business days from the date of determination.

To estimate the labor costs associated with seeking administrative review, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications for which administrative review will be requested based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$10,143 (= 8,636 applications × 5 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$7,549 at a discount rate of 3 percent and \$7,797 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$71,187 at a discount rate of 3 percent and \$59,357 at a discount rate of 7 percent.

(w) Request for Withdrawal

The IFR permits employers to request withdrawal of an application any time after it has been accepted for processing, as long as the employer complies with the terms and conditions of employment in the application and work contract with respect to all workers recruited and hired in connection with that application. The employer must submit a request in writing to the NPC stating the reason(s) for withdrawal.

To estimate the labor costs associated with requesting withdrawal of an application, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be withdrawn based on the Department's experience with other TLC programs (10 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (10 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$3,388 (= 8,636 applications × 10 percent × 10 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$2,521 at a discount rate of 3 percent and \$2,604 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$23,776 at a discount rate of 3 percent and \$19,825 at a discount rate of 7 percent.

(x) Certifying Officer-Ordered Assisted Recruitment

If an employer violates the terms of the CW-1 program and the Department

determines that the violation does not warrant debarment, the CO may require the employer to undergo assisted recruitment for future applications. This requirement not only protects the integrity of the CW-1 program but can also be an effective tool to help an employer that, due to either program inexperience or confusion, commits an unintentional violation in its application and indicates a need for assistance from the Department.

To estimate the labor costs associated with conducting assisted recruitment, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be affected by this requirement based on the Department's experience with other TLC programs (0.5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$1,014 (= 8,636 applications × 0.5 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$755 at a discount rate of 3 percent and \$780 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$7,119 at a discount rate of 3 percent and \$5,936 at a discount rate of 7 percent.

b. Transfer Payments

This section discusses the quantifiable transfer payments related to transportation and subsistence costs, as well as the impact on the wages of CW-

1 workers and corresponding U.S. workers.

(1) Transportation and Subsistence Costs

The IFR requires CW-1 employers to pay the inbound transportation and daily subsistence costs of workers who complete 50 percent of the job order period and the outbound transportation and subsistence costs of workers who complete the entire job order period. Reasonable expenses incurred between a worker's hometown and the consular city are within the scope of inbound transportation and subsistence costs, including lodging costs while CW-1 workers travel from their hometown to the consular city to wait to obtain a visa and from the consular city to the place of employment. The impacts of requiring CW-1 employers to pay for workers' transportation and subsistence represent transfers from CW-1 employers to workers because the impacts are distributional effects, not a change in society's resources.⁶⁹

To estimate the transfer payments related to transportation and subsistence, the Department first calculated the proportion of CW-1 workers from each of the 10 most common countries of origin in FY 2016–2018. The Department then averaged these proportions and normalized them to account for the small portion of CW-1 workers in each year originating from countries other than the 10 most common countries of origin. These normalized proportions, presented in Exhibit 4, were used to create weighted averages of travel costs in the analysis below.

EXHIBIT 4—AVERAGE PROPORTION OF WORKERS BY COUNTRY OF ORIGIN
[FY 2016–2018]

Country	FY 2016	Proportion (percent)	FY 2017	Proportion (percent)	FY 2018	Proportion (percent)	Average proportion (percent)	Normalized proportion (percent)
Philippines	7,086	53.28	6,497	47.90	6,043	65.02	55.40	56.34
China	4,844	36.42	5,298	39.06	1,703	18.32	31.27	31.80
South Korea	433	3.26	380	2.80	374	4.02	3.36	3.42
Bangladesh	473	3.56	352	2.60	210	2.26	2.80	2.85
Japan	142	1.07	200	1.47	92	0.99	1.18	1.20
Taiwan	35	0.26	240	1.77	276	2.97	1.67	1.70
Malaysia	26	0.20	200	1.47	202	2.17	1.28	1.30
Vietnam	4	0.03	116	0.86	95	1.02	0.64	0.65
Thailand	56	0.42	58	0.43	54	0.58	0.48	0.48
India	14	0.11	24	0.18	44	0.47	0.25	0.26
Top 10 Total	13,113	98.60	13,365	98.54	9,093	97.84	98.33	100.00

⁶⁹For the purpose of this analysis, CW-1 workers are considered temporary residents of the United States.

EXHIBIT 4—AVERAGE PROPORTION OF WORKERS BY COUNTRY OF ORIGIN—Continued
[FY 2016–2018]

Country	FY 2016	Proportion (percent)	FY 2017	Proportion (percent)	FY 2018	Proportion (percent)	Average proportion (percent)	Normalized proportion (percent)
Total	13,299	100.00	13,563	100.00	9,294	100.00	.....	.....

The Department estimated total transportation, lodging, and subsistence costs to and from the CNMI based on four components: (1) The average estimated cost of a one-way bus or train trip from three major regional cities to the consular city; (2) the estimated cost of lodging in the consular city for 1 night; (3) the minimum daily

subsistence amount for workers traveling to their place of employment; and (4) the estimated cost of a one-way flight from the consular city to Saipan. The Department estimated the total one-way cost from each country of origin by adding these four components and then estimating a weighted average total one-way travel cost by multiplying the total

one-way travel cost from each country of origin with the appropriate normalized weight from Exhibit 4 and summing the resulting weighted costs. The Department estimated the total round-trip travel costs by multiplying the weighted average total one-way travel cost by two. These figures are presented in Exhibit 5.

EXHIBIT 5—ESTIMATED COST OF TRAVEL FOR CW-1 WORKERS

Item	Cost (2018 dollars)
Philippines	
One-way travel—within Manila	\$0.00
One-way travel—Quezon City to Manila	1.00
One-way travel—Caloocan to Manila	1.00
Average—Home city to Manila	0.67
Lodging Cost—Manila	1.47
Meals	12.26
One-way travel—Manila to Saipan	397.00
Total one-way travel	411.40
China	
One-way travel—within Beijing	0.00
One-way travel—Chongqing to Beijing	77.00
One-way travel—Shanghai to Beijing	87.50
Average—Home city to Beijing	54.83
Lodging cost—Beijing	8.74
Meals	12.26
One-way travel—Beijing to Saipan	410.20
Total one-way travel	486.03
South Korea	
One-way travel—within Seoul	0.00
One-way travel—Busan to Seoul	27.00
One-way travel—Incheon to Seoul	1.50
Average—Home city to Seoul	9.50
Lodging cost—Seoul	9.01
Meals	12.26
One-way travel—Seoul to Saipan	206.00
Total one-way travel	236.77
Bangladesh	
One-way travel—within Dhaka	0.00
One-way travel—Sylhet to Dhaka	6.00
One-way travel—Chittagong to Dhaka	12.00
Average—Home city to Dhaka	6.00
Lodging cost—Dhaka	15.00
Meals	12.26
One-way travel—Dhaka to Saipan	970.00

EXHIBIT 5—ESTIMATED COST OF TRAVEL FOR CW-1 WORKERS—Continued

Item	Cost (2018 dollars)
Total one-way travel	1,003.26
Japan	
One-way travel—within Tokyo	0.00
One-way travel—Yokohama to Tokyo	5.50
One-way travel—Osaka to Tokyo	60.00
Average—Home city to Tokyo	21.83
Lodging cost—Tokyo	12.26
Meals	12.26
One-way travel—Tokyo to Saipan	336.00
Total one-way travel	382.35
Taiwan	
One-way travel—New Taipei City to Taipei City	1.00
One-way travel—Taichung to Taipei City	6.50
One-way travel—Kaohsiung to Taipei City	21.00
Average—Home city to Taipei City	9.50
Lodging cost—Taipei City .....	.79
Meals	12.26
One-way travel—Taipei City to Saipan	308.00
Total one-way travel	339.55
Malaysia	
One-way travel—within Kuala Lumpur	0.00
One-way travel—Ipoh to Kuala Lumpur	5.00
One-way travel—Iskander Puteri to Kuala Lumpur	21.50
Average—Home city to Kuala Lumpur	8.83
Lodging cost—Kuala Lumpur	5.08
Meals	12.26
One-way travel—Kuala Lumpur to Saipan	445.00
Total one-way travel	471.17
Vietnam	
One-way travel—within Hanoi	0.00
One-way travel—Ho Chi Minh City to Hanoi	30.00
One-way travel—Da Nang to Hanoi	14.00
Average—Home city to Hanoi	14.67
Lodging cost—Hanoi	5.08
Meals	12.26
One-way travel—Hanoi to Saipan	419.00
Total one-way travel	448.63
Thailand	
One-way travel—within Bangkok	0.00
One-way travel—Pattaya to Bangkok	5.00
One-way travel—Nonthaburi to Bangkok	1.00
Average—Home city to Bangkok	2.00
Lodging cost—Bangkok	3.68
Meals	12.26
One-way travel—Bangkok to Saipan	447.00
Total one-way travel	464.94
India	
One-way travel—within New Delhi	0.00
One-way travel—Mumbai to New Delhi	16.00

EXHIBIT 5—ESTIMATED COST OF TRAVEL FOR CW-1 WORKERS—Continued

Item	Cost (2018 dollars)
One-way travel—Bengaluru to New Delhi	30.00
Average—Home city to New Delhi	15.33
Lodging cost—New Delhi	3.27
Meals	12.26
One-way travel—New Delhi to Saipan	592.00
Total one-way travel	622.86
All	
One-way travel—Weighted average	446.27
Round-trip travel—Weighted average	892.54

To calculate the total transfers associated with workers traveling to the CNMI, the Department first multiplied the projected number of CW-1 workers in each year by the estimated percentage of CW-1 workers not currently living in CNMI (37 percent) to obtain an estimate for the number of workers that will require transportation, lodging, and subsistence. The Department then multiplied this estimate by the country-of-origin weighted average total round-trip travel cost (\$892.54). For example, the projected number of CW-1 workers in FY 2019 is 13,000, so the estimated FY 2019 transfer is \$4,293,109 (= 13,000 workers × 37 percent × \$892.54). The annualized transfer over the 11.25-year period is estimated at \$3,195,353 at a discount rate of 3 percent and \$3,300,461 at a discount rate of 7 percent. The total transfer over the 11.25-year period is estimated at \$30,131,920 at a discount rate of 3 percent and \$25,124,791 at a discount rate of 7 percent.

(2) Wage Impact Analysis

The IFR, at § 655.410(b)(1), provides that if the mean hourly wage for an occupational classification in the CNMI is reported by the Governor, annually,

and meets the Department’s statistical requirements set forth in § 655.410(e), the wage reported by the Governor must be the prevailing wage for the occupational classification. When the Department has not approved a survey for the occupation—either because the Governor has not conducted a survey or because the Governor’s survey fails to meet the statistical standards for the occupation—the prevailing wage must be the mean wage estimate for Guam for the appropriate occupation, as reported by BLS in the OES. If Guam OES wage data are unavailable for an occupation, the prevailing wage must be the mean wage paid to workers in the SOC in the United States from the BLS OES Survey, adjusted based on the ratio of the mean wage paid to workers in all SOCs in Guam compared to the mean wage paid to workers in all SOCs in the United States from the BLS OES survey. For this analysis, the Department used the May 2017 ratio of 0.71, which is the ratio of the Guam mean wage rate of \$17.30⁷⁰ to the national mean wage rate of \$24.34.⁷¹ First, the Department matched each CW-1 occupation from the USCIS CW-1 beneficiary data to the most appropriate SOC code. Then, the Department established a baseline wage

for each occupation using the hourly wage for the appropriate SOC code in the 2016 CNMI Prevailing Wage and Workforce Assessment Study (inflated to 2018 dollars). In contrast to the statistical requirements for the prevailing wage—namely, 3 or more employers surveyed with a total of 30 or more employees—the baseline wage for this analysis was established using a statistical standard of 3 or more employers surveyed with a total of just 6 or more employees. If the occupation met the statistical standard but the survey wage was lower than \$7.25 per hour, the Department assigned \$7.25 per hour as the baseline because the CNMI minimum wage increased to \$7.25 after the reference period for the 2016 CNMI Prevailing Wage and Workforce Assessment Study (November 1–16, 2016). Similarly, if the survey wage failed to meet the statistical standard, the Department assigned \$7.25 per hour. For each occupation, the Department calculated the hourly wage difference by subtracting the baseline wage estimate from the chosen prevailing wage. Exhibit 6 provides four examples to illustrate how the baseline and prevailing wages were chosen for each occupation.

EXHIBIT 6—CNMI PREVAILING HOURLY WAGE UNDER THE IFR

[Example cases]

CW-1 occupation title	SOC code	Baseline wage ^a	CNMI survey wage	Guam OES wage	National OES wage × 0.71	Assigned wage	Wage difference
Accountant	132011	\$12.86	\$12.86	\$22.23	\$26.60	\$12.86	\$0.00
Civil Engineer	172051	23.52	N/A	29.06	31.33	29.06	5.54
Architect/Surveyor	173031	8.06	N/A	N/A	15.82	15.82	7.76
Fisher/Hunter/Trapper ..	453011	7.25	N/A	N/A	10.65	10.65	3.40

^a The baseline wage is the wage in the 2016 CNMI Prevailing Wage and Workforce Assessment Study (inflated to 2018 dollars) if the number of employers surveyed is three or more and the total number of employees is six or more. Otherwise, the baseline is \$7.25 per hour.

⁷⁰ U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics program, “State Occupational Employment and

Wage Estimates, Guam” (May 2017), https://www.bls.gov/oes/current/oes_gu.htm.

⁷¹ U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics

program, “National Occupational Employment and Wage Estimates, United States” (May 2017), https://www.bls.gov/oes/current/oes_nat.htm.

For accountants, the 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$12.86 (inflated to 2018 dollars) based on survey responses from 165 employers with a total of 332 employees, meeting the Department’s baseline wage criteria of 3 employers and 6 employees. The survey sample size also met the Department’s prevailing wage criteria of 3 employers and 30 employees, so \$12.86 per hour was assigned. This results in zero wage difference between the baseline and the chosen prevailing wage for accountants in the CNMI.

For civil engineers, the 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$23.52 (inflated to 2018 dollars) based on survey responses from 12 employers with a total of 26 employees, meeting the Department’s baseline criteria. However, this survey sample size falls short of the Department’s prevailing wage criteria of 3 employers with a total of 30 employees. Therefore, the 2016 CNMI Prevailing Wage and Workforce Assessment Study hourly wage for civil engineers was not chosen as the prevailing wage. Instead, the May 2017 OES wage for Guam of \$29.06 per hour was assigned as the prevailing

wage, resulting in an hourly wage difference of \$5.54 for civil engineers.

The CW–1 occupation labeled as architect/surveyor was assigned the SOC code for Surveying and Mapping Technicians. The 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$8.06 (inflated to 2018 dollars) for Surveying and Mapping Technicians. The survey wage was based on responses from three employers with a total of eight employees, making it sufficient for the baseline estimate but not for the prevailing wage. The May 2017 OES hourly wage for Guam was also unavailable. Therefore, the scaled down May 2017 national OES wage of \$15.82 per hour was assigned as the prevailing wage, resulting in a wage difference of \$7.76.

Lastly, the CW–1 occupation labeled as fishers, hunters, and trappers was assigned the SOC code for Fishers and Related Fishing Workers. The 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$6.60 for this SOC code, so the Department assigned \$7.25 per hour as the baseline. The hourly wage from the 2016 CNMI Prevailing Wage and Workforce Assessment Study was based on responses from 8 employers with a total of 19 employees, so the survey

sample size was not large enough to use as the prevailing wage. The May 2017 OES hourly wage for Guam was also unavailable. Therefore, the scaled down May 2017 national OES wage of \$10.65 was assigned as the prevailing wage, resulting in a wage difference of \$3.40. This process was repeated for all CW–1 occupation titles provided by USCIS.

Next, the Department used FY 2018 USCIS CW–1 beneficiary approvals data to calculate the percentage of the CW–1 workers in each occupation relative to the total number of CW–1 workers. The Department then multiplied the percentage for each occupation by the statutory limit of workers to estimate the total number of CW–1 workers in each occupation for each year of the analysis. The Department then calculated the number of U.S. workers in corresponding employment by multiplying the number of CW–1 beneficiaries in each occupation in FY 2018 by a ratio of citizen to noncitizen workers derived from CNMI Department of Commerce data on the number of citizen and noncitizen workers in highly aggregated occupational groups.⁷² Exhibit 7 provides examples for the same CW–1 occupations as in Exhibit 6 to illustrate how the number of CW–1 workers and corresponding U.S. workers were estimated.

EXHIBIT 7—FY 2019 CORRESPONDING U.S. WORKERS IN CW–1 OCCUPATIONS
[Example cases]

CW–1 occupation title	SOC code	FY 2018 CW–1 approvals	Percentage of FY 2018 approvals	Projected FY 2019 CW–1 workers	CNMI Department of Commerce category	Ratio of U.S. workers to CW–1 workers	Corresponding U.S. workers	Total affected workers
		(a)	(b)	(c) = 13,000 × (b)		(d)	(e) = (a) × (d)	(c) + (e)
Accountant	132011	287	3.09	401	Business and Financial Operations	1.35	387	788
Civil Engineer	172051	10	0.11	14	Architecture and Engineering	0.84	8	22
Architect/Surveyor	173031	6	0.06	8	Architecture and Engineering	0.84	5	13
Fisher/Hunter/Trapper ..	453011	19	0.20	27	Farming, Fishing, and Forestry	0.77	15	42

The Department estimated wage impacts for each occupation by multiplying the sum of the estimated number of CW–1 workers and corresponding U.S. workers in each occupation by the difference between the chosen prevailing hourly wage and the baseline wage, multiplied by 2,080 hours per year. For example, in the case of civil engineers, the Department estimated a wage increase of \$5.54 per hour, as shown in Exhibit 6. Exhibit 7 projects 14 CW–1 workers and 8 corresponding U.S. workers in FY 2019. To calculate the wage impacts for CW–1 workers resulting from the increase in

the prevailing wage for civil engineers, the Department multiplied the number of affected CW–1 workers (14) by the number of hours worked in 1 year (2,080) and by the change in the hourly wage (\$5.54). The result is an estimated increase in wages of \$161,257 in FY 2019 (= 14 workers × 2,080 hours × \$5.54).⁷³ For U.S. workers, the result is an estimated increase in wages of \$96,223 in FY 2019 (= 8 workers × 2,080 hours × \$5.54).

This calculation was performed for each CW–1 occupation in each year, and the total impacts were estimated by summing across all occupations in each

year. The annualized wage transfer over the 11.25-year period is estimated at \$31,599,130 (= \$18,192,270 to CW–1 workers + \$13,406,860 to U.S. workers) at a discount rate of 3 percent and \$32,221,562 (= \$18,816,920 to CW–1 workers + \$13,404,642 to U.S. workers) at a discount rate of 7 percent. The total wage transfer over the 11.25-year period is estimated at \$297,977,189 (= \$171,551,603 to CW–1 workers + \$126,425,586 to U.S. workers) at a discount rate of 3 percent and \$245,286,945 (= \$143,243,981 to CW–1 workers + \$102,042,965 to U.S. workers) at a discount rate of 7 percent.

⁷² CNMI Department of Commerce, Statistical Yearbook 2017, Table 5.24 “Average Hourly Wages by Occupation and Citizenship, CNMI: 2016” at

<http://ver1.cnmicommerce.com/sy-2017-table-5-17-31-wage-survey/>.

⁷³ Calculations may not match due to rounding.

The wage impact estimates of this IFR are driven, in large part, by the statutory requirement that employers offer a wage that equals or exceeds the highest of the prevailing wage, or the Federal minimum wage, or the Commonwealth minimum wage. In the absence of a valid wage based on the 2016 CNMI Prevailing Wage and Workforce Assessment Study conducted by the CNMI Governor, the Department's estimates predominantly use the mean wage of workers similarly employed in Guam from the BLS OES survey, as

required by the statute, which are significantly higher than what employers in the CNMI are currently paying workers in the occupational classification. Additionally, beginning September 30, 2018, the minimum wage in the Commonwealth reached the Federal minimum wage of \$7.25 per hour, representing a \$0.20-cent increase over the Commonwealth's prior minimum wage of \$7.05 per hour. Thus, where the wage for any occupation based on the 2016 CNMI Prevailing Wage and Workforce Assessment Study

conducted by the CNMI Governor fell below \$7.25 per hour, the Department's estimates assume these employers would increase the rate of pay for workers to match current minimum wage requirements in the Commonwealth.

5. Summary of Costs and Transfer Payments

Exhibit 8 presents a summary of the costs and transfer payments associated with this IFR.⁷⁴

EXHIBIT 8—ESTIMATED COSTS AND TRANSFER PAYMENTS
[2018 dollars]

Fiscal year	Costs	Transfer payments		
		Total transfer payments	Transfer payments to CW-1 workers	Transfer payments to U.S. workers
2019	\$4,359,067	\$42,286,653	\$28,877,022	\$13,409,631
2020	3,930,868	41,175,998	27,766,367	13,409,631
2021	3,775,905	40,065,343	26,655,712	13,409,631
2022	3,620,948	38,954,589	25,545,058	13,409,631
2023	3,465,984	37,844,034	24,434,403	13,409,631
2024	3,156,064	35,622,725	22,213,094	13,409,631
2025	2,846,144	33,401,415	19,991,784	13,409,631
2026	2,535,763	31,180,106	17,770,475	13,409,631
2027	2,225,842	28,958,796	15,549,165	13,409,631
2028	1,915,922	26,737,487	13,327,856	13,409,631
2029	1,605,547	24,516,178	11,106,547	13,409,631
2030,Q1	365,405	4,155,414	903,007	3,352,408
Annualized, 3% discount rate, 11.25 years	3,086,620	34,794,484	21,387,623	13,406,860
Annualized, 7% discount rate, 11.25 years	3,190,028	35,522,023	22,117,381	13,404,642
Total, 3% discount rate, 11.25 years	29,106,568	328,109,108	201,683,522	126,425,586
Total, 7% discount rate, 11.25 years	24,284,121	270,411,736	168,638,772	102,042,965

6. Regulatory Alternatives

The Department considered two regulatory alternatives to the provisions in the IFR. The two alternatives differ from the IFR in one respect: The third option used to set the prevailing wage.

Under the IFR, if wage data are not available from the Governor's survey or the OES survey for Guam, the Department will base the prevailing wage on an adjusted national OES wage. Under the first regulatory alternative,

the third option would be the national OES wage without adjustment. To illustrate how prevailing wages would be determined under this regulatory alternative, Exhibit 9 presents the PWD for four occupations.

EXHIBIT 9—CNMI PREVAILING HOURLY WAGE UNDER REGULATORY ALTERNATIVE 1
[Example cases]

CW-1 occupation title	SOC code	Baseline wage	CNMI survey wage	Guam OES wage	National OES wage	Assigned wage	Wage difference
Accountant	132011	\$12.86	\$12.86	\$22.23	\$37.46	\$12.86	\$0.00
Civil Engineer	172051	23.52	N/A	29.06	44.13	29.06	5.54
Architect/Surveyor	173031	8.06	N/A	N/A	22.28	22.28	14.22
Fisher/Hunter/Trapper ..	453011	7.25	N/A	N/A	15.00	15.00	7.75

The PWDs for accountants and civil engineers under this regulatory alternative are identical to those of the

IFR methodology. In contrast, the PWDs for architects/surveyors and fishers/hunters/trappers are higher due to the

fact that they are not scaled down to reflect the ratio of the mean wage in

⁷⁴In addition to the costs and transfers estimated by the Department, the IFR is expected to cause deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens anytime the conditions for a perfectly competitive market are not met. Causes of DWL include taxes, subsidies, externalities, labor

market interventions, price ceilings, and price floors. This IFR establishes a wage floor, which will increase compensation rates above the equilibrium level for some occupations. The higher cost of labor may lead to a decrease in the total number of labor hours that are purchased on the market. DWL is a function of the difference between the

compensation employers were willing to pay for the hours lost and the compensation employees were willing to accept for those hours. The extent of the DWL will largely depend on the elasticities of labor demand and labor supply in the CNMI.

Guam compared to the mean national wage.

The total impact of this regulatory alternative was calculated in the same manner as the calculations for the IFR. The annualized transfer over the 11.25-year period is estimated at \$37,945,227 (= \$21,376,630 to CW–1 workers + \$16,568,597 to U.S. workers) at a discount rate of 3 percent and \$38,676,475 (= \$22,110,619 to CW–1 workers + \$16,565,856 to U.S. workers) at a discount rate of 7 percent. The total

transfer over the 11.25-year period is estimated at \$357,820,363 (= \$201,579,856 to CW–1 workers + \$156,240,507 to U.S. workers) at a discount rate of 3 percent and \$294,425,028 (= \$168,317,291 to CW–1 workers + \$126,107,737 to U.S. workers) at a discount rate of 7 percent. As explained earlier in the preamble, the Department did not select this regulatory option because the Department concluded it would be inappropriate to require an employer to

pay a prevailing wage that is based only on the national wage for the SOC from the OES survey, without adjustment.

Under the second regulatory alternative considered by the Department, the third option used to set the prevailing wage would be the Federal minimum wage of \$7.25. To illustrate how prevailing wages would be determined under this regulatory alternative, Exhibit 10 presents the PWD for four occupations.

EXHIBIT 10—CNMI PREVAILING HOURLY WAGE UNDER REGULATORY ALTERNATIVE 2
[Example cases]

CW–1 occupation title	SOC code	Baseline wage	CNMI survey wage	Guam OES wage	Federal minimum wage	Assigned wage	Wage difference
Accountant	132011	\$12.86	\$12.86	\$22.23	\$7.25	\$12.86	\$0.00
Civil Engineer	172051	23.52	N/A	29.06	7.25	29.06	5.54
Architect/Surveyor	173031	8.06	N/A	N/A	7.25	7.25	–0.81
Fisher/Hunter/Trapper ..	453011	7.25	N/A	N/A	7.25	7.25	0.00

The PWDs for accountants and civil engineers under this regulatory alternative are identical to those of the IFR methodology. In contrast, the PWDs for architects/surveyors and fishers/hunters/trappers are lower due to the fact that they are based on the Federal minimum wage rather than an adjusted national wage.

The total impact of this regulatory alternative was calculated in the same manner as the calculations for the IFR. The annualized transfer over the 11.25-year period is estimated at \$21,206,225 (= \$13,260,759 to CW–1 workers + \$7,945,466 to U.S. workers) at a discount rate of 3 percent and \$21,660,232 (= \$13,716,081 to CW–1 workers + \$7,944,151 to U.S. workers) at a discount rate of 7 percent. The total transfer over the 11.25-year period is estimated at \$199,972,952 (= \$125,047,868 to CW–1 workers + \$74,925,085 to U.S. workers) at a discount rate of 3 percent and \$164,888,722 (= \$104,413,798 to CW–1 workers + \$60,474,924 to U.S. workers) at a discount rate of 7 percent. The Department did not select this regulatory option because the Department concluded it would not prevent the employment of CW–1 workers from causing an adverse effect on the wages and working conditions of similarly employed U.S. workers.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA) imposes certain requirements on Federal agency rules that are subject to the notice-and-comment requirements of the APA, 5

U.S.C. 553(b),⁷⁵ and that are likely to have a significant economic impact on a substantial number of small entities. This IFR is exempt from the notice-and-comment requirements of the APA because, as described earlier, the Workforce Act directs the Secretary to publish an IFR “[n]otwithstanding the requirements under sec. 553(b) of [the Administrative Procedure Act].” Public Law 115–218, sec. 3(b). Therefore, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. 603 (providing for an initial regulatory flexibility analysis), do not apply to this IFR. Accordingly, the Department is not required to either certify that the IFR would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

C. Paperwork Reduction Act

As part of its effort to streamline information collection, clarify statutory and regulatory requirements, and provide greater transparency and oversight of PWDs and TLCs in the context of the CW–1 program, the Department engages with the public and Federal agencies to provide them with an opportunity to comment on collections of information tools in accordance with the PRA (44 U.S.C. 3506(c)(2)(A)). In January 2019, the Department submitted an Information

Collection Requests (ICR) in connection with this IFR to the Office of Management and Budget (OMB) for which it obtained approval using emergency clearance procedures outlined at 5 CFR 1320.13, to create new information collection tools on which it will rely to administer the issuance of PWDs and TLCs in connection with the CW–1 program. OMB assigned a new OMB Control Number for this information collection, 1205–053X.

This process of engaging the public and other Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. See 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, the Department, is affording the public with notice and an opportunity to comment on these new information collection tools that are related to the CW–1 Program, and that are necessary to

⁷⁵ The Regulatory Flexibility Act, as amended, governs “any rule for which [a Federal] agency publishes a general notice of proposed rulemaking pursuant to sec. 553(b) of [the Administrative Procedure Act] or any other law.” 5 U.S.C. 601(2) (defining “rule,” for purposes of the RFA).

implement the requirements of this IFR. The information collection activities covered by this new OMB Control Number 1205–053X is required by 48 U.S.C. 1806 of the Workforce Act, and 20 CFR 655, subpart E. The Workforce Act provides that a petition to import a nonimmigrant worker under the CW–1 visa classification may not be approved by DHS unless the employer has received a TLC from the Department confirming that: (1) There are not sufficient U.S. workers in the CNMI who are able, willing, qualified, and available at the time and place needed to perform the services or labor involved in the petition; and (2) the employment of a nonimmigrant worker who is the subject of a petition will not adversely affect the wages and working conditions of similarly employed U.S. workers.

As mentioned above, the new OMB Control No. 1205–053X, includes the collection of information to be conducted through information collection tools, that include forms and record keeping requirements, on which the Department relies for determining prevailing wages and issuing TLCs in connection with the CW–1 program. Additionally, the new information collection tools permit employers to assure compliance with respect to the minimum terms and conditions associated with the PWD and TLC processes, which include the rights and obligations of CW–1 workers and workers in corresponding employment, in addition to information regarding record keeping requirements associated with the CW–1 program. Specifically, ETA has created new Form ETA–9141C, *Application for Prevailing Wage Determination* and new Form ETA–9142C, *CW–1 Application for Temporary Employment Certification*.

The information contained in the new Form ETA–9141C is the basis for the Secretary's determination of the appropriate prevailing wage that employers in the CNMI must pay in the hiring of a foreign worker, to make sure there is no adverse effect on U.S. workers' wages. Prior to submitting a requests to OFLC for a TLCs and, as needed, labor condition applications, employers must obtain a prevailing wage for the job opportunity based on the place of employment. In order to carry out the provisions of this IFR, the Department created under this ICR the collection of information on the Form ETA–9141C, to collect information from employers under the CW–1 program to establish a prevailing wage in the occupational classification and places of employment within the Commonwealth. This request must be electronically submitted unless the regulatory

exemptions, specified in the rule, apply, in which case the employer will be allowed to submit a PW via mail.

In addition, the Department has created the Form ETA–9142C, *CW–1 Application for Temporary Employment Certification*, and corresponding appendices which serve as the basis for the Secretary's certification that qualified U.S. workers are not available to perform the services or labor needed by the employer, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of CW–1 workers. This certification is required before a petition for a CW–1 worker can be filed with and approved by DHS. This request must be filed electronically through the newly created OFLC FLAG system, unless the employer establishes inadequate access to the internet or requests that a special accommodation be made; under these exemptions, employers will be allowed to file the request by mail, and when necessary, with the assistance of the Department.

The Form ETA–9142C collects basic information related to the employer in the CNMI and the job opportunity in which it seeks to employ CW–1 workers, including, but not limited to, the job title and occupational classification, number of workers, period of employment, job duties and minimum requirements, and other material terms and conditions of the job offer. To ensure no adverse effect on the wages of similarly employed U.S. workers and that all work expected to be performed by CW–1 workers will be located within the Commonwealth, an employer must disclose on the Form ETA–9142C—and on Appendix B, if appropriate⁷⁶—all places of employment (*i.e.*, worksites) and the wage rates to be paid to CW–1 workers at those worksites. The latter allows OFLC to compare the reported wage rates with the PWDs obtained by the employer for each of those places of employment. Where it is not practical to collect supporting documentation using one of the standard OMB-approved appendices, the newly created FLAG System will permit an employer to upload documentation in support of the application, required by this subpart at the time of filing, in an acceptable digitized format (*e.g.*, Adobe PDF, Microsoft Word, .TXT) to minimize employer reporting burden.

The Form ETA–9142C must also be filed electronically through the newly created OFLC FLAG system, unless the employer establishes inadequate access to the internet or requests that a special accommodation be made; under these

exemptions, employers will be allowed to file the request by mail, and when necessary, with the assistance of the Department. In preparing the Form ETA–9142C in the FLAG System, the employer will be provided with a series of electronic data validation checks and prompts to ensure each required field is completed and values entered on the form are valid and consistent with regulatory requirements. OFLC's website and the FLAG System's e-filing capability will include detailed instructions designed to help employers understand what each form collection item means, what kind of entries are required, and what other documentation or information is required to be attached in order for a complete Application for Temporary Employment Certification for the CW–1 Program to be submitted for processing by the NPC.

In addition to its requests for comments in connection with this IFR, the Department is seeking comments on the recordkeeping costs associated with this IFR and its implementation of Form ETA–9142C and its three appendices and accompanying general instructions. The Appendix A provides a standard format for an employer filing as a job contractor to disclose the name and contact information of its employer-client, as required by this IFR. The Appendix B requires an employer to use a standard format to disclose multiple places of employment and, if applicable, multiple wage offers for the job opportunity within the Commonwealth. And finally, employers and, if applicable, their authorized agents or attorneys, use Appendix C to attest to their compliance with all of the terms, conditions, and obligations of the CW–1 program.

To promote greater efficiency in issuing TLC decisions and minimize delays associated with employers filing CW–1 petitions with DHS, the Form ETA–9142C, Final Determination: CW–1 Temporary Labor Certification Approval, will be issued electronically to employers granted TLC by ETA. In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the TLC documents electronically, ETA will send the certification documents printed on standard paper in a manner that ensures expedited delivery.

The information collection requirements associated with this rule are summarized as follows:

Agency: DOL–ETA.

Type of Information Collection: New.

Title of the Collection: CW–1 Temporary Labor Certification.

Agency Form Number: Form ETA-9142C; Form ETA-9141C; recordkeeping requirements.

Affected Public: Private Sector—businesses or other for-profits; non-profits.

Total Estimated Number of Respondents: Approximately 2,314.

Form ETA-9142C:

Estimated Number of Respondents filing electronically: Approximately 2,198

Estimated Number of Respondents filing by mail: Approximately 166

Form ETA-9141C:

Estimated Number of Respondents filing electronically: Approximately 2,198

Estimated Number of Respondents filing by mail: Approximately 116

Record keeping:

Estimated Number of Respondents that must comply with record keeping requirements: Approximately 2,314.

Total Estimated Number of Responses: Approximately 149,739 responses.

Average Time per Response: 46 minutes per Form ETA 9141 application and 1 hour and 50 minutes per Form ETA 9142C application materials; 20 minutes to comply with recordkeeping requirements.

Total Estimated Annual Time Burden: 73,987 hours.

Total Estimated Other Costs Burden: \$155,155.00.

D. Unfunded Mandates Reform Act of 1995

This IFR has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA). 2 U.S.C. 1501 *et seq.* For the purposes of the UMRA, this IFR does not impose any federal mandate that may result in increased expenditures by State, local, or Tribal governments, or increased expenditures by the private sector, of more than \$100 million in any year.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This IFR would not be a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104-121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). OIRA has found that this rule is not likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or export markets.

F. Executive Order 13132, Federalism

This IFR does not have federalism implications because it would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132, Federalism, requires no further agency action or analysis.

G. Executive Order 13175, Indian Tribal Governments

This IFR does not have “tribal implications” because it would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons stated in the preamble, the Department of Labor amends 20 CFR part 655 as follows:

Title 20—Employees’ Benefits

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Add subpart E to read as follows:

Subpart E—Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Marianas Islands (CW-1 Workers)

Sec.

655.400 Scope and purpose of this subpart.

655.401 Authority of the agencies, offices, and divisions in the Department of Labor.

655.402 Definition of terms.

655.403 Persons and entities authorized to file.

655.404 Requirements for agents.

655.405-655.409 [Reserved]

Prefiling Procedures

655.410 Offered wage rate and determination of prevailing wage.

655.411 Review of prevailing wage determinations.

655.412-655.419 [Reserved]

CW-1 Application for Temporary Employment Certification Filing Procedures

655.420 Application filing requirements.

655.421 Job contractor filing requirements.

655.422 Emergency situations.

655.423 Assurances and obligations of CW-1 employers.

655.424-655.429 [Reserved]

Processing of an CW-1 Application for Temporary Employment Certification

655.430 Review of applications.

655.431 Notice of Deficiency.

655.432 Submission of modified applications.

655.433 Notice of Acceptance.

655.434 Amendments to an application.

655.435-655.439 [Reserved]

Post Acceptance Requirements

655.440 Employer-conducted recruitment.

655.441 Job offer assurances and advertising contents.

655.442 Place advertisement with CNMI Department of Labor.

655.443 Contact with former U.S. workers.

655.444 Notice of posting requirement.

655.445 Additional employer-conducted recruitment.

655.446 Recruitment report.

655.447-655.449 [Reserved]

Labor Certification Determinations

655.450 Determinations.

- 655.451 Criteria for temporary labor certification.
 655.452 Approved certification.
 655.453 Denied certification.
 655.454 Partial certification.
 655.455 Validity of temporary labor certification.
 655.456 Document retention requirements for CW-1 employers.
 655.457-655.459 [Reserved]

Post Certification Activities

- 655.460 Extensions.
 655.461 Administrative review.
 655.462 Withdrawal of a CW-1 Application for Temporary Employment Certification.
 655.463 Public disclosure.
 655.464-655.469 [Reserved]

Integrity Measures

- 655.470 Audits.
 655.471 Assisted recruitment.
 655.472 Revocation.
 655.473 Debarment.
 655.474-655.499 [Reserved]

§ 655.400 Scope and purpose of this subpart.

(a) *Purpose.* (1) A temporary labor certification (TLC) issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 48 U.S.C. 1806(d)(2)(A), that:

(i) There are not sufficient U.S. workers in the Commonwealth who are able, willing, and qualified and who will be available at the time and place needed to perform the services or labor for which an employer desires to hire foreign workers; and

(ii) The employment of the CNMI-Only Transitional Worker visa program (CW-1) nonimmigrant worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(2) This subpart describes the process by which the Department of Labor (Department or DOL) makes such a determination and certifies its determination to the Department of Homeland Security (DHS).

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the employment of foreign workers in the CW-1 nonimmigrant classification, as defined in 48 U.S.C. 1806(d). It also establishes standards and obligations with respect to the terms and conditions of the temporary labor certification (TLC) with which CW-1 employers must comply, as well as the rights and obligations of CW-1 workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the TLC.

§ 655.401 Authority of the agencies, offices, and divisions in the Department of Labor.

The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 48 U.S.C. 1806. Determinations on a *CW-1 Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

§ 655.402 Definition of terms.

For purposes of this subpart:
Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Agent means a person or a legal entity, such as an association or other organization of employers, or an attorney for an association or other organization of employers, that:

(1) Is authorized to act on behalf of the employer for Temporary Labor Certification (TLC) purposes;

(2) Is not itself an employer, or a joint employer, as defined in this subpart with respect to the specific application; and

(3) Is not under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

Applicant (or U.S. applicant) means a U.S. worker who is applying for a job opportunity for which an employer has filed a *CW-1 Application for Temporary Employment Certification*.

Application for Prevailing Wage Determination means the Office of Management and Budget (OMB)-approved Form ETA-9141C (or successor form) and the appropriate appendices, submitted by an employer to secure a prevailing wage determination (PWD) from the National Prevailing Wage Center (NPWC).

CW-1 Application for Temporary Employment Certification means the OMB-approved Form ETA-9142C (or successor form) and the appropriate appendices, a valid wage determination, as required by § 655.410, and all supporting documentation submitted by an employer to secure a TLC determination from the OFLC Administrator.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia. Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 1003.101 or 292.3, may represent an employer under this subpart.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of ALJs appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of BALCA.

Certifying Officer or CO means the person who makes determination on a *CW-1 Application for Temporary Employment Certification* filed under the CW-1 program. The OFLC Administrator is the national CO. Other COs may also be designated by the OFLC Administrator to make the determinations required under this subpart, including making PWDs.

Chief Administrative Law Judge or Chief ALJ means the chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

CNMI Department of Labor means the executive Department of the Commonwealth Government that administers employment and job training activities for employers and U.S. workers in the Commonwealth.

Commonwealth or CNMI means the Commonwealth of the Northern Mariana Islands.

Corresponding employment means the employment of U.S. workers who are not CW-1 workers by an employer who has an approved *CW-1 Application for Temporary Employment Certification* in any work included in the approved job offer, or in any work performed by the CW-1 workers. To qualify as corresponding employment the work must be performed during the validity period of the *CW-1 Application for Temporary Employment Certification* and approved job offer, including any approved extension thereof.

CW-1 Petition means the U.S. Citizenship and Immigration Services (USCIS) Form I-129CW, *Petition for a CNMI-Only Nonimmigrant Transitional Worker*, a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and

additional evidence as may be prescribed or requested by USCIS.

CW-1 worker means any foreign worker who is lawfully present in the Commonwealth and authorized by DHS to perform temporary labor or services under 48 U.S.C. 1806(d).

Date of need means the first date the employer requires services of the CW-1 workers as indicated on the *CW-1 Application for Temporary Employment Certification*.

Department of Homeland Security or DHS means the Federal Department having jurisdiction over certain immigration-related functions, acting through its component agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this subpart.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the Commonwealth and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to a CW-1 worker or a worker in corresponding employment, as defined under the common law of agency; and

(3) Possesses, for purposes of filing a *CW-1 Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

Employer-client means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch, or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer-client on a temporary basis and will not exercise substantial, direct day-to-day supervision and

control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

Employment and Training Administration or ETA means the agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under for the administration and adjudication of a *CW-1 Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full-time means 35 or more hours of work per week.

Governor means the Governor of the Commonwealth of the Northern Mariana Islands.

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers that are not an affiliate, branch, or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and releasing the workers.

Job offer means the offer made by an employer or potential employer of CW-1 workers to both U.S. and CW-1 workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means full-time employment at a place in the Commonwealth to which U.S. workers can be referred.

Joint employment means that where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

Layoff means any involuntary separation of one or more U.S. employees other than for cause.

Long-term worker means an alien who was admitted to the CNMI as a CW-1 nonimmigrant during fiscal year (FY) 2015, and who was granted CW-1 nonimmigrant status during each of FYs 2016 through 2018, as defined by DHS.

National Prevailing Wage Center or NPWC means that office within OFLC from which employers, agents, or attorneys who wish to file a *CW-1 Application for Temporary Employment Certification* receive a PWD.

NPWC Director means the OFLC official to whom the OFLC Administrator has delegated authority to

carry out certain NPWC operations and functions.

National Processing Center (NPC) means the office within OFLC in which the COs operate, and which are charged with the adjudication of *CW-1 Applications for Temporary Employment Certification*.

NPC Director means the OFLC official to whom the OFLC Administrator has delegated authority for purposes of certain NPC operations and functions.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the Bureau of Labor Statistics (BLS) that reports annual wage estimates, including those for Guam, based on standard occupational classifications (SOCs).

Offered wage means the wage offered by an employer in the *CW-1 Application for Temporary Employment Certification* and job offer. The offered wage must equal or exceed the highest of the prevailing wage, or the Federal minimum wage, or the Commonwealth minimum wage.

Office of Foreign Labor Certification or OFLC means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including determinations related to an employer's request for an *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*.

Place of employment means the worksite (or physical location) where work under the *CW-1 Application for Temporary Employment Certification* and job offer actually is performed by the CW-1 workers and workers in corresponding employment.

Prevailing wage (PW) means the official wage issued by the NPWC on the Form ETA 9141C, *Application for Prevailing Wage Determination for the CW-1 Program*, or successor form. At least that amount must be paid to all CW-1 workers and U.S. workers in corresponding employment.

Prevailing wage determination (PWD) means the prevailing wage issued by the OFLC NPWC on the Form ETA-9141C, *Application for Prevailing Wage Determination for the CW-1 Program*, or successor form. The PWD is used in support of the *CW-1 Application for Temporary Employment Certification*.

Secretary of Labor or Secretary means the chief official of the U.S. DOL, or the Secretary's designee.

Secretary of Homeland Security means the chief official of DHS or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest means an employer, agent, or attorney that is controlling and carrying on the business of a previous employer.

(1) Where an employer, agent, or attorney has violated 48 U.S.C. 1806 or the regulations in this subpart and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, and all the circumstances will be considered as a whole:

- (i) Substantial continuity of the same business operations;
- (ii) Use of the same facilities;
- (iii) Continuity of the work force;
- (iv) Similarity of jobs and working conditions;
- (v) Similarity of supervisory personnel;
- (vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (vii) Similarity in machinery, equipment, and production methods;
- (viii) Similarity of products and services; and
- (ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

Temporary labor certification or TLC means the certification made by the OFLC Administrator, based on the *CW-1 Application for Temporary Employment Certification*, job offer, and all supporting documentation, with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as a *CW-1* worker.

United States means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, Guam,

the U.S. Virgin Islands, and the Commonwealth.

United States worker (U.S. worker) means a worker who is:

- (1) A citizen or national of the United States;
- (2) An alien lawfully admitted for permanent residence; or
- (3) A citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

U.S. Citizenship and Immigration Services or USCIS means the Federal agency within DHS that makes the determination whether to grant petitions filed by employers seeking *CW-1* workers to perform temporary work in the Commonwealth.

Wages mean all forms of cash remuneration to a worker by an employer in payment for labor or services.

Work contract means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, places of employment, and other benefits, including all assurances and obligations required to be included under this subpart. The contract between the employer and the worker may be in the form of a separate written document containing the advertised terms and conditions of the job offer. In the absence of a separate, written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the required terms of the certified *CW-1 Application for Temporary Employment Certification* will be the work contract.

§ 655.403 Persons and entities authorized to file.

(a) *Persons authorized to file.* In addition to the employer, a request for a PWD or TLC under this subpart may be filed by an attorney or agent, as defined in § 655.402.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *CW-1 Application for Temporary Employment Certification* and all documentation submitted to the Department.

§ 655.404 Requirements for agents.

An agent filing a *CW-1 Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document

demonstrating the agent's authority to represent the employer to the NPC at the time of filing the application.

§§ 655.405–655.409 [Reserved]

Prefiling Procedures

§ 655.410 Offered wage rate and determination of prevailing wage.

(a) *Offered wage.* (1) The employer must advertise the position to all potential workers at a wage that is at least the highest of the following:

- (i) The prevailing wage for the job opportunity obtained from the NPWC;
- (ii) The Federal minimum wage; or
- (iii) The Commonwealth minimum wage.

(2) The employer must offer and pay at least the wage provided in paragraph (a)(1) of this section to both its *CW-1* workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal or Commonwealth law.

(b) *Determinations—(1) Methods.* The OFLC Administrator will determine prevailing wages in the Commonwealth and occupational classification as follows:

(i) If the mean hourly wage for the occupational classification in the Commonwealth is reported by the Governor, annually, and meets the requirements set forth in paragraph (e) of this section, as determined by the OFLC Administrator, that wage must be the prevailing wage for the occupational classification;

(ii) If the OFLC Administrator has not approved a survey, as reported by the Governor, for the occupational classification under paragraph (b)(1)(i) of this section, and the BLS OES survey reports a mean wage paid to workers in the SOC in Guam, the prevailing wage must be the mean wage paid to workers in the SOC in Guam from the BLS OES survey; and

(iii) If the OFLC Administrator has not approved a survey, as reported by the Governor, for the occupational classification under paragraph (b)(1)(i) of this section and the BLS OES survey does not report the mean wage paid to workers in the SOC in Guam under paragraph (b)(1)(ii) of this section, the prevailing wage must be the mean wage paid to workers in the SOC in the United States from the BLS OES Survey, adjusted based on the ratio of the mean wage paid to workers in all SOCs in Guam compared to the mean wage paid to workers in all SOCs in the United States from the BLS OES survey.

(2) *Multiple occupations.* If the job duties on the *Application for Prevailing Wage Determination* do not fall within a single occupational classification, the NPC will determine the applicable prevailing wage based on the highest prevailing wage for all applicable occupational classifications.

(c) *Request for PWD.* (1) *Filing requirement.* An employer must electronically request and receive a PWD from the NPWC then electronically file the *CW-1 Application for Temporary Employment Certification* with the NPC.

(2) *Location and methods of filing—*
(i) *Electronic filing.* The employer must file the *Application for Prevailing Wage Determination* and all required supporting documentation with the NPWC using the electronic method(s) designated by the OFLC Administrator. The NPWC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits with the application a statement of the need to file by mail.

(ii) *Filing by mail.* Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. The mailed application must include a statement indicating the need to file by mail. The NPWC will return, without review, mailed applications that do not contain such a statement. OFLC will publish the address for mailed applications in the instructions to Form ETA-9141C.

(d) *NPWC action.* The NPWC will provide the PWD, indicate the source of the PWD, and return the *Application for Prevailing Wage Determination* with its endorsement to the employer.

(e) *Wage survey reported by the Governor.* The OFLC Administrator will issue a prevailing wage for the occupational classification in the Commonwealth based on a wage survey reported by the Governor if all of the following requirements are met:

(1) The survey was independently conducted and issued by the Governor of the Commonwealth, including through any Commonwealth agency, Commonwealth college, or Commonwealth university;

(2) The survey provides the arithmetic mean of the wages of workers in the occupational classification in the Commonwealth;

(3) The surveyor either made a reasonable, good faith attempt to contact all employers in the Commonwealth employing workers in the occupation or conducted a randomized sampling of such employers;

(4) The survey includes the wages of at least 30 workers in the Commonwealth;

(5) The survey includes the wages of workers in the Commonwealth employed by at least three employers;

(6) The survey was conducted across industries that employ workers in the occupational classification;

(7) The wage reported in the survey includes all types of pay;

(8) The survey is based on wages paid to workers in the occupational classification not more than 12 months before the date the survey is submitted to the OFLC Administrator for consideration; and

(9) The Governor submits the survey to the OFLC Administrator, with specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.

(f) *Review of wage survey reported by the Governor.* (1) If the OFLC Administrator finds the wage reported for any occupational classification not to be acceptable, the OFLC Administrator must inform the Governor in writing of the reasons the wage reported in the survey was not accepted.

(2) The Governor, after receiving notification from the OFLC Administrator that the wage reported in the survey it provided for consideration is not acceptable, may submit corrected wage data or conduct a new wage survey and submit revised wage data to the OFLC Administrator for consideration under this section.

(g) *Validity period.* The NPWC will specify the validity period of the prevailing wage, which in no event may be more than 365 days or fewer than 90 days from the date that the determination is issued.

(h) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance if not used in support of a TLC application or if it is used in support of a TLC application that is denied, and 3 years from the date on which the certification of the *CW-1 Application for Temporary Employment Certification* expires, whichever is later. The employer must submit the PWD to a CO if requested by a Notice of Deficiency (NOD), described in § 655.431, or audit, as described in § 655.470, or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

§ 655.411 Review of prevailing wage determinations.

(a) *Request for review of PWDs.* Any employer desiring review of a PWD must make a written request for such review to the NPWC Director. The written request must be received by the NPWC Director within 7 business days from the date the PWD was issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review.* Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review must issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.

(c) *Request for review by BALCA.* Any employer desiring review of the NPWC Director's decision on a PWD must make a written request to BALCA for review of the determination, with a copy simultaneously sent to the NPWC Director who issued the final determination. The written request must be received by BALCA within 10 business days from the date the Final Determination letter was issued.

(1) Upon receipt of a request for BALCA review, the NPWC will prepare an Appeal File and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD by the NPWC Director was based.

(3) BALCA will handle appeals in accordance with § 655.461.

§§ 655.412 –655.419 [Reserved]

CW-1 Application for Temporary Employment Certification Filing Procedures

§ 655.420 Application filing requirements.

An employer seeking to hire CW-1 workers must electronically file a *CW-1 Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. This section provides the procedures an employer must follow when filing.

(a) *What to file.* An employer seeking a TLC must file a completed *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and the appropriate appendices and valid PWD),

and all supporting documentation and information required at the time of filing under this subpart. Applications that are incomplete at the time of submission will be returned to the employer without review.

(b) *Timeliness.* (1) Except as provided in paragraph (b)(2) of this section, a completed *CW-1 Application for Temporary Employment Certification* must be filed no more than 120 calendar days before the employer's date of need.

(2) If the employer is seeking a TLC to extend the employment of a *CW-1* worker, a completed *CW-1 Application for Temporary Employment Certification* must be filed no more than 180 calendar days before the date on which the *CW-1* status expires.

(c) *Location and methods of filing—*
(1) *Electronic filing.* The employer must file the *CW-1 Application for Temporary Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return, without review, any application submitted using a method other than the designated electronic method(s), unless the employer submits with the application a statement of the need to file by mail or indicates that it already submitted such a statement to NPWC during the same fiscal year.

(2) *Filing by mail.* Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. The mailed application must include a statement indicating the need to file by mail as indicated above. The NPC will return, without review, mailed applications that do not contain such a statement. OFLC will publish the address for mailed applications in the instructions to Form ETA-9142C.

(d) *Original signature and acceptance of electronic signatures.* An electronically filed *CW-1 Application for Temporary Employment Certification* must contain an electronic (scanned) copy of the original signature of the employer (and that of the employer's authorized attorney or agent, if the employer is represented by an attorney or agent) or, in the alternative, use a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *CW-1 Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Requests for multiple positions.* An employer may request certification of more than one position on its *CW-1*

Application for Temporary Employment Certification as long as all *CW-1* workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment, and at a location (or locations) covered by the application.

(f) *Scope of application.* (1) A *CW-1 Application for Temporary Employment Certification* must be limited to places of employment within the Commonwealth.

(2) In a single application filing, an association or other organization of employers is not permitted to file a *CW-1 Application for Temporary Employment Certification* on behalf of more than one employer-member under the *CW-1* program.

(g) *Period of employment.* (1) Except as provided in paragraph (g)(2) of this section, the period of need identified in the *CW-1 Application for Temporary Employment Certification* must not exceed 1 year.

(2) If the employer is seeking TLC to employ a long-term *CW-1* worker, the period of need identified in the *CW-1 Application for Temporary Employment Certification* must not exceed 3 years.

(h) *Return of applications based on USCIS CW-1 cap notice.* (1) Except as provided in paragraph (h)(3) of this section, if USCIS issues a public notice stating that it has received a sufficient number of *CW-1* petitions to meet the statutory numerical limit on the total number of foreign nationals who may be issued a *CW-1* permit or otherwise granted *CW-1* status for the fiscal year, the OFLC Administrator must return without review any *CW-1 Applications for Temporary Employment Certification* with dates of need in that fiscal year received on or after the date that the OFLC Administrator provides the notice in paragraph (h)(2) of this section.

(2) The OFLC Administrator will announce the return of future *CW-1 Applications for Temporary Employment Certification* with dates of need in the fiscal year for which the cap is met with a notice on the OFLC's website. This notice will be effective on the date of its publication on the OFLC's website and will remain valid for the fiscal year unless:

(i) USCIS issues a public notice stating additional *CW-1* permits are available for the fiscal year; and

(ii) The OFLC Administrator publishes a new notice announcing that additional TLCs may be granted in the fiscal year.

(3) After the notice that OFLC will return future *CW-1 Applications for Temporary Employment Certification*,

the OFLC Administrator will continue to process *CW-1 Applications for Temporary Employment Certification* filed before the effective date of the suspension notice and will continue to permit the filing of *CW-1 Applications for Temporary Employment Certification* by employers who identify in the *CW-1 Application for Temporary Employment Certification* that the employment of all *CW-1* workers employed under the *CW-1 Application for Temporary Employment Certification* will be exempt from the statutory numerical limit on the total number of foreign nationals who may be issued a *CW-1* permit or otherwise granted *CW-1* status.

§ 655.421 Job contractor filing requirements.

(a) A job contractor may submit a *CW-1 Application for Temporary Employment Certification* on behalf of itself and that employer-client. By doing so, the Department deems the job contractor a joint employer.

(b) A job contractor must have separate contracts with each different employer-client. A single contract or agreement may support only one *CW-1 Application for Temporary Employment Certification* for each employer-client job opportunity in the Commonwealth.

(c) Either the job contractor or its employer-client may submit an *Application for Prevailing Wage Determination* describing the job opportunity to the NPWC. However, each of the joint employers is separately responsible for ensuring that the wage offer(s) listed in the *CW-1 Application for Temporary Employment Certification* and related recruitment at least equals the prevailing wage obtained from the NPWC, or the Federal or Commonwealth minimum wage, whichever is highest, and that all other wage obligations are met.

(d)(1) A job contractor that is filing as a joint employer with its employer-client must submit to the NPC a completed *CW-1 Application for Temporary Employment Certification* that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the places of employment), in accordance with instructions provided by the OFLC Administrator. The *CW-1 Application for Temporary Employment Certification* must bear the original signature of the job contractor and the employer-client or use a verifiable electronic signature method, consistent with the requirements set forth at § 655.420(d), and be accompanied by the contract or agreement establishing

the employers' relationships related to the workers sought.

(2) By signing the *CW-1 Application for Temporary Employment Certification*, each employer independently attests to the conditions of employment required of an employer participating in the CW-1 program and assumes full responsibility for the accuracy of the representations made in the application and for all of the responsibilities of an employer in the CW-1 program.

(e)(1) Either the job contractor or its employer-client may place the required advertisements and conduct recruitment as described in §§ 655.442 through 655.445. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC meeting the requirement set forth in § 655.446.

(2) All recruitment conducted by the joint employers must satisfy the job offer assurance and advertising content requirements identified in § 655.441. Additionally, in order to fully inform applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the place(s) of employment where workers will perform labor or services.

(3)(i) Provided that all of the employer-clients' job opportunities are in the same occupation located in the Commonwealth and have the same requirements and terms and conditions of employment, including dates of employment, a job contractor may combine more than one of its joint employer employer-clients' job opportunities in a single advertisement. Each advertisement must fully inform potential workers of the job opportunity available with each employer-client and otherwise satisfy the job offer assurances and advertising content requirements identified in § 655.441. Such a shared advertisement must clearly identify the job contractor by name, the joint employment relationship, and the number of workers sought for each job opportunity, identified by employer-client names and locations (e.g., five openings with Employer-Client A (place of employment location), three openings with Employer-Client B (place of employment location)).

(ii) In addition, the advertisement must contain the following statement: "Applicants may apply for any or all of

the jobs listed. When applying, please identify the job(s) (by company and work location) you are applying to for the entire period of employment specified." If an applicant fails to identify one or more specific work location(s), that applicant is presumed to have applied to all work locations listed in the advertisement.

(f) If a TLC for the joint employers is granted, the Final Determination certifying the *CW-1 Application for Temporary Employment Certification* will be sent to both the job contractor and employer-client.

§ 655.422 Emergency situations.

(a) *Waiver of PWD requirement prior to application filing.* The CO may waive the requirement to obtain a PWD, as required under § 655.410(c), prior to filing a *CW-1 Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the labor market and to make a final determination as required by § 655.450. The requirement to obtain a PWD prior to filing the *CW-1 Application for Temporary Employment Certification*, under § 655.410(c), is the only provision of this subpart which will be waived under these emergency situation procedures.

(b) *Employer requirements.* The employer requesting a waiver of the requirement to obtain a PWD must submit to the NPC a completed *Application for Prevailing Wage Determination*, a completed *CW-1 Application for Temporary Employment Certification*, and a statement justifying the waiver request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to an Act of God, or similar unforeseeable man-made catastrophic events (such as a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control. Issues related to the CW-1 visa cap are not good and substantial cause for a waiver of the filing requirements. Further, a denial of a previously submitted *CW-1 Application for Temporary Employment Certification* or CW-1 petition with USCIS does not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications.* The CO will process the emergency *CW-1 Application for Temporary Employment Certification*, including the *Application for Prevailing Wage Determination for the CW-1 Program*, in a manner consistent with the provisions of this subpart and make a determination in accordance with § 655.450. The CO will notify the employer, if the application cannot be processed because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or the filing does not meet the requirements set forth in this subpart.

§ 655.423 Assurances and obligations of CW-1 employers.

An employer employing CW-1 workers and/or workers in corresponding employment under a *CW-1 Application for Temporary Employment Certification* has agreed as part of the *CW-1 Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its CW-1 workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the work contract equals or exceeds the highest of the prevailing wage, Federal minimum wage, or Commonwealth minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *CW-1 Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the work contract and the employer must demonstrate that they are normal and usual for non-CW-1 employers for the same occupation in the Commonwealth.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece-rate is no less than the normal rate paid by non-CW-1 employers to workers performing the same activity in the Commonwealth. The average hourly piece-rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece-rate basis and at the end of the workweek the piece-rate does not result in average hourly piece-rate earnings during the workweek at least equal to

the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or in negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The work contract must specify all deductions not required by law that the employer will make from the worker's pay; any such deductions not disclosed in the work contract are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kick backs" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent, or recruiter, including any agents or employees of these entities or any affiliated person, derives any payment, rebate, commission, profit, or benefit

directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *CW-1 Application for Temporary Employment Certification*.

(d) *Job opportunity is full time.* The job opportunity is a full-time position, consistent with § 655.402, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—7 consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement must be listed in the work contract and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-CW-1 employers in the same occupation and in the Commonwealth. The employer's job qualifications and requirements imposed on U.S. workers must not be less favorable than the qualifications and requirements that the employer is imposing or will impose on CW-1 workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment that a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement.

(f) *Three-fourths guarantee—(1) Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period of employment specified in the work contract, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. See the exception in paragraph (f)(1)(iv) of this section.

(i) For purposes of this paragraph (f), a workday means the number of hours in a workday as stated in the work contract. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) In the event the worker begins working later than the start date of need specified in the application, the guarantee period begins with the first workday after the arrival of the worker at the place of employment and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks \times 48 hours/week = 480 hours \times 75 percent = 360). If a Federal holiday occurred during the 10-week period, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks \times 48 hours/week = 480 hours $-$ 8 hours (Federal holiday) = 472 hours \times 75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, the worker will not be required to work more than the number of hours specified in the work contract for a workday but all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or CW-1 worker less employment than that required under this paragraph (f)(1)(iv), the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays of the work contract period if each workday did not consist of a full number of hours of work time as specified in the work contract.

(2) *Guarantee for piece-rate paid worker.* If the worker is paid on a piece-rate basis, the employer must use the worker's average hourly piece-rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee in accordance with paragraph (f)(1) of this section.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the work contract for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including

voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this subpart.

(g) *Impossibility of fulfillment.* If before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the work contract impossible, the employer may terminate the work contract with the approval of the CO. In the event of such termination, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the work contract or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the CW-1 worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with immigration laws, as applicable. If a transfer is not affected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified CW-1 employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the work contract the frequency with which the worker will be paid, which must be at least every 2 weeks. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature, amount, and location(s) of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended

each workday; the rate of pay (both piece-rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate or piece-rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

(vi) If piece-rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address, and FEIN.

(j) *Transportation and visa fees—(1)(i) Transportation to the place of employment.* The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the United States, including another part of the Commonwealth, or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the work contract (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-CW-1 employers in the occupation and in the Commonwealth to do so or when the employer extends such benefits to similarly situated CW-1 workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's place of employment from such a distance that the worker is not reasonably able to return to their residence each day. The

amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: The costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the Fair Labor Standards Act applies independently of the CW-1 requirements and imposes obligations on employers regarding payment of wages.

(ii) *Transportation from the place of employment.* If the worker completes the period of employment covered by the work contract (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent CW-1 employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the work contract to provide or pay for the worker's transportation from the former employer's place of employment to such subsequent employer's place of employment, the former employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the work contract to provide or pay for the worker's transportation from the former employer's place of employment to such subsequent employer's place of employment, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable Federal and Commonwealth laws and regulations including, but not limited to, vehicle safety standards, driver licensure requirements, and vehicle insurance coverage.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the CW-1 worker, but not for passport expenses or

other charges primarily for the benefit of the worker.

(k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(l) *Disclosure of work contract.* The employer must provide to a CW-1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract including any subsequent approved modifications. For a CW-1 worker changing employment from a CW-1 employer to a subsequent CW-1 employer, the copy must be provided no later than the time an offer of employment is made by the subsequent CW-1 employer. The disclosure of all documents required by this paragraph (l) must be provided in a language understood by the worker. At a minimum, the work contract must contain all of the provisions required to be included by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the certified CW-1 *Application for Temporary Employment Certification* will be the work contract.

(m) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has, related to the CW-1 program:

(1) Filed a complaint under or related to any applicable Federal or Commonwealth laws and regulations;

(2) Instituted or caused to be instituted any proceeding under or related to any applicable Federal or Commonwealth laws and regulations;

(3) Testified or is about to testify in any proceeding under or related to any applicable Federal or Commonwealth laws and regulations;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to any applicable Federal or Commonwealth laws and regulations; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by any applicable Federal or Commonwealth laws and regulations.

(n) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or

employees have not sought or received payment of any kind from the worker for any activity related to obtaining CW-1 labor certification or employment, including payment of the employer's attorney or agent fees, application and CW-1 *Petition* fees, recruitment costs, or any fees attributed to obtaining the approved CW-1 *Application for Temporary Employment Certification*. For purposes of this paragraph (n), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. All wages must be paid free and clear. This paragraph (n) does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(o) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of CW-1 workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees."

(p) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to CW-1 workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's CW-1 workers. This does not relieve the employer from providing to CW-1 workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(q) *Nondiscriminatory hiring practices.* The job opportunity is open to any qualified U.S. worker as defined in § 655.402, regardless of race, color, national origin, age, sex, religion,

disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 655.456.

(r) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in §§ 655.442 through 655.445.

(s) *No strike or lockout.* There is no strike or lockout at any of the employer's place(s) of employment within the Commonwealth for which the employer is requesting CW-1 certification at the time the CW-1 *Application for Temporary Employment Certification* is filed.

(t) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the CW-1 *Application for Temporary Employment Certification* in the Commonwealth within the period beginning 270 calendar days before the date of need and through the end of the TLC's period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all CW-1 workers are laid off before any U.S. worker in corresponding employment.

(u) *No work performed outside the Commonwealth and job opportunity.* The employer must not place any CW-1 workers employed under the approved CW-1 *Application for Temporary Employment Certification* outside the Commonwealth or in a job opportunity not listed on the approved CW-1 *Application for Temporary Employment Certification*.

(v) *Abandonment/termination of employment.* Upon the separation from employment of any worker employed under the CW-1 *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment period specified in the CW-1 *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 working days after such separation is discovered by the employer. An abandonment or abandonment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the

separation is due to the voluntary abandonment of employment by the CW-1 worker or worker in corresponding employment or is terminated for cause, and the employer provides appropriate notification specified under this paragraph (v), the employer will not be responsible for providing or paying for the subsequent transportation and subsistence costs of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section.

(w) *Compliance with applicable laws.* During the period of employment specified on the CW-1 Application for Temporary Employment Certification, the employer must comply with all applicable Federal and Commonwealth employment-related laws and regulations, including health and safety laws. This includes compliance with 18 U.S.C. 1592(a), with respect to prohibitions against employers, the employer's agents, or their attorneys knowingly holding, destroying or confiscating workers' passports, visas, or other immigration documents.

§§ 655.424–655.429 [Reserved]

Processing of an CW-1 Application for Temporary Employment Certification

§ 655.430 Review of applications.

(a) *NPC review.* The CO will review the CW-1 Application for Temporary Employment Certification for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision as to whether to issue a NOD under § 655.431 or a Notice of Acceptance (NOA) under § 655.433.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be sent electronically or via first class mail using the address, including electronic mail address, provided on the CW-1 Application for Temporary Employment Certification. The employer's response to such a notice or request must be filed electronically or via first class mail. The employer's response must be filed electronically or postmarked by the date due or the next business day if the due date falls on a Saturday, Sunday, or Federal Holiday.

(c) *Information dissemination.* OFLC may forward, to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function, information OFLC receives in the course of processing a request for a CW-1 Application for Temporary Employment

Certification or of administering program integrity measures such as audits.

§ 655.431 Notice of Deficiency.

(a) *Notification.* If the CO determines the CW-1 Application for Temporary Employment Certification contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will issue a NOD to the employer and, if applicable, the employer's attorney or agent.

(b) *Notice content.* The NOD will:

- (1) State the reason(s) the CW-1 Application for Temporary Employment Certification fails to meet the criteria for acceptance;

- (2) Offer the employer an opportunity to submit a modified CW-1 Application for Temporary Employment Certification within 10 business days from the date of the NOD, and state the modification that is required for the CO to issue a NOA; and

- (3) State that if the employer does not comply with the requirements of § 655.432 for submitting a modified application, the CO will deny the CW-1 Application for Temporary Employment Certification.

§ 655.432 Submission of modified applications.

(a) *Review of a modified CW-1 Application for Temporary Employment Certification.* Upon receipt of a response to a NOD, including any modifications, the CO will review the response. The CO may issue one or more additional NODs before issuing a decision. The employer's failure to comply with a NOD, including not responding in a timely manner or not providing all required documentation, will result in a denial of the CW-1 Application for Temporary Employment Certification.

(b) *Acceptance of a modified CW-1 Application for Temporary Employment Certification.* If the CO accepts the modification(s) to the CW-1 Application for Temporary Employment Certification, the CO will issue a NOA to the employer and, if applicable, the employer's attorney or agent.

(c) *Denial of modified CW-1 Application for Temporary Employment Certification.* If the modified CW-1 Application for Temporary Employment Certification does not cure the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will, at its discretion, either send a second NOD or deny the CW-1 Application for Temporary Employment Certification in accordance with the labor certification determination provisions in § 655.453.

(d) *Appeal from denial of modified CW-1 Application for Temporary*

Employment Certification. The procedures for appealing a denial of a modified CW-1 Application for Temporary Employment Certification are the same as for appealing the denial of a nonmodified CW-1 Application for Temporary Employment Certification, outlined in § 655.461.

(e) *Post acceptance modifications.* Notwithstanding the decision to accept the CW-1 Application for Temporary Employment Certification, the CO may require modifications to the CW-1 Application for Temporary Employment Certification at any time before the final determination to grant or deny the CW-1 Application for Temporary Employment Certification if the CO determines that the job offer does not contain the minimum benefits, wages, and working conditions set forth in § 655.441. The employer must make such modifications, or the application will be denied under § 655.453. The employer must provide all workers recruited in connection with the job opportunity in the CW-1 Application for Temporary Employment Certification with a copy of the modified CW-1 Application for Temporary Employment Certification, as approved by the CO, no later than the date work commences.

§ 655.433 Notice of Acceptance.

(a) *Notification.* When the CO determines the CW-1 Application for Temporary Employment Certification contains no errors or inaccuracies, and meets the requirements set forth in this subpart, the CO will issue a NOA to the employer and, if applicable, the employer's attorney or agent.

(b) *Notice content.* The NOA must:

- (1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.442 through 655.444, including any additional recruitment ordered by the CO under § 655.445;

- (2) State that such employer-conducted recruitment must begin within 14 calendar days from the date the NOA is issued, consistent with § 655.440(b);

- (3) Require the employer to submit a report of its recruitment efforts, by the date required by the CO in the NOA, as specified in § 655.446; and

- (4) Advise the employer that failure to submit a complete recruitment report by the deadline will lead to denial of the application.

§ 655.434 Amendments to an application.

(a) *Increases in number of workers.* The CW-1 Application for Temporary Employment Certification may be amended at any time before the CO's certification determination to increase

the number of workers requested in the initial *CW-1 Application for Temporary Employment Certification* by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the employer demonstrates that the need for additional workers could not have been foreseen and is wholly outside of the employer's control. All requests to increase the number of workers must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(b) *Minor changes to the period of employment.* The *CW-1 Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to make minor changes (meaning a change of up to 14 calendar days) in the total period of employment, without requiring an additional recruitment period for U.S. workers. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen and is wholly outside of the employer's control. The CO will deny any request to change the period of employment where the total amended period of employment will exceed the maximum applicable duration permitted under § 655.420(g). Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(c) *Other minor amendments to the CW-1 Application for Temporary Employment Certification.* The employer may request other minor amendments to the *CW-1 Application for Temporary Employment Certification* at any time before the CO's certification determination is issued. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into

account the effect of the changes on the underlying labor market test for the job opportunity. All requests for minor changes must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(d) *Amendments after certification are not permitted.* After the CO has made a determination to certify the *CW-1 Application for Temporary Employment Certification*, the employer may no longer request amendments.

§§ 655.435–655.439 [Reserved]

Post Acceptance Requirements

§ 655.440 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *CW-1 Application for Temporary Employment Certification*.

(b) *Period to begin employer-conducted recruitment.* Unless otherwise instructed by the CO, the employer must begin the recruitment required in §§ 655.442 through 655.445 within 14 calendar days from the date the NOA is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.446.

(c) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential *CW-1* workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(d) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity and must hire all U.S. applicants who are qualified and who will be available for the job opportunity. U.S. applicants may be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(e) *Recruitment report.* The employer must prepare a recruitment report meeting the requirements of § 655.446, by the date specified by the CO in the NOA.

§ 655.441 Job offer assurances and advertising contents.

(a) *General.* All recruitment conducted under §§ 655.442 through 655.445 in connection with an *CW-1 Application for Temporary Employment Certification* must contain terms and conditions of employment that are not less favorable than those offered to the *CW-1* workers and must comply with the assurances applicable to job offers as set forth in § 655.423.

(b) *Contents.* All advertising must contain the following information:

(1) The employer's name and contact information;

(2) A statement that the job opportunity is a temporary, full-time position and identify the job title and total number of job openings the employer intends to fill;

(3) A description of the job opportunity with sufficient information to apprise applicants of the services or labor to be performed, including the job duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) The place(s) of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(5) The wage that the employer is offering, intends to offer or will provide to the *CW-1* workers or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal or Commonwealth minimum wage;

(6) If applicable, a statement that overtime will be available to the worker and specify the wage offer(s) for working any overtime hours;

(7) The frequency with which the worker will be paid as required by § 655.423(h);

(8) A statement that the employer will make all deductions from the worker's paycheck required by law, and must specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(9) A statement summarizing the three-fourths guarantee as required by § 655.423(f);

(10) A statement that transportation and subsistence will be provided to the worker while traveling from the worker's origin to the place of employment as will the return transportation and subsistence at the

conclusion of the job opportunity, as required by § 655.423(j)(1);

(11) If applicable, a statement that daily transportation to and from the place(s) of employment will be provided by the employer;

(12) If applicable, a statement that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.423(k);

(13) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(14) If applicable, a statement indicating that on-the-job training will be provided to the worker; and

(15) A statement that directs applicants to apply for the job opportunity directly with the employer, and that indicates at least two verifiable methods by which applicants may apply for the job opportunity, one of which must be via electronic means, and that provides the days and hours during which applicants may be interviewed for the job opportunity.

§ 655.442 Place advertisement with CNMI Department of Labor.

(a) The employer must place an advertisement with the CNMI Department of Labor for a period of 21 consecutive calendar days satisfying the requirements set forth in § 655.441.

(b) Documentation of this step must include:

(1) Either printouts of web pages in which the advertisement appeared on the CNMI Department of Labor job listing system, or other verifiable evidence from the CNMI Department of Labor containing the text of the advertisement; and

(2) The dates of publication demonstrating compliance with the requirement of this section.

§ 655.443 Contact with former U.S. workers.

The employer must contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 270 calendar days before the date of need, employed by the employer in the occupation at the place(s) of employment during the previous year (except those who were dismissed for cause or who abandoned the place(s) of employment), provide a copy of the *CW-1 Application for Temporary Employment Certification*, and solicit their return to the job. This contact must occur during the period of time that the job offer is being advertised on the CNMI Department of Labor's job listing system under

§ 655.442. The employer must retain documentation sufficient to prove such contact in accordance with § 655.456. An employer has no obligation to contact U.S. workers it terminated for cause or who abandoned employment at any time during the previous year, if the employer provided timely notice to the NPC of the termination or abandonment in the manner described in § 655.423(v).

§ 655.444 Notice of posting requirement.

The employer must post a copy of the *CW-1 Application for Temporary Employment Certification* in at least two conspicuous locations at the place(s) of employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW-1 workers. Electronic posting, such as displaying an electronic copy of the *CW-1 Application for Temporary Employment Certification* prominently on any internal or external website that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must be posted for a period of 21 consecutive calendar days. The employer must maintain proof the *CW-1 Application for Temporary Employment Certification* was posted and identify where and during what period of time it was posted in accordance with § 655.456.

§ 655.445 Additional employer-conducted recruitment.

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional reasonable recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there is a likelihood that U.S. workers who are qualified will be available for the work.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, advertising the job offer on the employer's website or another electronic job search website; advertising with community-based organizations, local unions, or trade unions; or other advertising using a professional, trade, or other publication where such a publication is appropriate for the workers likely to apply for the job opportunity. When assessing the appropriateness of a particular recruitment method, the CO will

consider the cost of the additional recruitment and the likelihood that the additional recruitment method(s) will identify qualified and available U.S. workers.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be retained by the employer as proof that the additional recruitment requirements were met. Documentation must be retained as required in § 655.456.

§ 655.446 Recruitment report.

(a) *Requirements of the recruitment report.* No fewer than 2 calendar days after the last date on which the last advertisement appeared, as required by the NOA issued under § 655.433, the employer must prepare, sign, and date a recruitment report. Where recruitment was conducted by a job contractor or its employer-client, both joint employers must sign the recruitment report in accordance with § 655.421(e)(1). The recruitment report must be submitted to the NPC, by the date specified in the NOA, and contain the following information:

- (1) The name of each recruitment activity or source;
- (2) The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;
- (3) Confirmation that the advertisement was posted on the CNMI Department of Labor's job listing system and the dates of advertising;
- (4) Confirmation that former U.S. employees were contacted, if applicable, and by what means and the date(s) of contact;
- (5) Confirmation the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the CW-1 workers and the dates of advertising;
- (6) If applicable, confirmation that additional recruitment was conducted as directed by the CO and the date(s) of advertising; and
- (7) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update and retain the recruitment report.* The employer must update the recruitment report throughout the recruitment period. In a joint employment situation, either the

job contractor or the employer-client may update the recruitment report throughout the recruitment period. The employer must retain the recruitment report as required in § 655.456.

§§ 655.447–655.449 [Reserved]

Labor Certification Determinations

§ 655.450 Determinations.

Except as otherwise noted in this section, the OFLC Administrator and CO(s), by virtue of delegation from the OFLC Administrator, have the authority to certify or deny *CW-1 Applications for Temporary Employment Certification*. The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.451, thus demonstrating that there is an insufficient number of U.S. workers in the Commonwealth who are able, willing, qualified and who will be available at the time and place of the job opportunity for which certification is sought and that the employment of the *CW-1* workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

§ 655.451 Criteria for temporary labor certification.

(a) The criteria for TLC include whether the employer has complied with all of the requirements of this subpart, which are required to grant the labor certification.

(b) In determining whether there are insufficient U.S. workers in the Commonwealth to fill the employer's job opportunity, the CO will count as available any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason. In making this determination, the CO will also consider the employer's contacts with its former U.S. workers, including workers that have been laid off within 270 calendar days before the date of need.

§ 655.452 Approved certification.

If the TLC is granted, the CO will send a Final Determination notice and a copy of the certified *CW-1 Application for Temporary Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.420(c), the CO will send the Final Determination notice and a copy of the certified *CW-1 Application for Temporary Employment Certification* by first class mail. The CO

will send the certified *CW-1 Application for Temporary Employment Certification*, including approved modifications, on behalf of the employer, directly to USCIS using an electronic method(s) designated by the OFLC Administrator. The employer must retain a copy of the certified *CW-1 Application for Temporary Employment Certification*, including the original signed Appendix C, as required by § 655.456.

§ 655.453 Denied certification.

If an electronically filed TLC is denied, the CO will send the Final Determination notice to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.420(c), the CO will send the Final Determination notice by first class mail. The Final Determination notice will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.461; and

(c) State that if the employer does not request administrative review in accordance with § 655.461, the denial is final, and the Department will not accept any appeal on that *CW-1 Application for Temporary Employment Certification*.

§ 655.454 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of *CW-1* workers or both, based upon information the CO receives during the course of processing the *CW-1 Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and who has not been rejected for lawful, job-related reasons, to perform the labor or services. If a partial labor certification is issued, the CO will send the Final Determination notice approving partial certification using the procedures at § 655.452.

The Final Determination notice will:

(a) State the reason(s) the period of employment or the number of *CW-1* workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the partial certification under § 655.461; and

(c) State that if the employer does not request administrative judicial review in accordance with § 655.461, the partial certification is final, and the Department will not accept any appeal on that *CW-1 Application for Temporary Employment Certification*.

§ 655.455 Validity of temporary labor certification.

(a) *Validity period.* A TLC is valid only for the period of employment as approved on the *CW-1 Application for Temporary Employment Certification*. The certification expires after the last day of authorized employment, including any approved extensions thereof.

(b) *Scope of validity.* A TLC is valid only for the number of *CW-1* positions, the places of employment located in the Commonwealth, the job classification and specific services or labor to be performed, and the employer(s) specified on the approved *CW-1 Application for Temporary Employment Certification*, including any approved modifications. The TLC may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.456 Document retention requirements for *CW-1* employers.

(a) *Entities required to retain documents.* All *CW-1* employers filing a *CW-1 Application for Temporary Employment Certification* are required to retain the documents and records establishing compliance with this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of record retention.* The employer must retain records and documents for 3 years from the date on which the certification of the *CW-1 Application for Temporary Employment Certification* expires, or 3 years from the date of the final determination if the *CW-1 Application for Temporary Employment Certification* is denied, or 3 years from the date the Department receives the request for withdrawal of a *CW-1 Application for Temporary Employment Certification* under § 655.462.

(c) *Documents and records to be retained by all employers.* All employers filing a *CW-1 Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records to the Department and any other Federal Government Official in the event of an audit or investigation:

(1) Proof of recruitment efforts, including:

(i) Placement of the job offer with the CNMI Department of Labor as specified in § 655.442;

(ii) Contact with former U.S. employees as specified in § 655.443, including documents demonstrating that each such U.S. worker had been offered the job opportunity listed in the *CW-1 Application for Temporary Employment Certification*, and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons;

(iii) Posting notice of the job opportunity to all employees in the job classification and area in which the work will be performed by the *CW-1* workers as specified in § 655.444; and

(iv) All additional employer-conducted recruitment required by the CO as specified in § 655.445.

(2) Documentation supporting the information submitted in the recruitment report prepared in accordance with § 655.446, such as evidence of nonapplicability of contact with former workers as specified in § 655.443 and any supporting resumes and contact information as specified in § 655.446.

(3) Records of each worker's earnings, hours offered and worked, location(s) where work is performed, and other information as specified in § 655.423(i).

(4) If applicable, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 655.423(j).

(5) Copies of written contracts with third parties demonstrating compliance with the prohibition of seeking or receiving payments or other compensation of any kind from prospective workers as specified in § 655.423(o).

(6) Evidence of the employer's contact with U.S. workers who applied for the job opportunity in the *CW-1 Application for Temporary Employment Certification*, including, but not limited to, documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.423(q).

(7) Written notice provided to and informing OFLC that a *CW-1* worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *CW-1 Application for Temporary Employment Certification*, as specified in § 655.423(v).

(8) A copy of the *CW-1 Application for Temporary Employment Certification* and all accompanying appendices, including any modifications, amendments, or

extensions, signed by the employer as directed by the CO.

(d) *Availability of documents and records for enforcement purposes.* The employer must make available to the Department, DHS or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function all documents and records required to be retained under this subpart for purposes of copying, transcribing, or inspecting them.

§§ 655.457–655.459 [Reserved]

Post Certification Activities

§ 655.460 Extensions.

(a) *Basis for extension.* Under certain circumstances an employer may apply for extensions of the period of employment. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will not grant an extension where the total period of employment under that *CW-1 Application for Temporary Employment Certification* and the authorized extension would exceed the maximum applicable duration permitted under § 655.420(g).

(b) *Decision by the CO.* The CO will notify the employer of the decision in writing. The employer may appeal a denial of a request for an extension by following the appeal procedures in § 655.461.

(c) *Obligations during period of extension.* The *CW-1* employer's assurances and obligations under the TLC will continue to apply during the extended period of employment. The employer must immediately provide to its *CW-1* workers and workers in corresponding employment a copy of any approved extension.

§ 655.461 Administrative review.

(a) *Request for review.* Where authorized in this subpart, an employer wishing review of a determination by the CO must request an administrative review before BALCA of that determination to exhaust its administrative remedies. In such cases, the request for review:

(1) Must be received by BALCA, and the CO who issued the determination, within 10 business days from the date of the determination;

(2) Must clearly identify the particular determination for which review is sought;

(3) Must include a copy of the CO's determination;

(4) Must set forth the particular grounds for the request, including the specific factual issues the requesting party alleges needs to be examined in connection with the CO's determination;

(5) May contain any legal argument that the employer believes will rebut the basis for the CO's determination, including any briefing the employer wishes to submit; and

(6) May contain only such evidence as was actually before the CO at the time of the CO's determination.

(b) *Appeal File.* After the receipt of a request for review, the CO will send a copy of the Appeal File, as soon as practicable by means normally assuring next-day delivery, to BALCA, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor (counsel).

(c) *Assignment.* The Chief ALJ will immediately, upon receipt of the appeal file from the CO, assign either a single member or a three-member panel of BALCA to consider a particular case.

(d) *Administrative review—(1) Briefing schedule.* If the employer wishes to submit a brief on appeal, it must do so as part of its request for review. Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit a brief in support of the CO's decision and, if applicable, in response to the employer's brief.

(2) *Standard of review.* The ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(e) *Scope of review.* BALCA will affirm, reverse, or modify the CO's determination, or remand to the CO for further action. BALCA will reach this decision after due consideration of the documents in the Appeal File that were before the CO at the time of the CO's determination, the request for review, and any legal briefs submitted. BALCA may not consider evidence not before the CO at the time of the CO's determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

(f) *Decision.* The decision of BALCA must specify the reasons for the action taken and must be provided to the employer, the CO, and counsel for the CO within 7 business days of the submission of the CO's brief or 10

business days after receipt of the Appeal File, whichever is later, using means normally assuring expedited delivery.

§ 655.462 Withdrawal of a CW-1 Application for Temporary Employment Certification.

(a) The employer may withdraw a *CW-1 Application for Temporary Employment Certification* after it has been submitted to the NPC for processing, including after the CO grants certification under § 655.450. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *CW-1 Application for Temporary Employment Certification* and work contract with respect to all workers recruited and hired in connection with that application.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the *CW-1 Application for Temporary Employment Certification* and stating the reason(s) for the withdrawal.

§ 655.463 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for TLCs. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§§ 655.464–655.469 [Reserved]

Integrity Measures

§ 655.470 Audits.

The CO may conduct audits of certified *CW-1 Applications for Temporary Employment Certification*.

(a) *Discretion.* The CO has the sole discretion to choose the certified applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

- (1) Specify the documentation that must be submitted by the employer;
- (2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and
- (3) Advise that failure to comply fully with the audit process may result:
 - (i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.471 in future filings of *CW-1 Applications for Temporary Employment Certification* for a period of up to 2 years; or
 - (ii) In a revocation of the certification or debarment from the *CW-1* program

and any other foreign labor certification program administered by the Department.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 655.471 Assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *CW-1 Application for Temporary Employment Certification*.

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a *CW-1 Application for Temporary Employment Certification*, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.461 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.442 through 655.445 and may consist of, but is not limited to, one or more of the following:

- (1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *CW-1 Application for Temporary Employment Certification*;
- (2) Designating the sources where the employer must recruit for U.S. workers in the Commonwealth and directing the

employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisements;

(4) Requiring the employer to notify the CO in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO;

(7) Requiring the employer to provide proof of all U.S. workers who applied (or on whose behalf an application is made) in response to the employer's recruitment efforts;

(8) Requiring the employer to submit any proof of contact with all referrals and former U.S. workers; or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer materially fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and its attorney or agent may be debarred under § 655.473.

§ 655.472 Revocation.

(a) *Basis for revocation.* The OFLC Administrator may revoke a TLC approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the TLC was not justified due to fraud or misrepresentation of a material fact in the application process;

(2) The employer substantially failed to comply with any of the terms or conditions of the approved TLC. A substantial failure is a failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.473(d); or

(3) The employer impeded the audit process, as set forth in § 655.470, or impeded any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

(b) *DOL procedures for revocation—*

(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's TLC, the OFLC Administrator will issue a Notice of Revocation to the employer (and its attorney or agent, if applicable). The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence to the OFLC Administrator or to request administrative review of the Notice of

Revocation by BALCA. If the employer does not submit rebuttal evidence or request administrative review within 10 business days from the date the Notice of Revocation is issued, the notice will become the final agency action and will take effect immediately at the end of the 10 business days.

(2) *Rebuttal.* If the employer timely submits rebuttal evidence, the OFLC Administrator will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification must be revoked, the OFLC Administrator will inform the employer of its right to appeal the final determination to BALCA according to the procedures of § 655.461. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Request for review.* An employer may appeal a Notice of Revocation or a final determination of the OFLC Administrator after the review of rebuttal evidence to BALCA, according to the appeal procedures of § 655.461. The ALJ's decision is the final agency action.

(4) *Stay.* The timely submission of rebuttal evidence or a request for administrative review will stay the revocation pending the outcome of the proceeding.

(5) *Decision.* If the TLC is revoked, the OFLC Administrator will provide copies of final revocation decisions to DHS and DOS promptly.

(c) *Employer's obligations in the event of revocation.* If an employer's TLC is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other required expenses;

(2) The workers' outbound transportation and other required expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

§ 655.473 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or

condition of the *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*, as defined in paragraph (d) of this section. The OFLC Administrator will provide copies of final debarment decisions to DHS and DOS promptly.

(b) *Effect on future applications in all foreign labor programs.* The debarred employer, or a debarred agent or attorney, or any successor in interest to any debarred employer, agent, or attorney, will be disqualified from filing any labor certification applications or labor condition applications with the Department subject to the term limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Period of debarment.* No employer, agent, or attorney may be debarred under this subpart for more than 5 years for a single violation.

(d) *Definition of violation.* For the purposes of this section, a violation of a material term or condition of the *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification* includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent or attorney that involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's CW-1 workers or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with the NOD process, as set forth in § 655.431, or the assisted recruitment process, as set forth in § 655.471;

(vi) Impeding the audit process, as set forth in § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function;

(vii) Employing a CW-1 worker outside of the Commonwealth, in an activity not listed in the work contract, or outside the validity period of employment of the work contract, including any approved extension thereof;

(viii) A violation of the requirements of § 655.423(n) or (o);

(ix) A violation of any of the provisions listed in § 655.423(q); or

(x) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) Fraud involving the *Application for Prevailing Wage Determination* or the *CW-1 Application for Temporary Employment Certification* under this subpart; or

(3) A material misrepresentation of fact during the course of processing the *CW-1 Application for Temporary Employment Certification*.

(e) *Determining whether a violation is substantial.* In determining whether a violation is substantial as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the CW-1 program;

(2) The number of CW-1 workers, workers in corresponding employment, or U.S. workers who were or are affected by the violation(s);

(3) The gravity of the violation(s); or

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(f) *Debarment procedure*—(1) *Notice of Debarment.* If the OFLC Administrator makes a determination to debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, the OFLC Administrator will issue the party a Notice of Debarment. The notice will state the reason(s) for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the notice of its right to submit rebuttal evidence to the OFLC Administrator, or to request administrative review of the decision by BALCA. If the party does not file rebuttal evidence or a request for review within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect on the date specified in the notice or if no date is specified, at the end of 30 calendar days. The timely filing of rebuttal evidence or a request for review stays the debarment pending the outcome of the appeal as provided in paragraphs (f)(2) through (6) of this section.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the notice within 30 calendar days of the date the notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a Final Determination on the debarment within

30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party must be debarred, the OFLC Administrator will issue a Final Determination and inform the party of its right to request administrative review of the debarment by BALCA according to the procedures in this section. The party must request review within 30 calendar days after the date of the Final Determination, or the Final Determination will be the final agency order and the debarment will take effect on the date specified in the Final Determination or if no date is specified, at the end of 30 calendar days.

(3) *Request for review.* (i) The recipient of a Notice of Debarment or Final Determination seeking to challenge the debarment must request review of the debarment within 30 calendar days of the date of the Notice of Debarment or the date of the Final Determination by the OFLC Administrator after review of rebuttal evidence submitted under paragraph (f)(2) of this section. A request for review of debarment must be sent in writing to the Chief ALJ, United States Department of Labor, with a simultaneous copy served on the OFLC Administrator; the request must clearly identify the particular debarment determination for which review is sought; and must set forth the particular grounds for the request. If no timely request for review is filed, the debarment will take effect on the date specified in the Notice of Debarment or Final Determination, or if no date is specified, 30 calendar days from the

date the Notice of Debarment or Final Determination is issued.

(ii) Upon receipt of a request for review, the OFLC Administrator will promptly send a certified copy of the ETA case file to the Chief ALJ by means normally assuring expedited delivery. The Chief ALJ will immediately assign an ALJ to conduct the review.

(iii) Statements, briefs, and other submissions of the parties must contain only legal argument and only such evidence that was within the record upon which the debarment was based, including any rebuttal evidence submitted pursuant to paragraph (f)(2) of this section.

(4) *Review by the ALJ.* (i) In considering requests for review, the ALJ must afford all parties 30 days to submit or decline to submit any appropriate Statement of Position or legal brief. The ALJ must review the debarment determination on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted.

(ii) The ALJ's final decision must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ's decision will be provided to the parties by expedited mail. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties

and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete appeal record to the ARB.

(iii) Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (*e.g.*, briefs or oral argument), and the time within which the presentation must be submitted.

(6) *ARB Decision.* The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

§§ 655.474–655.499 [Reserved]

Signed at Washington, DC.

Molly E. Conway,
Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2019-05937 Filed 3-27-19; 11:15 am]

BILLING CODE 4510-FF-P



FEDERAL REGISTER

Vol. 84

Monday,

No. 62

April 1, 2019

Part IV

Commodity Futures Trading Commission

17 CFR Part 1

De Minimis Exception to the Swap Dealer Definition—Swaps Entered Into by Insured Depository Institutions in Connection With Loans to Customers; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038-AE68

De Minimis Exception to the Swap Dealer Definition—Swaps Entered Into by Insured Depository Institutions in Connection With Loans to Customers

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is amending the de minimis exception within the “swap dealer” definition in the Commission’s regulations by establishing as a factor in the de minimis threshold determination whether a given swap has specified characteristics of swaps entered into by insured depository institutions in connection with loans to customers.

DATES: This rule is effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT:

Matthew Kulkin, Director, 202–418–5213, mkulkin@cftc.gov, Rajal Patel, Associate Director, 202–418–5261, rpatel@cftc.gov, or Jeffrey Hasterok, Data and Risk Analyst, 646–746–9736, jhasterok@cftc.gov, Division of Swap Dealer and Intermediary Oversight; Bruce Tuckman, Chief Economist, 202–418–5624, btuckman@cftc.gov or Scott Mixon, Associate Director, 202–418–5771, smixon@cftc.gov, Office of the Chief Economist; or Mark Fajfar, Assistant General Counsel, 202–418–6636, mfajfar@cftc.gov, Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

- A. Statutory and Regulatory Background
 1. Statutory Authority
 2. Regulatory History
 3. Policy Considerations
- B. Proposal

II. Final Rule—Swaps Entered Into by Insured Depository Institutions in Connection With Loans to Customers

- A. Proposal
 1. Background
 2. Proposed IDI De Minimis Provision
- B. Final Rule, Summary of Comments, and Commission Response
 1. Generally
 2. Timing of Execution of Swap
 3. Relationship of Swap to Loan
 4. Duration of Swap
 5. Level of Funding of Loan
 6. Other Comments

7. Commission Authority To Amend the De Minimis Exception
- III. Related Matters
 - A. Regulatory Flexibility Act
 - B. Paperwork Reduction Act
 - C. Cost-Benefit Considerations
 1. General Costs and Benefits
 2. Section 15(a)
 - D. Antitrust Considerations

I. Background

A. Statutory and Regulatory Background

1. Statutory Authority

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by regulating the swap market. Among other things, the Dodd-Frank Act amended the Commodity Exchange Act (“CEA”)² to provide for the registration and regulation of swap dealers (“SDs”).³ The Dodd-Frank Act directed the CFTC and the U.S. Securities and Exchange Commission (“SEC” and together with the CFTC, “Commissions”) to jointly further define, among other things, the term “swap dealer,”⁴ and to exempt from designation as an SD a person that engages in a de minimis quantity of swap dealing.⁵

CEA section 1a(49) defines the term “swap dealer” to include any person who: (1) Holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps (collectively referred to as “swap dealing,” “swap dealing activity,” or “dealing activity”).⁶ The statute also requires the Commission to promulgate regulations to establish factors with respect to the making of a determination to exempt from designation as an SD an entity engaged in a de minimis quantity of swap dealing.⁷ CEA section 1a(49)

¹ Public Law 111–203, 124 Stat. 1376 (2010), available at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

² The CEA is found at 7 U.S.C. 1, *et seq.*

³ See generally 7 U.S.C. 6s.

⁴ Dodd-Frank Act section 712(d)(1). See the definitions of “swap dealer” in CEA section 1a(49) and § 1.3 of the Commission’s regulations. 7 U.S.C. 1a(49); 17 CFR 1.3.

⁵ See Dodd-Frank Act section 721.

⁶ 7 U.S.C. 1a(49)(A). In general, a person that satisfies any one of these prongs is deemed to be engaged in swap dealing activity. See also the definitions of “swap” in CEA section 1a(47) and § 1.3 of the Commission’s regulations. 7 U.S.C. 1a(47); 17 CFR 1.3.

⁷ 7 U.S.C. 1a(49)(D).

further provides that in no event shall an insured depository institution (“IDI”) be considered to be an SD to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.⁸

2. Regulatory History

Pursuant to the statutory requirements, in December 2010, the Commissions issued a proposing release (“SD Definition Proposing Release”)⁹ further defining, among other things, the term “swap dealer.” Subsequently, in May 2012, the Commissions issued an adopting release (“SD Definition Adopting Release”)¹⁰ further defining, among other things, the term “swap dealer” in § 1.3 of the CFTC’s regulations (“SD Definition”) and providing for a de minimis exception in paragraph (4) therein (“De Minimis Exception”).¹¹ Pursuant to an amendment proposed in June 2018,¹² and adopted by the Commission in November 2018,¹³ the De Minimis Exception now states that a person shall not be deemed to be an SD unless its swaps connected with swap dealing activities exceed an aggregate gross notional amount (“AGNA”) threshold of \$8 billion (measured over the prior 12-month period).¹⁴

3. Policy Considerations

(i) Swap Dealer Registration Policy Considerations

The policy goals underlying SD registration and regulation generally include reducing systemic risk, increasing counterparty protections, and increasing market efficiency, orderliness, and transparency.

Reducing systemic risk: The Dodd-Frank Act was enacted in the wake of the financial crisis of 2008, in significant part, to reduce systemic risk, including the risk to the broader U.S.

⁸ 7 U.S.C. 1a(49)(A).

⁹ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 FR 80174 (proposed Dec. 21, 2010).

¹⁰ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30596 (May 23, 2012).

¹¹ See 17 CFR 1.3, Swap dealer. As discussed in more detail in section II, the Commission notes that a joint rulemaking with the SEC is not required to amend the De Minimis Exception, pursuant to paragraph (4)(v) of the De Minimis Exception. See 17 CFR 1.3, Swap dealer, paragraph (4)(v); 77 FR at 30634 n.464.

¹² See De Minimis Exception to the Swap Dealer Definition, 83 FR 27444 (proposed June 12, 2018).

¹³ See De Minimis Exception to the Swap Dealer Definition, 83 FR 56666 (Nov. 13, 2018).

¹⁴ See 17 CFR 1.3, Swap dealer, paragraph (4)(i)(A).

financial system created by interconnections in the swap market.¹⁵ Pursuant to the Dodd-Frank Act, the Commission has adopted regulations designed to mitigate the potential systemic risk inherent in the previously unregulated swap market.¹⁶

Increasing counterparty protections: Providing regulatory protections for swap counterparties who may be less experienced or knowledgeable about the swap products offered by SDs (particularly end-users who use swaps for hedging or investment purposes) is a fundamental policy goal advanced by the regulation of SDs.¹⁷ The Commissions recognized that a narrower or smaller de minimis exception would increase the number of counterparties that could potentially benefit from those regulatory protections.¹⁸

Increasing market efficiency, orderliness, and transparency: Increasing swap market efficiency, orderliness, and transparency is another goal of SD regulation.¹⁹ Regulations requiring SDs, for example, to keep detailed daily trading records, report trade information, and engage in portfolio reconciliation and compression exercises help achieve these market benefits.²⁰

¹⁵ Dodd-Frank Act, Preamble (indicating that the purpose of the Dodd-Frank Act was to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail,” to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes). See also 83 FR at 56667; 83 FR at 27446.

¹⁶ For example, registered SDs have specific requirements for risk management programs and margin. See, e.g., 17 CFR 23.600; 17 CFR 23.150–23.161.

¹⁷ For example, registered SDs are subject to external business conduct standard regulations designed to provide counterparty protections. See, e.g., 17 CFR 23.400–23.451.

¹⁸ SD Definition Adopting Release, 77 FR at 30628 (“On the one hand, a de minimis exception, by its nature, will eliminate key counterparty protections provided by Title VII for particular users of swaps and security-based swaps.”). See also 83 FR at 56667; 83 FR at 27446.

¹⁹ 77 FR at 30629 (The statutory requirements that apply to swap dealers include requirements aimed at helping to promote effective operation and transparency of the swap markets.”). See *id.* at 30703 (Those who engage in swaps with entities that elude swap dealer or major swap participant status and the attendant regulations could be exposed to increased counterparty risk; customer protection and market orderliness benefits that the regulations are intended to provide could be muted or sacrificed, resulting in increased costs through reduced market integrity and efficiency.). See also 83 FR at 56667–68; 83 FR at 27446.

²⁰ See, e.g., 17 CFR 23.200–23.205; 17 CFR parts 43 and 45; 17 CFR 23.502–23.503.

(ii) De Minimis Exception Policy Considerations

Consistent with Congressional intent, an appropriately calibrated de minimis exception has the potential to advance other interests.²¹ These interests include increasing efficiency, allowing limited swap dealing in connection with other client services, encouraging new participants to enter the market, and focusing regulatory resources.²² The policy objectives underlying the de minimis exception are designed to encourage participation and competition by allowing persons to engage in a de minimis amount of dealing without incurring the costs of registration and regulation.²³

Increasing efficiency: A de minimis exception based on an objective test with a limited degree of complexity enables entities to engage in a lower level of swap dealing with limited concerns about whether their activities would require registration.²⁴ The de minimis exception thereby fosters efficient application of the SD Definition. Additionally, the Commission is of the view that the potential for regular or periodic changes to the de minimis threshold may reduce its efficacy by making it challenging for persons to calibrate their swap dealing activity as appropriate for their business models. Further, the Commission is mindful that objective, predictable standards in the de minimis exception increase efficiency by establishing a simple test for whether a person’s swaps connected with swap dealing activity must be included in the de minimis calculation. On the other hand, more complexity in the de minimis calculation potentially results in less efficiency.²⁵

²¹ See 77 FR at 30628. See also 83 FR 56668; 83 FR at 27446.

²² See 77 FR at 30628–30, 30707–08. See also 83 FR at 56668; 83 FR at 27446–47.

²³ In considering the appropriate de minimis threshold, excluding entities whose dealing activity is sufficiently modest in light of the total size, concentration and other attributes of the applicable markets can be useful in avoiding the imposition of regulatory burdens on those entities for which dealer regulation would not be expected to contribute significantly to advancing the customer protection, market efficiency and transparency objectives of dealer regulation. 77 FR at 30629–30. See also 83 FR at 56668; 83 FR at 27446–47.

²⁴ 77 FR at 30628–29 (The de minimis exception may further the interest of regulatory efficiency when the amount of a person’s dealing activity is, in the context of the relevant market, limited to an amount that does not warrant registration. In addition, the exception can provide an objective test.). See also 83 FR at 56668; 83 FR at 27446–47.

²⁵ 77 FR at 30707–08 (On the other hand, requiring market participants to consider more variables in evaluating application of the de minimis exception would likely increase their costs to make this determination.). See also 83 FR at 56668; 83 FR at 27446–47.

Allowing limited ancillary dealing: A de minimis exception allows persons to accommodate existing clients that have a need for swaps (on a limited basis) along with other services.²⁶ This enables end-users to continue transacting within existing business relationships, for example to hedge interest rate or currency risk.

Encouraging new participants: A de minimis exception also promotes competition by allowing a person to engage in some swap dealing activities without immediately incurring the regulatory costs associated with SD registration and regulation.²⁷ Without a de minimis exception, SD regulation could become a barrier to entry that may stifle competition. An appropriately calibrated de minimis exception could lower the barrier to entry of becoming an SD by allowing smaller participants to gradually expand their business until the scope and scale of their activity warrants regulation (and the costs involved with compliance).

Focusing regulatory resources: Finally, the de minimis exception also increases regulatory efficiency by enabling the Commission to focus its limited resources on entities whose swap dealing activity is sufficient in size and scope to warrant oversight.²⁸

As noted in the SD Definition Adopting Release, implementing the de minimis exception requires a careful balancing that considers the regulatory interests that could be undermined by an unduly broad exception as well as those regulatory interests that may be promoted by an appropriately limited exception.²⁹ A narrower de minimis exception would likely mean that a greater number of entities would be required to register as SDs and become subject to the regulatory framework applicable to registered SDs. However, a de minimis exception that is too narrow could, for example, discourage persons from engaging in limited swap dealing activity to avoid the burdens associated with SD regulation.

B. Proposal

On June 12, 2018, the Commission published for public comment a Notice of Proposed Rulemaking (“NPRM”) to amend the De Minimis Exception by: (1)

²⁶ 77 FR at 30629, 30707–08. See also 83 FR at 56668; 83 FR at 27447.

²⁷ 77 FR at 30629. See also 83 FR at 56668; 83 FR at 27447.

²⁸ 77 FR at 30628–29. See also 83 FR at 56668; 83 FR at 27447.

²⁹ 77 FR at 30628. See SD Definition Proposing Release, 75 FR at 80179 (The de minimis exception should apply only when an entity’s dealing activity is so minimal that applying dealer regulations to the entity would not be warranted.). See also 83 FR at 56668; 83 FR at 27447.

Setting the AGNA threshold for the De Minimis Exception at \$8 billion in swap dealing activity entered into by a person over the preceding 12 months; (2) adding new factors to the De Minimis Exception that would lead to excepting from the AGNA calculation: (a) Certain swaps entered into with a customer by an IDI in connection with originating a loan to that customer, (b) certain swaps entered into to hedge financial or physical positions, and (c) certain swaps resulting from multilateral portfolio compression exercises; and (3) providing that the Commission may determine the methodology to be used to calculate the notional amount for any group, category, type, or class of swaps, and delegating to the Director of the Division of Swap Dealer and Intermediary Oversight (“DSIO”) the authority to make such determinations (collectively, the “Proposal”).³⁰

In addition, the Commission sought comment on the following additional potential changes to the De Minimis Exception: (1) Adding as a factor a minimum dealing counterparty count threshold and/or a minimum dealing transaction count threshold; (2) adding as a factor whether a swap is exchange-traded and/or cleared; and (3) adding as a factor whether a swap is categorized as a non-deliverable forward transaction.

The Commission received 43 letters and Commission staff participated in four ex parte meetings³¹ concerning the

³⁰ 83 FR 27444.

³¹ Comments were submitted by the following entities: 360 Trading Networks Inc. (“360 Trading”); American Bankers Association (“ABA”) (ABA also attached a report prepared by NERA Economic Consulting); American Gas Association (“AGA”); Americans for Financial Reform (“AFR”); Associated Foreign Exchange, Inc. and GPS Capital Markets, Inc. (“AFEX/GPS”); Association of Global Custodians (“AGC”); Better Markets, Inc. (“Better Markets”); Bond Dealers of America (“BDA”); Capital One Financial Corporation (“Capital One”); Cboe SEF, LLC (“Cboe SEF”); Citizens Financial Group, Inc. (“Citizens”); CME Group Inc. and Intercontinental Exchange, Inc. (“CME/ICE”); Coalition for Derivatives End-Users (“CDEU”); Coalition of Physical Energy Companies (“COPE”); Commercial Energy Working Group (“CEWG”); Commodity Markets Council (“CMC”) (CMC also expressed support for the CEWG comment letter); Covington & Burling LLP (“Covington”); Daiwa Securities Co. Ltd. (“Daiwa”); Edison Electric Institute and Electric Power Supply Association (“EEI/EPSA”); Foreign Exchange Professionals Association (“FXPA”); Frost Bank; Futures Industry Association and FIA Principal Traders Group (“FIA”); Institute for Agriculture and Trade Policy (“IATP”); Institute of International Bankers (“IIB”); International Energy Credit Association (“IECA”) (IECA also expressed support for the EEI/EPSA comment letter); International Swaps and Derivatives Association and Securities Industry and Financial Markets Association (“ISDA/SIFMA”); Japanese Bankers Association (“JBA”); M&T Bank

NPRM.³² Twelve of the letters addressed the IDI-related proposed amendment.³³ As discussed above, the Commission adopted an \$8 billion de minimis threshold in November 2018. This release does not include discussion regarding other aspects of the NPRM as they were addressed in the adopting release for the \$8 billion threshold.³⁴

II. Final Rule—Swaps Entered Into by Insured Depository Institutions in Connection With Loans to Customers

Given the more complete information now available regarding certain portions of the swap market, the data analytical capabilities developed since the SD regulations were adopted, five years of implementation experience, and comments received in response to the NPRM, the amendment being adopted in this release: (1) Supports a clearer and more streamlined application of the De Minimis Exception; (2) provides greater clarity regarding which swaps need to be counted towards the AGNA threshold; and (3) accounts for practical

(“M&T”); Managed Funds Association (“MFA”); National Council of Farmer Cooperatives (“NCFC”); National Rural Electric Cooperative Association and American Public Power Association (“NRECA/APPA”); Natural Gas Supply Association (“NGSA”); NEX Group plc (“NEX”); Northern Trust; Optiver US LLC (“Optiver”) (Optiver also expressed support for the FIA comment letter); Regions Financial Corp. (“Regions”); State Street; SVB Financial Group (“SVB”); Thomson Reuters (SEF) LLC (“TR SEF”); six U.S. Senators (“Senators”); Virtu Financial Inc. (“Virtu”); Western Union Business Solutions (USA), LLC and Custom House USA, LLC (“Western Union”); and XTX Markets Limited (“XTX”). Additionally, there were three meetings with Delta Strategy Group, DRW, Jump Trading, and Optiver, and one meeting with Better Markets. The comment letters and notice of the ex parte meetings are available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2885>.

³² Additionally, in March 2017, Chairman Giancarlo initiated an agency-wide internal review of CFTC regulations and practices to identify those areas that could be simplified to make them less burdensome and costly (“Project KISS”). See Remarks of then-Acting Chairman J. Christopher Giancarlo before the 42nd Annual International Futures Industry Conference in Boca Raton, FL (Mar. 15, 2017), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20>. The Commission subsequently published in the **Federal Register** a Request for Information soliciting suggestions from the public regarding how the Commission’s existing rules, regulations, or practices could be applied in a simpler, less burdensome, and less costly manner. A number of responses submitted pursuant to the Project KISS Request for Information supported modifications to the De Minimis Exception. Project KISS, 82 FR 21494 (May 9, 2017), amended by 82 FR 23765 (May 24, 2017). The suggestion letters filed by the public are available at <https://comments.cftc.gov/KISS/KissInitiative.aspx>.

³³ See ABA, Better Markets, BDA, Capital One, CDEU, Citizens, Frost Bank, IIB, ISDA/SIFMA, JBA, M&T, and Regions comment letters.

³⁴ See 83 FR 56666.

considerations relevant to swaps in different circumstances.

In this adopting release, the Commission is amending the De Minimis Exception by establishing as a factor in the AGNA threshold determination whether a given swap has specified characteristics of swaps entered into by IDIs in connection with originating loans to customers.³⁵ The CFTC may in the future separately propose or adopt rules addressing any aspect of the NPRM that is not finalized in this release, or that has not already been finalized.³⁶

The changes to the De Minimis Exception are being adopted pursuant to the Commission’s authority under CEA section 1a(49)(D), which requires the Commission to exempt from designation as an SD an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers, and to promulgate regulations to establish factors with respect to the making of this determination to exempt.³⁷ The Commissions issued the SD Definition Adopting Release pursuant to section 712(d)(1) of the Dodd-Frank Act, which requires the CFTC and SEC to jointly adopt rules regarding the definition of, among other things, the term “swap dealer.” The CFTC continues to coordinate with the SEC on SD and security-based swap dealer regulations. However, as discussed in the NPRM and the SD Definition Adopting Release, a joint rulemaking is not required with respect to the De Minimis Exception.³⁸ The Commission notes that it has consulted with the SEC and prudential regulators regarding the changes to the De Minimis Exception adopted herein.³⁹

³⁵ This exception would be independent of the existing exclusion in paragraph (5) of the SD Definition for swaps entered into by IDIs.

³⁶ See *ICI v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (“[A]s the Supreme Court has emphasized, ‘[n]othing prohibits federal agencies from moving in an incremental manner.’”) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009)).

³⁷ 7 U.S.C. 1a(49)(D). See also 17 CFR 1.3, Swap dealer, paragraph (4)(v).

³⁸ 83 FR at 27448; 77 FR at 30634 n.464 (stating that we do not interpret the joint rulemaking provisions of section 712(d) of the Dodd-Frank Act to require joint rulemaking here, because such an interpretation would read the term “Commission” out of CEA section 1a(49)(D) (and Exchange Act section 3(a)(71)(D)), which themselves were added by the Dodd-Frank Act.”).

³⁹ As required by section 712(a)(1) of the Dodd-Frank Act.

A. Proposal

The Commission proposed adding an IDI loan-related factor in the De Minimis Exception (the “IDI De Minimis Provision”) to address concerns that there are circumstances where swaps not covered by the IDI loan-related swap exclusion in paragraph (5) of the SD Definition (the “IDI Swap Dealing Exclusion”) should be excluded from the de minimis calculation. Specifically, the Commission proposed to add specific factors that an IDI can consider when assessing whether swaps entered into with customers in connection with originating loans to those customers must be counted towards the IDI’s de minimis calculation.⁴⁰ The IDI could exclude qualifying swaps from the de minimis calculation pursuant to the IDI De Minimis Provision regardless of whether the swaps would qualify for the IDI Swap Dealing Exclusion.

1. Background

The Commissions jointly adopted the IDI Swap Dealing Exclusion⁴¹ as paragraph (5) of the SD Definition. It allows an IDI to exclude—when determining whether it is an SD—certain swaps it enters into with a customer in connection with originating a loan to that customer.⁴² For a swap to be considered to have been entered into in connection with originating a loan, the IDI Swap Dealing Exclusion requires that: (1) The IDI enter into the swap no earlier than 90 days before and no later than 180 days after execution of the loan agreement (or transfer of principal);⁴³ (2) the rate, asset, liability, or other notional item underlying the swap be tied to the financial terms of the loan or be required as a condition of the loan to hedge risks arising from potential changes in the price of a commodity;⁴⁴ (3) the duration of the swap not extend beyond termination of the loan;⁴⁵ (4) the IDI be the source of at least 10 percent of the principal amount of the loan, or the source of a principal amount greater than the notional

amount of swaps entered into by the IDI with the customer in connection with the loan;⁴⁶ (5) the AGNA of swaps entered into in connection with the loan not exceed the principal amount outstanding;⁴⁷ (6) the swap be reported as required by other CEA provisions if it is not accepted for clearing;⁴⁸ (7) the transaction not be a sham, whether or not the transaction is intended to qualify for the IDI Swap Dealing Exclusion;⁴⁹ and (8) the loan not be a synthetic loan, including, without limitation, a loan credit default swap or a loan total return swap.⁵⁰ A swap that meets the above requirements would not be considered when assessing whether a person is an SD.

The Commission understands that certain IDIs are restricting loan-related swaps because of the potential that such swaps would not be covered by the IDI Swap Dealing Exclusion and therefore would have to be counted towards an IDI’s de minimis threshold, requiring the IDI to register as an SD and incur registration-related costs.⁵¹ The restrictions on loan-related swaps by IDIs may result in reduced availability of swaps for the loan customers of these IDIs, potentially hampering the ability of end-user borrowers to enter into hedges in connection with their loans.

2. Proposed IDI De Minimis Provision

Any swap that meets the requirements of the IDI Swap Dealing Exclusion would also meet the requirements of the IDI De Minimis Provision. Beyond this, the IDI De Minimis Provision furthers the purposes of the de minimis exception by setting out additional factors for determining which swaps need to be counted towards an IDI’s de minimis calculation. The Commission expects that including the IDI De Minimis Provision in the De Minimis Exception would facilitate the provision of swaps by IDIs that are not registered as SDs to their loan customers because the IDIs would be able to provide these risk-mitigating swaps in connection with originating loans without counting the swaps towards the AGNA threshold.

The Commission proposed that the IDI De Minimis Provision include the following requirements:⁵²

- The swap is entered into with the customer no earlier than 90 days before execution of the applicable loan agreement, or no earlier than 90 days

before transfer of principal to the customer by the IDI pursuant to the loan, unless an executed commitment or forward agreement for the applicable loan exists, in which event the 90 day restriction does not apply.

- The rate, asset, liability or other term underlying such swap is, or is related to, a financial term of such loan, which includes, without limitation, the loan’s duration, rate of interest, the currency or currencies in which it is made and its principal amount; or the swap is required as a condition of the loan, either under the IDI’s loan underwriting criteria or as is commercially appropriate, in order to hedge risks incidental to the borrower’s business (other than for risks associated with an excluded commodity) that may affect the borrower’s ability to repay the loan.

- The duration of the swap does not extend beyond termination of the loan.

- The IDI is committed to be, under the terms of the agreements related to the loan, the source of at least five percent of the maximum principal amount under the loan; or if the IDI is committed to be, under the terms of the agreements related to the loan, the source of less than five percent of the maximum principal amount under the loan, then the aggregate notional amount of all swaps entered by the IDI with the customer in connection with the financial terms of the loan cannot exceed the principal amount of the IDI’s loan.

- The swap is considered to have been entered into in connection with originating a loan with a customer if the IDI directly transfers the loan amount to the customer; is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer; purchases or receives a participation in the loan; or under the terms of the agreements related to the loan, is, or is intended to be, the source of funds for the loan.

- The loan to which the swap relates shall not include: any transaction that is a sham, whether or not intended to qualify for the exception from the de minimis threshold in this definition; or any synthetic loan.

B. Final Rule, Summary of Comments, and Commission Response

Upon consideration of the comments described below, the Commission is adopting the IDI De Minimis Provision in paragraph (4)(i)(C) of the De Minimis Exception as proposed, with a few modifications as discussed in detail below.

⁴⁰ A joint rulemaking is not required with respect to changes to the de minimis exception-related factors. See *supra* note 38; 77 FR at 30634 n.464. As noted above, pursuant to section 712(a)(1) of the Dodd-Frank Act, the Commission consulted with the SEC and prudential regulators regarding the changes to the De Minimis Exception discussed in this adopting release.

⁴¹ The IDI Swap Dealing Exclusion was adopted pursuant to statutory language stating that in no event shall an IDI be considered to be an SD to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer. 7 U.S.C. 1a(49)(A).

⁴² 17 CFR 1.3, Swap dealer, paragraph (5).

⁴³ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(A).

⁴⁴ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(B).

⁴⁵ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(C).

⁴⁶ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(D).

⁴⁷ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(E).

⁴⁸ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(F).

⁴⁹ 17 CFR 1.3, Swap dealer, paragraph (5)(iii)(A).

⁵⁰ 17 CFR 1.3, Swap dealer, paragraph (5)(iii)(B).

⁵¹ See, e.g., ABA, Capital One, Citizens, and Regions comment letters.

⁵² See 83 FR at 27458–62, 27478–79.

The Commission believes that the IDI De Minimis Provision advances the policy objectives of the de minimis exception by allowing some IDIs that are not registered SDs to provide swaps to customers in connection with originating loans. The IDI De Minimis Provision should facilitate an appropriate level of swap dealing in connection with other client services and may encourage more IDIs to participate in the swap market—two policy objectives of the de minimis exception. Greater availability of loan origination-related swaps may also improve the ability of customers to hedge their loan-related exposure. The Commission also believes that the proposed IDI De Minimis Provision may

allow for more focused, efficient application of the SD Definition to the activities of those IDIs that offer swaps in connection with loans.

The Commission also considered how the IDI De Minimis Provision would affect the policy objectives of the SD registration requirement. The de minimis exception should allow amounts of swap dealing activity that are sufficiently small that they do not warrant registration to address concerns implicated by SD regulations.⁵³ As discussed in the Proposal,⁵⁴ Commission staff reviewed the AGNA of swaps activity entered into by entities that were identified as IDIs⁵⁵ with at least 10 counterparties in interest rate swaps (“IRS”), credit default swaps (“CDS”), foreign exchange (“FX”) swaps,⁵⁶ and equity swaps. In particular, the AGNA of swaps activity of IDIs within various AGNA ranges from \$1 billion to \$50 billion was analyzed. The range of \$1 billion to \$50 billion was analyzed because larger IDIs appear to have a significant amount of non-IDI loan origination-related swaps activity, and therefore, the Commission believes that the addition of the IDI De Minimis Provision would be beneficial primarily to small and mid-sized IDIs with lower AGNA of activity. As seen in Table 1, during the review period, the AGNA of swaps activity that these unregistered IDIs entered into with other non-registered entities was low relative to the total swap market analyzed.

swaps,⁵⁶ and equity swaps. In particular, the AGNA of swaps activity of IDIs within various AGNA ranges from \$1 billion to \$50 billion was analyzed. The range of \$1 billion to \$50 billion was analyzed because larger IDIs appear to have a significant amount of non-IDI loan origination-related swaps activity, and therefore, the Commission believes that the addition of the IDI De Minimis Provision would be beneficial primarily to small and mid-sized IDIs with lower AGNA of activity. As seen in Table 1, during the review period, the AGNA of swaps activity that these unregistered IDIs entered into with other non-registered entities was low relative to the total swap market analyzed.

TABLE 1—IDI ACTIVITY (Ranges between \$1 Bn and \$ 50 Bn)⁵⁷ IRS, CDS, FX SWAPS, AND EQUITY SWAPS [Minimum 10 counterparties]

Range of AGNA of swaps activity (\$Bn)	Number of IDIs		AGNA of swaps activity ¹		
	Registered as SDs	Not registered as SDs	Total with at least one registered SD (\$Bn)	Total with no registered SDs (\$Bn)	Total with no registered SDs (percent of overall market)
1–3	0	13	13.5	8.9	0.004
3–8	0	10	37.5	16.5	0.007
8–20	0	4	42.6	6.5	0.003
20–50	2	3	160.7	14.2	0.006

¹ The AGNA totals are not mutually exclusive across rows, and therefore cannot be added together without double counting. For example, some IDIs in the \$1 billion to \$3 billion range transact with IDIs in the \$3 billion to \$8 billion range. Transactions that involve entities from multiple rows are reported in both rows.

For example, there were four IDIs that had between \$8 billion and \$20 billion each in AGNA of swaps activity—none of which are registered SDs.⁵⁸ In aggregate, these IDIs entered into approximately \$49.1 billion in AGNA of swaps activity. However, only \$6.5 billion of that activity was between two entities not registered as SDs, representing only 0.003 percent of the total AGNA of swaps activity during the review period. Depending on the range of AGNA of swaps activity examined, the level of activity occurring between two entities not registered as SDs (at least one of which is an IDI) ranged from only approximately \$6.5 billion to \$16.5 billion, or 0.003 percent and 0.007 percent of the total AGNA of swaps activity. Though these entities are active

in the swap market, the Commission is of the view that their activity poses relatively low systemic risk because of their limited AGNA of swaps activity as compared to the overall size of the swap market. Additionally, the Commission notes that because only IDIs entering into swaps with customers in connection with loan origination may exclude such swaps from de minimis calculations, the IDIs will be subject to prudential supervision of their lending and swap dealing activities, thereby maintaining regulatory oversight of the risks of such swaps. Further, subject to certain exceptions, whether or not a swap involves a registered SD, the swap and the swap’s counterparties are still subject to the Commission’s regulations, including provisions regarding

mandatory clearing, trade execution, and swap data reporting, which advance the policy considerations underlying SD regulations.

The Commission believes that end-users would primarily benefit from the IDI De Minimis Provision by entering into IRS, FX swaps, and NFC swaps with IDIs to hedge loan-related risks. SDR data indicates that IDIs that have between \$1 billion and \$50 billion in AGNA of swaps activity primarily enter into IRS, FX swaps, and NFC swaps, as measured by AGNA and transaction count.⁵⁹ Further, market participants have also indicated that IDIs primarily provide swaps to customers to hedge interest rate, FX, and commodity price

⁵³ SD Definition Adopting Release, 77 FR at 30626–28. See also SD Definition Proposing Release, 75 FR at 80179.

⁵⁴ See 83 FR at 27459–60.

⁵⁵ Based on information on the Federal Deposit Insurance Corporation website, available at https://www5.fdic.gov/idasp/advSearch_war_p_download_all.asp.

⁵⁶ The term “FX swaps” is used in this release to only describe those FX transactions that are

counted towards a person’s de minimis calculation. The term “FX swaps” does not refer to swaps and forwards that are not counted towards the de minimis threshold pursuant to the exemption granted by the Secretary of the Treasury. See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694, 69704–05 (Nov. 20, 2012); Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap

Agreement Recordkeeping, 77 FR 48208, 48253 (Aug. 13, 2012).

⁵⁷ 83 FR at 27459.

⁵⁸ See Table 1.

⁵⁹ This is based on an analysis of SDR data from January 1, 2017, through December 31, 2017. The data was sourced from data reported to the four registered SDRs: BSDR LLC, Chicago Mercantile Exchange Inc., DTCC Data Repository, and ICE Trade Vault. See 83 FR at 27449.

risk.⁶⁰ Because IDI swaps are entered into in connection with loans, the Commission believes the most common IDI swaps will be entered into by loan customers to reduce interest rate risk associated with loan obligations. Similarly, the Commission also believes that some IDI swaps will be used by loan customers to reduce currency or commodity price risk associated with loans and the borrower's repayment ability. This usage of IDI swaps is likely to continue after adoption of the IDI De Minimis Provision because: (1) On a notional and trade count basis, IRS and FX swaps are the largest components of the market, and loans are expected to generally continue to have an interest rate or FX component that can be hedged; and (2) IDIs may more effectively be able to provide loan customers the option to enter into NFC swaps to hedge loan-related risk.⁶¹ The Commission believes that increased IDI swap dealing not only benefits borrowers for the reasons stated above, but also provides benefits to IDIs who also seek to provide swaps in connection with originating loans. Generally, IDIs improve loan customers' ability to repay loans by better allowing the customers to hedge loan-related risks using IRS, FX swaps, or NFC swaps.

The Commission has also considered the potential that IDIs might respond to the IDI De Minimis Provision by

⁶⁰ See, e.g., ABA and Capital One comment letters. ABA generally referenced a January 19, 2016 comment letter that it submitted in response to the Swap Dealer De Minimis Exception Preliminary Report (Nov. 18, 2015), in which it stated that IRS and NFC swaps are examples of how banks use swaps to serve customers. The Swap Dealer De Minimis Exception Preliminary Report and ABA comment letter are available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1634>. Capital One stated that it enters into swaps with its commercial banking customers so that those customers can hedge risks associated with the financial terms of the related loans, and that it enters into swaps with customers in order to help them hedge their other interest rate, FX, and NFC risks arising from their business operations. The Commission also notes that, as discussed in the Swap Dealer De Minimis Exception Preliminary Report, comments in response to the SD Definition Proposing Release indicated that small and mid-sized banks were primarily dealers in the IRS market because of their focus on lending activities. See Swap Dealer De Minimis Exception Preliminary Report at 43.

⁶¹ See *id.* See also Citizens, M&T, and Regions comment letter. Citizens generally supported the IDI De Minimis Provision, stating that the IDI Swap Dealing Exclusion is too restrictive and is difficult to interpret in certain instances, particularly with respect to IRS. M&T indicated that the IDI De Minimis Provision better aligns the regulatory framework with the risk mitigation demands of bank customers, particularly with respect to IRS. Regions agreed that one benefit of the IDI De Minimis Provision is to provide greater flexibility for borrowers to hedge commodity price risks with IDIs.

engaging in more swap dealing activity.⁶² Because swap dealing under the IDI De Minimis Provision must be connected to customer loan origination, future growth in swap dealing by unregistered IDIs is partially limited by growth in the related customer lending business. The Commission believes that customer swap dealing is complementary to the customer loan business, and is not the sole determinative factor in the overall growth of the customer loan business.⁶³ The Commission believes that the requisite direct relationship between the swap and the origination of a loan will prevent IDIs from engaging in swap dealing activity not related to loans to customers. Therefore, the Commission believes that the swap dealing activity by IDIs that may occur under the IDI De Minimis Provision, taken together with swap dealing activity that may occur under other provisions of the De Minimis Exception, is "sufficiently modest in light of the total size, concentration and other attributes of the applicable markets" to not warrant SD registration, because it would not appreciably affect the systemic risk, counterparty protection, and market efficiency considerations of regulation.⁶⁴ The Commission is of the view that the IDI De Minimis Provision will not lead to a significant expansion of swap dealing activity by unregistered entities, as compared to the overall size of the swap market. As noted, growth in swap dealing by IDIs is partially limited by growth in the related customer lending business. This lending business, in turn, is driven in part by macroeconomic factors such as interest rates and economic growth. These factors may be expected to constrain the ability of IDIs to substantially increase

⁶² In determining the scope of the de minimis exception, it is important to consider not only the current state of the swap and security-based swap markets, but also to account for how those markets may evolve in the future. 77 FR at 30628.

⁶³ See, e.g., Capital One and Regions comment letters. Capital One stated that its commercial banking business "primarily originates loans (and participates in loans originated by other banks) for its commercial banking customers. In connection with the origination of (or participation in) these loans, Capital One enters into swaps with its commercial banking customers so that those customers can hedge risks associated with the financial terms of the related loans." Regions stated the IDI De Minimis Provision removes "overly restrictive definitions of swaps tied to lending activity and better reflect[s] the way that traditional regional banking organizations . . . interact with their commercial customers."

⁶⁴ See 77 FR at 30626, 30629. As noted in the SD Definition Adopting Release, implementing the de minimis exception requires a careful balancing that considers the regulatory interests that could be undermined by an unduly broad exception as well as those regulatory interests that may be promoted by an appropriately limited exception. *Id.* at 30628.

their loan origination-related swaps activity—such as during the onset of a recession when default risk increases—simply because of this change to the De Minimis Exception. Additionally, constraints from prudential supervision,⁶⁵ capital requirements, and the need to post margin on certain transactions will also act as limits on an IDI's swap dealing activities.⁶⁶

1. Generally

Almost all commenters that addressed the IDI De Minimis Provision expressed general support for the proposed amendment.⁶⁷ Commenters often compared the IDI De Minimis Provision to the IDI Swap Dealing Exclusion. In that regard, commenters stated that the IDI De Minimis Provision: (1) Better aligns the regulatory framework with the risk mitigation demands of bank customers;⁶⁸ (2) allows IDIs to more accurately address the needs of loan customers seeking to access cost-effective and tailored hedges for their loans;⁶⁹ (3) provides the benefit of reduced risk and more efficient use of loan collateral through more tailored swaps;⁷⁰ and (4) removes overly restrictive definitions of swaps tied to lending activity and better reflects how traditional regional banks interact with their commercial customers.⁷¹

ABA suggested that the Commission amend the first sentence in proposed paragraph (4)(i)(C) to clarify that the IDI

⁶⁵ For example, loan loss provisioning requirements should act as a constraint on the size of the IDI's loan portfolio, which would also serve to constrain the IDI's loan-related swaps. See, e.g., The Office of the Comptroller of the Currency, Comptroller's Handbook: Allowance for Loan and Lease Losses (June 1996-May 1998) (still applicable as of May 17, 2012).

⁶⁶ The Commission also notes that ABA submitted a study that evaluated the costs and benefits of SD registration for member banks, prepared by NERA Economic Consulting ("NERA"). NERA estimated regulatory coverage for several different scenarios, including for: (1) An AGNA threshold; and (2) an AGNA threshold in conjunction with a modified exception for IDI loan-related swaps that eliminated the date restrictions related to the IDI Swap Dealing Exclusion. Although the assumptions and analytical methodology differed from the Commission's approach, NERA's analysis also estimated only a limited decrease in regulatory coverage in the scenario that evaluated an AGNA threshold with a modified exception for IDI loan-related swaps—with \$138.383 billion of swaps activity covered—as compared to the scenario that evaluated just an AGNA threshold—with \$138.406 billion of swaps activity covered (a decrease of 0.017 percent). See ABA comment letter (attaching NERA study).

⁶⁷ See ABA, BDA, Capital One, CDEU, Citizens, Frost Bank, IIB, ISDA/SIFMA, JBA, M&T, and Regions comment letters.

⁶⁸ See M&T comment letter.

⁶⁹ See Capital One and Frost Bank comment letters.

⁷⁰ See Frost Bank comment letter.

⁷¹ See Regions comment letter.

De Minimis Provision applies to both the \$8 billion threshold and the special entity \$25 million threshold by replacing the term “the aggregate gross notional amount threshold” with the term “any aggregate gross notional amount threshold.”⁷² The Commission is modifying paragraph (4)(i)(C) to read “the \$8 billion aggregate gross notional amount threshold” to reflect that the IDI De Minimis Provision would only apply to swaps that would otherwise be counted towards the \$8 billion threshold. The Commission stated in the NPRM that the special entity threshold was outside of the scope of the Proposal.⁷³ Accordingly, the Commission cannot make changes that would affect the special entity threshold at this time.

Additionally, ABA and Citizens stated that the Commission should permit IDIs to exclude swaps that meet the provisions of the IDI De Minimis Provision retroactively for a 12-month period from the date on which the regulation becomes effective.⁷⁴ In response, the Commission takes the position that swaps that were executed prior to the effective date of this release do not qualify for the IDI De Minimis Provision. The applicability of provisions in the De Minimis Exception is generally determined at the time of execution of the swap (or at the time a life cycle event occurs, if applicable), and accordingly, swaps executed prior to the effective date did not qualify for the exception at the time of execution and cannot be retroactively qualified under these amendments.

Further, as discussed in the Proposal, the Commission is of the view that swaps entered into in connection with non-synthetic lending arrangements that are commonly known in the market as “loans” would generally not need to be counted towards an IDI’s de minimis calculation if the other requirements of the IDI De Minimis Provision are also met.⁷⁵ As noted, the Commission’s regulations in part 75 (regarding “Proprietary Trading and Certain Interests in and Relationships with Covered Funds”) define a loan as any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative,⁷⁶ and the Commission is of the view that this definition would also apply for purposes of the IDI De Minimis

Provision.⁷⁷ Generally, allowing swaps entered into in connection with other forms of financing commonly known as loans not to be counted towards the de minimis threshold calculation better reflects the breadth of lending products and credit financings that borrowers often utilize and thereby advances the policy objectives of the de minimis exception noted above.⁷⁸

The Commission addresses the comments regarding the specific requirements of the IDI De Minimis Provision below.

2. Timing of Execution of Swap

The Commission is adopting as proposed new paragraph (4)(i)(C)(1) of the De Minimis Exception. Paragraph (4)(i)(C)(1) provides that a swap must be entered into no earlier than 90 days before execution of the loan agreement, or before transfer of principal to the customer, unless an executed commitment or forward agreement for the applicable loan exists. In that event, the 90-day restriction does not apply.

The IDI Swap Dealing Exclusion in paragraph (5) of the SD Definition requires that a swap must be entered into no more than 90 days before or 180 days after the date of execution of the loan agreement (or date of transfer of principal to the customer).⁷⁹ The IDI De Minimis Provision does not include the 180-day restriction. Therefore, an IDI would not have to count towards its de minimis calculation any swap entered into in connection with a loan after the date of execution of the loan agreement (or date of transfer of principal).

As discussed in the Proposal, the timing restrictions in the IDI Swap Dealing Exclusion limit the ability of IDIs that want to remain below the AGNA threshold from providing fairly common hedging solutions to end-user borrowers. Depending on market conditions or business needs, it is not uncommon for a borrower to wait for a period of time greater than 180 days after a loan is originated to enter into a hedging transaction. Given that many of the entities that the Commission expects to utilize the IDI De Minimis Provision are small and mid-sized banks, not including this timing restriction could lead to increased swap availability for the borrowing customers that rely on such IDIs for access to swaps (and

thereby advance a policy objective of the de minimis exception).⁸⁰ Additionally, as noted by Capital One, efforts to comply with the IDI Swap Dealing Exclusion have resulted in end-users entering into swaps on an unfavorable date to their business, or incurring higher costs or the additional administrative burden of entering into swaps with counterparties other than the lender bank.⁸¹ Further, Citizens stated that the proposed timing provision would lead to increased swap capacity for customers, adding that customers do not always enter into swaps to hedge loan-related risks at the inception of a loan, but may instead hedge all or portions of the loan at strategic intervals during the term of the loans.⁸²

M&T supported the requirement that the swap be entered into 90 days before loan funding, unless an executed commitment or forward agreement for the loan exists. M&T noted that the provision in proposed paragraph (4)(i)(C)(1) referencing “executed commitment” or “forward agreement” sufficiently reflects market practice regarding how swaps may be entered into in connection with a loan in advance of the loan being executed.⁸³ On the other hand, three commenters recommended removing the 90-day restriction because it would be detrimental to the IDIs and/or borrowers.⁸⁴ BDA noted that it is not uncommon for a borrower to enter into a swap more than 90 days before entering in a loan to lock-in interest rates in anticipation of refinancing current loans, and stated many banks have policies prohibiting them from providing forward underwriting or commitments longer than 90 days, which would effectively restrict their ability to utilize that aspect of the exception.⁸⁵ CDEU stated that the restriction would constrain an IDI’s ability to provide cost-effective pricing for loan-related swaps, especially for complex, longer-term financing transactions where funding might take longer than 90 days and be memorialized in an unexecuted term sheet.⁸⁶ ISDA/SIFMA stated that the 90-day requirement is an arbitrary limitation, and that such arbitrary limitations could force small financial

⁷² See ABA comment letter.

⁷³ 83 FR at 27445 n.14.

⁷⁴ See ABA and Citizens comment letters.

⁷⁵ See 83 FR at 27461–62.

⁷⁶ 17 CFR 75.2(s).

⁷⁷ See 83 FR at 27461–62. As stated in the Proposal, the Commission recognizes the common law definition of the term “loan” cited in the SD Definition Adopting Release, and the Commission does not at this time assess any individual category of transactions to determine whether they qualify as loans. See *id.* at 27461.

⁷⁸ See *id.*

⁷⁹ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(A).

⁸⁰ See 83 FR at 27460. See generally Citizens, Frost Bank, M&T, and Regions comment letters.

⁸¹ See Capital One comment letter.

⁸² See Citizens comment letter.

⁸³ See M&T comment letter.

⁸⁴ See BDA, CDEU, and ISDA/SIFMA comment letters.

⁸⁵ See BDA comment letter.

⁸⁶ See CDEU comment letter.

institutions to incur the costs of becoming an SD.⁸⁷

The Commission is declining to remove the 90-day restriction for purposes of the IDI De Minimis Provision because the Commission believes that there should be a reasonable expectation that the loan will be entered into with a customer in order to exclude the related swap from the de minimis calculation. Without some prescribed time limit, firms could exclude swaps with only the most tenuous connection to a potential future loan origination. The Commission believes the proposed 90-day restriction is suitable for the IDI De Minimis Provision because it conditions availability of the exception on whether the swap was entered into within an appropriate period of time prior to the execution of the loan.

Additionally, the Commission notes that the 90-day restriction does not apply if an executed commitment or forward agreement exists. Where an executed commitment or forward agreement to loan money exists between the IDI and the borrower prior to the 90-day limit, the Commission believes a reasonable expectation for the loan is demonstrated and the related swap may properly be excluded from the AGNA threshold. With an executed commitment or forward agreement, the parties have committed in a formal agreement that they intend to enter into a loan. If no documentation is required, the Commission would have no way of evaluating and enforcing the pre-loan timing requirement. Allowing swaps entered into more than 90 days before execution of a loan agreement to not count towards the AGNA threshold, when an executed commitment or forward agreement exists, offers substantial flexibility to IDIs and borrowers.

Capital One and Frost Bank suggested revisions to the “executed commitment” or “forward agreement” exception to the 90-day restriction.⁸⁸ Capital One stated that the Commission should clarify that the IDI De Minimis Provision applies in situations where the counterparties have also agreed to and documented all of the material loan terms (e.g., through an agreed-upon term sheet). Capital One explained that the inclusion of “agreed terms” within the exception would more accurately reflect market practice and address concerns about ensuring that there is written evidence linking the swap and the loan, “without creating restrictive, defined

documentation categories of ‘executed commitments’ or ‘forward agreements.’”⁸⁹ Frost Bank recommended that the exception be interpreted in a manner analogous to a “bona fide loan commitment” discussed in CFTC Staff Letter No. 12–17, specifically stating that the 90-day restriction should not apply to an executed commitment or forward agreement for a loan that is (1) in writing, (2) subject to the satisfaction of commercially reasonable conditions to closing or funding, and (3) was entered into for business purposes unrelated to qualification for the IDI De Minimis Provision.⁹⁰

The Commission is declining to revise the “executed commitment or forward agreement” exception to the 90-day restriction.⁹¹ The Commission believes that a “term sheet” implies that the counterparties still retain flexibility to adjust the contractual terms of the transaction prior to execution or walk away from the loan altogether without any legal implications. A term sheet often simply indicates an interest in engaging in a transaction and establishes the general terms, but does not formalize an actual transaction, the terms of which may be enforced in a court of law. On the other hand, the Commission notes that an “executed commitment or forward agreement” is stronger evidence that a forward-settled legally binding contract has been established, and is therefore more indicative of a reasonable expectation that the loan will be entered into. Further, the Commission notes that CFTC Staff Letter No. 12–17 is not an appropriate precedent for the IDI De Minimis Provision, because it provides interpretations and no-action relief in connection with eligible contract participant status, and is different in purpose and meaning from the IDI De Minimis Provision. Additionally, the Commission believes that the bona fide loan commitment language in CFTC Staff Letter No. 12–17 is more indicative

⁸⁷ See Capital One comment letter.

⁸⁹ See Frost Bank comment letter; CFTC Staff Letter No. 12–17, Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and “Anticipatory ECPs” (Oct. 12, 2012), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@rllettergeneral/documents/letter/12-17.pdf>.

⁹¹ For avoidance of doubt, the Commission notes that the word “executed” applies to both the term “commitment” and the term “forward agreement,” such that either agreement must be executed to comply with the requirement. Accordingly, the Commission notes that an executed commitment or forward agreement that is not legally binding would not meet the requirements of this aspect of the IDI De Minimis Provision.

of a term sheet, rather than an executed commitment or forward agreement.

3. Relationship of Swap to Loan

As proposed, paragraph (4)(i)(C)(2) states that for purposes of the IDI De Minimis Provision, a swap is “in connection with” a loan if: (1) The rate, asset, liability or other term underlying such swap is, or is related to, a financial term of such loan; or (2) if such swap is required as a condition of the loan, either under the IDI’s loan underwriting criteria or as is commercially appropriate, in order to hedge risks incidental to the borrower’s business (other than for risks associated with an excluded commodity) that may affect the borrower’s ability to repay the loan. As discussed below, the Commission is adopting new paragraph (4)(i)(C)(2) of the De Minimis Exception, with one modification. The Commission is revising paragraph (4)(i)(C)(2)(ii) from what was proposed to read, such swap is permissible under the IDI’s loan underwriting criteria and is commercially appropriate in order to hedge risks incidental to the borrower’s business.

As explained in the SD Definition Adopting Release, the first category of swaps in paragraph (4)(i)(C)(2) is for adjusting the borrower’s exposure to certain risks directly related to the loan itself, such as risks arising from changes in interest rates or currency exchange rates, and the second category is to mitigate risks faced by both the borrower and the lender, by reducing risks that the loan will not be repaid.⁹² Therefore, both categories of swaps are directly related to repayment of the loan.

This provision of the IDI De Minimis Provision would further the policy objectives of the de minimis exception by providing flexibility to reflect the common market practices of end-users who hedge risk with loan-related swaps.⁹³ Specifically, the first provision refers to a “term” rather than a “notional item,” and does not include the word “directly.” Additionally, because the second provision in paragraph (4)(i)(C)(2) allows for swaps that are not explicitly required as a

⁹² SD Definition Adopting Release, 77 FR at 30622.

⁹³ The IDI Swap Dealing Exclusion requires that (1) the rate, asset, liability, or other notional item underlying such swap is, or is directly related to, a financial term of such loan, or (2) that such swap is required, as a condition of the loan under the IDI’s loan underwriting criteria, to be in place in order to hedge price risks incidental to the borrower’s business and arising from potential changes in the price of a commodity (other than an excluded commodity). See 17 CFR 1.3, Swap dealer, paragraph (5)(i)(B); 77 FR at 30622.

⁸⁷ See ISDA/SIFMA comment letter.

⁸⁸ See Capital One and Frost Bank comment letters.

condition of the IDI's underwriting criteria, it provides flexibility for IDIs to enter into certain swaps with borrowers to hedge risks that are determined based on the unique characteristics of the borrower, or other factors that may not have been readily evident at the time the loan was executed and funded, rather than being based on the standard bank underwriting criteria. For example, in these cases, the underwriting criteria may not explicitly require that the borrower enter into swaps to hedge commodity price risk. This additional flexibility facilitates the transaction as a whole (*i.e.*, the loan and related swaps) by allowing IDIs to enter into swaps, as commercially appropriate, with borrowers to hedge risks (*e.g.*, commodity price risk) that may affect the borrower's ability to repay the loan without the limitation that such swaps must be contemplated in the original underwriting criteria in order not to be counted towards an IDI's *de minimis* calculation.

Though risk-mitigating hedges are beneficial because they may lower credit risk and may lower the probability of default, the Commission recognizes that they may increase an IDI's counterparty exposure if a default does occur, particularly if the IDI enters into uncollateralized loan-related swaps with its customers. Nonetheless, the Commission believes that this language benefits both IDIs and customers and serves the purposes of the *de minimis* exception by allowing for greater use of swaps in effective and dynamic hedging strategies. The Commission also believes that this aspect of the new provision would facilitate efficient application of the SD Definition by reducing the concern that ancillary swap dealing activity may inadvertently subject the IDI to SD registration-related requirements. Additionally, the Commission is of the view that prudential regulatory oversight of an IDI's derivatives activities mitigates the concerns associated with an IDI's increased counterparty exposure in the event of a default.⁹⁴ However, if a borrower enters into a swap with an IDI for speculative or investment purposes, paragraph (4)(i)(C)(2) would not allow the IDI to exclude such swap from its *de minimis* threshold calculation.

In response to comments, with respect to swaps addressed by paragraph (4)(i)(C)(2)(*ii*)—*i.e.*, loan repayment risk-

⁹⁴ For example, IDIs are subject to risk management requirements related to exposures and risks in their swaps books. *See, e.g.*, The Office of the Comptroller of the Currency, Comptroller's Handbook: Risk Management of Financial Derivatives (Jan. 1997–Feb. 1998) (still applicable as of Jan. 17, 2012).

related swaps—the Commission is clarifying that such swaps must be permissible under the IDI's loan underwriting criteria and be commercially appropriate. This would replace the proposed requirement that such swaps be required as a condition of the loan, either under the IDI's loan underwriting criteria or as is commercially appropriate. Regions stated that the “condition of the loan” requirement would significantly reduce the likelihood that the swap would qualify for the exception, which could reduce the willingness of IDIs to offer loan-related swaps or encourage IDIs to impose covenants on borrowers solely to allow swaps to fall within the exception.⁹⁵ Additionally, ABA noted that borrowers may be reluctant to agree to include loan covenants on hedging as they seek to maintain flexibility to manage their hedging strategies over the term of a loan or borrowing relationship, adding that covenants relating to hedging may include flexibility that make satisfaction of the “condition” requirement difficult to determine. ABA also stated that if a risk is identified after closing, the loan would have to be amended at such later time to incorporate a condition, which is likely to reduce the use of the exception as borrowers seek to avoid restrictive covenants or additional transaction costs or because it may not be feasible to amend syndicated loan agreements involving multiple lenders not involved in the swap.⁹⁶

The Commission agrees with the concerns stated by the commenters. The Commission did not intend for the “condition of the loan” language to require amending loan documents or lead to covenants being imposed solely for allowing swaps to qualify for the exception. Additionally, the restriction that the swaps hedge risks incidental to the borrower's business (other than for risks associated with an excluded commodity) that may affect the borrower's ability to repay the loan provides a limit to the scope of this exception. The Commission also stresses that the requirement that the swaps be in connection with originating a loan places further restrictions on the ability of IDIs to engage in swap dealing activity not related to loans to

⁹⁵ *See* Regions comment letter.

⁹⁶ *See* ABA comment letter. ABA also suggested that as an alternative to removing the “condition of the loan” requirement, the Commission could clarify that loan covenants that provide for a minimum amount, maximum amount, or permitted range of hedging would satisfy the “condition” requirement. The Commission believes that the change being adopted addresses the concern and is not considering the alternative.

customers. As stated above, if a borrower enters into a swap with an IDI for speculative or investment purposes, the IDI would not be able to exclude such swap from its *de minimis* threshold calculation.

ABA stated that the Commission should clarify that a hedge of an asset supporting an asset-based or reserve-based loan would be considered “related to” a “financial term of such loan.”⁹⁷ The Commission believes that a swap that hedges risks related to the underlying collateral of a loan (such as physical assets or reserves), can be related to “a financial term of such loan” under appropriate certain facts and circumstances.⁹⁸ The Commission also notes that the adopted rule includes the language “without limitation” when providing examples of financial terms, and therefore does not believe the term “borrowing base” needs to be added to the regulatory text.

JBA asked that the CFTC confirm that currency swaps would qualify for the exception.⁹⁹ The Commission confirms that currency swaps would qualify for the IDI *De Minimis* Provision, if they meet each of the requirements of the exception.

4. Duration of Swap

The Commission is adopting as proposed new paragraph (4)(i)(C)(3) of the *De Minimis* Exception, which states that the termination date of the swap cannot extend beyond termination of the loan.

A few commenters stated that circumstances can be anticipated at the time of loan origination that would support permitting the termination date of the swap to extend beyond termination of the loan.¹⁰⁰ For example, loan customers may hedge risks for longer periods with the expectation that they will continue to have debt outstanding with the IDI, often because customers may have a practice of refinancing every three to five years, or have outstanding loans that amortize over a period longer than a specific loan's stated term.¹⁰¹ Additionally, customers may request that the swap extend to an anticipated loan maturity

⁹⁷ *See id.*

⁹⁸ For example, if loan proceeds are used to purchase specific assets used as collateral for the loan, then risks associated with those assets are sufficiently related to the loan. However, a loan for general working capital that is not secured by any assets would likely not be related to any assets of a borrower that could render the borrower's assets a term of the loan for this provision.

⁹⁹ *See* JBA comment letter.

¹⁰⁰ *See* ABA, BDA, CDEU, Citizens, and M&T comment letters.

¹⁰¹ *See* ABA, CDEU, and Citizens comment letters.

date that extends beyond the stated maturity date—for example, as with certain construction loans, bridge loans, credit lines, revolving credits, variable rate demand bonds, and bank-qualified and nonbank-qualified bonds with call dates set prior to the bonds' maturity date.¹⁰² Further, borrowers may seek to hedge maturities longer than the loan maturity to hedge inherent risks of long-dated projects, even though the loan financing may have a shorter term than the length of the project, because borrowers often seek to hedge the full life of the project even when committed bank financing for equivalent length does not exist. In such circumstances, IDIs often provide such swaps because of acceleration or transfer provisions that are included in the hedge arrangement to address a scenario in which the IDI does not renew or participate in the refinancing.¹⁰³

The Commission is declining to modify the proposed rule text to account for the circumstances described by these commenters. The Commission does not believe that a swap with a maturity date that is after the maturity date of the loan should be considered “in connection with” the loan. Including that much flexibility would create a greater likelihood of abuse of the regulation, and would increase the difficulty of policing the application of the IDI De Minimis Provision. In addition, the Commission is of the view that the addition of more complicated timing structures for a swap in relation to a loan increases complexity and may potentially increase risk. In other words, the swap becomes less connected with the origination of the loan. Accordingly, it would be appropriate to expect the IDI to register as an SD to the extent that the IDI is entering into such swap arrangements in high volumes.

Additionally, in response to a question in the Proposal, a few commenters stated that in order to qualify for the IDI De Minimis Provision, IDIs should not be required to terminate loan-related swaps if a loan is called, put, accelerated, or goes into default before scheduled termination.¹⁰⁴ Commenters noted that: (1) Swap agreements between IDIs and end-user borrowers do not always include automatic termination provisions that trigger when a related loan is terminated;¹⁰⁵ (2) IDIs should be able to use methods they deem most appropriate for managing credit risk

without being required to terminate a swap transaction because a loan is no longer outstanding;¹⁰⁶ and (3) a mandatory cancellation provision would create significant administrative burden, and would potentially trigger cross-defaults, which is contrary to efforts to reduce the contagion of cross-defaults on derivatives contracts.¹⁰⁷ Commenters also pointed out that: (1) IDIs should have the option to terminate a loan-related swap, but should not be required to do so, as provided in standard ISDA Master Agreements, thus preserving the IDI's ability to address a troubled credit in the most efficient manner, particularly for a loan default that may be waived;¹⁰⁸ and (2) it is common for a swap to be terminated by mutual agreement when a loan is repaid, but firms do not always have termination event provisions in their ISDA Master Agreements that would allow them to enforce this termination.¹⁰⁹ Further, IIB noted that the Commission previously clarified that a swap may continue to qualify for the IDI Swap Dealing Exclusion in paragraph (5) of the SD Definition even if an IDI later transfers or terminates the loan in connection with which the swap was entered into, so long as the swap otherwise qualifies for the exception and the loan was originated in good faith and not a sham.¹¹⁰ IIB also stated that following a transfer of a loan, an IDI will often amend, novate, or partially terminate the related swap to conform to changes in the terms of the loan, and requested clarification that the swap resulting from any such amendment, novation, or termination may also qualify for the IDI De Minimis Provision and IDI Swap Dealing Exclusion. M&T noted that when the underlying credit financing that is hedged with the interest rate swap is terminated, it is common practice that such event triggers the termination of the swap.¹¹¹

After consideration of the comments, the Commission notes that the IDI De Minimis Provision is tied to the origination of a loan. Therefore, the eligibility of a swap to qualify for the IDI De Minimis Provision should not be affected if the loan is called, put, accelerated, or goes into default before scheduled termination. In these circumstances, the swap would not need to be amended, adjusted, accelerated, or terminated to remain

eligible for exclusion so long as the swap otherwise qualifies for the exception and the loan was originated in good faith and is not a sham. Further, if an IDI, in a manner directly related to changes in the terms of the loan, chooses to amend, novate, or partially terminate the loan-related swap, such amendment, novation, or termination might also qualify for the IDI De Minimis Provision.¹¹²

5. Level of Funding of Loan

The Commission is adopting as proposed new paragraph (4)(i)(C)(4)(i) of the De Minimis Exception, which requires an IDI to be, under the terms of the agreements related to the loan, the source of at least five percent of the maximum principal amount under the loan for a related swap not to be counted towards its de minimis calculation.¹¹³ The Commission is also adopting as proposed new paragraph (4)(i)(C)(4)(ii), which states that if an IDI is a source of less than a five percent of the maximum principal amount of the loan, the notional amount of all swaps the IDI enters into in connection with the financial terms of the loan cannot exceed the principal amount of the IDI's loan in order to qualify for the IDI De Minimis Provision.

As discussed in the Proposal, the lower syndication threshold of five percent provides flexibility for IDIs, particularly small and mid-sized IDIs participating in large syndications, to enter into a greater range of loan-related swaps without having those swaps count towards their de minimis calculations. As the Commission noted, for loans that are widely syndicated, lenders may not have control over their final share of the syndication. It is not uncommon for borrowers to enter into negotiations regarding related swaps before the underlying loan has been executed and the allocation of loan and swap percentages to the syndicate participants has been set.

Capital One supported the proposal to set the syndicated loan requirement at five percent because it acknowledges that lenders in many loan syndications do not have control over their final share of the syndication, and that industry practice on some participations often does fall below 10 percent (and can in some cases fall below five

¹¹² Whether such an amendment, novation, or termination would qualify for the IDI Swap Dealing Exclusion is outside of the scope of this rulemaking.

¹¹³ Moreover, as discussed below in section II.B.6.i, if the IDI is responsible for at least five percent of a syndicated loan, the IDI De Minimis Provision does not include a restriction that the AGNA of swaps entered into in connection with the loan not exceed the principal amount outstanding.

¹⁰² See BDA comment letter.

¹⁰⁷ See Capital One comment letter.

¹⁰⁸ See ABA comment letter.

¹⁰⁹ See ISDA/SIFMA comment letter.

¹¹⁰ See IIB comment letter (citing the SD Definition Adopting Release, 77 FR at 30623).

¹¹¹ See M&T comment letter.

¹⁰² See M&T comment letter.

¹⁰³ See BDA comment letter.

¹⁰⁴ See ABA, BDA, Capital One, CDEU, IIB, and ISDA/SIFMA comment letters.

¹⁰⁵ See CDEU comment letter.

percent).¹¹⁴ Additionally, M&T noted that it is not common for an IDI to have as low as five percent participation in a syndicated loan and also provide swaps in connection with the loan; rather, administrative agent and lenders holding larger shares in the credit facility tend to also be the swap providers.¹¹⁵

A few commenters stated that the five percent participation requirement should be eliminated from the IDI De Minimis Provision.¹¹⁶ Three of these commenters stated that the five percent participation threshold is arbitrary¹¹⁷ and could: (1) Force small financial institutions to incur the costs of becoming an SD;¹¹⁸ (2) lead to less liquidity for borrowers since IDIs may not control their level of participation in a syndicated loan, whereas a borrower may want a certain smaller group of lenders for the hedging component, for relationship or pricing reasons;¹¹⁹ or (3) create incentives for an agent bank to limit the offering amount of a loan syndication in small shares in order to secure a larger portion of the hedging for itself.¹²⁰ ABA also stated that the requirement has no supporting policy rationale, nor has one been asserted by the Commission.¹²¹ Citizens stated that the requirement should be removed because there are instances where the total notional amount of loan-related swaps may exceed the outstanding principal amount in connection with syndicated loans, regardless of whether the bank holds more than five percent of the loan.¹²²

After consideration of the comments, the Commission is retaining the requirement that the IDI be the source of at least five percent of the maximum principal amount under the loan in order for a related swap not to be counted towards its de minimis calculation. The Commission is of the view that removing the minimum participation amount requirement would allow IDIs with an immaterial “connection” to a loan (such as \$0.01) to provide all of the loan hedging swaps without having to count such swaps towards their AGNA threshold. Requiring a minimum level of loan participation provides a bright-line test

so that IDIs may prove a “connection” to a loan origination.

The Commission also notes that IDI De Minimis Provision does not include a requirement that the AGNA of all swaps entered into by the customer in connection with the financial terms of the loan cannot exceed the aggregate principal amount outstanding under the loan.¹²³ As long as an IDI is the source of at least five percent of the loan, an IDI may enter into a notional amount of swaps in excess of the aggregate principal amount of the loan without counting the swaps towards the IDI’s de minimis calculation. The Commission believes the final rule provides additional flexibility to IDIs to serve the hedging needs of their loan customers while appropriately requiring that a swap can only be excluded from the AGNA threshold if it is in connection with originating a loan.

6. Other Comments

(i) Total Notional Amount of Swaps

The IDI De Minimis Provision does not include the requirement from the IDI Swap Dealing Exclusion that the AGNA of swaps entered into in connection with the loan not exceed the principal amount outstanding.¹²⁴ As noted in the Proposal, it is not uncommon for a loan by an IDI to a customer to have related swaps that hedge multiple categories of exposure. For example, a borrower may hedge some combination of interest rate, foreign exchange, and/or commodity risk in connection with a loan. The AGNA of those swaps may exceed the loan principal amount. Therefore, this restriction might unduly restrict the ability of certain IDIs to provide loan-related swaps to their borrowing customers to more effectively allow the customers to hedge loan-related risks. Not including this restriction in the IDI De Minimis Provision would thereby advance the policy objectives of the de minimis exception noted above.

Capital One and M&T agreed that there are circumstances where the AGNA of loan-related swaps can exceed the outstanding principal amount of the loan.¹²⁵ M&T stated that in construction lending, the project may not have advanced sufficiently such that the loan was fully funded, yet the loan would

already have been hedged with a forward starting or accreting interest rate swap with a notional amount that anticipated the future and higher loan balance.¹²⁶ Capital One stated that a customer may enter into a forward starting swap to hedge future draws under a loan.¹²⁷

Accordingly, after consideration of the comments, the Commission is not including a requirement that the AGNA of loan-related swaps entered into in connection with the origination of the loan remain below a certain level. Though there are no caps on the AGNA of swaps, the swaps must be entered into in connection with originating a loan, and IDIs cannot use the IDI De Minimis Provision to provide swaps to loan customers for the loan customers’ speculative or investment purposes or to otherwise evade SD registration.

However, the Commission believes it is prudent to consider whether the IDI De Minimis Provision should include such a requirement. For example, the IDI De Minimis Provision could require the loan-related swaps to not exceed 300% of the principal outstanding. Therefore, although the Commission is not at this time adopting a restriction on the AGNA of loan-related swaps outstanding, it is instructing the Office of the Chief Economist (“OCE”) to conduct a study, within three years, of whether loan-related swaps should be required to remain below a certain level to qualify for the IDI De Minimis Provision. After review of relevant data, the results of the OCE study, and any related recommendations from OCE or DSIO, the Commission may consider adding a restriction on the AGNA of loan-related swaps.

(ii) Eligibility for IDI De Minimis Provision

Two commenters stated that foreign banks should be eligible for the IDI De Minimis Provision.¹²⁸ IIB recommended that the IDI De Minimis Provision cover U.S. branches and agencies of foreign banks because excluding these entities would unnecessarily discourage foreign banks’ participation in the U.S. swap and loan markets, reducing credit available to U.S. companies.¹²⁹ JBA noted that the IDI De Minimis Provision should apply to non-U.S. IDIs, particularly Japanese banks, because such banks engage in risk management practices, under the supervision of the Deposit Insurance Corporation of Japan, that are equivalent to U.S. IDIs’ risk

¹¹⁴ See Capital One comment letter.

¹¹⁵ See M&T comment letter.

¹¹⁶ See ABA, BDA, Citizens, and ISDA/SIFMA comment letters.

¹¹⁷ See ABA, BDA, and ISDA/SIFMA comment letters.

¹¹⁸ See ISDA/SIFMA comment letter.

¹¹⁹ See BDA comment letter.

¹²⁰ See *id.*

¹²¹ See ABA comment letter.

¹²² See Citizens comment letter.

¹²³ See *infra* section II.B.6.i.

¹²⁴ 17 CFR 1.3, Swap dealer, paragraph (5)(i)(E). As discussed above in section II.B.5 in connection with new paragraph (4)(i)(C)(4)(ii), if an IDI is a source of less than a five percent of the maximum principal amount of the loan, the notional amount of all swaps the IDI enters into in connection with the financial terms of the loan cannot exceed the principal amount of the IDI’s loan.

¹²⁵ See Capital One and M&T comment letters.

¹²⁶ See M&T comment letter.

¹²⁷ See Capital One comment letter.

¹²⁸ See IIB and JBA comment letters.

¹²⁹ See IIB comment letter.

management practices.¹³⁰ The Commission notes that these comments are outside of the scope of the proposed and adopted amendments because they relate to the definition and application of the term “IDI,” which the Commission did not propose to alter.

JBA stated that swaps in connection with loans by other banks to U.S. customers, and swaps entered into by a third party on behalf of a financial institution and allocated to the financial institution, should be eligible for the IDI De Minimis Provision because such swaps are arranged for the customer’s hedging purposes.¹³¹ BDA stated that where an affiliate of an IDI also falls under prudential regulation a subsidiary of a bank holding company, or otherwise, the affiliate should be allowed to take advantage of the IDI exclusion. For example, certain entities may be organized where the loan is provided by the IDI, but swaps are offered by the affiliate. BDA stated that these swaps are still subject to regulatory oversight because of the ownership structure of the affiliate or because the IDI accounts for the swap in its financial and risk reporting.¹³² The Commission notes that these comments are outside of the scope of the proposed and adopted amendments.

Citizens stated that the Commission should include more efficient procedures for determining whether certain swaps would be eligible for the IDI De Minimis Provision or the IDI Swap Dealing Exclusion, noting that the little guidance that exists with respect to whether transactions qualify does not provide the certainty that market participants need in order to run their businesses efficiently.¹³³ The Commission is not establishing such procedures at this time. The Commission believes that the Proposal and this adopting release, as well as the SD Definition Proposing Release and SD Definition Adopting Release, provide sufficient information regarding the requirements for a swap to qualify for the IDI De Minimis Provision or the IDI Swap Dealing Exclusion. In addition, the Commission notes that, as with all of its regulations, the Commission remains open to providing guidance to market participants who have questions of interpretation.

(iii) Notification or Confirmation Requirements

In response to a question in the Proposal, three commenters stated that

the CFTC should not impose any prior notice requirement or other conditions on the ability of IDIs to rely on the proposed IDI De Minimis Provision.¹³⁴ ABA and Capital One stated that there is no benefit to requiring a bank to provide such notice to the Commission or another party, particularly because the Commission already receives reports of swaps transacted pursuant to parts 43 and 45 of the Commission’s regulations.¹³⁵ M&T stated that imposing any notice requirements for use of the IDI De Minimis Provision would be contrary to the intention of the IDI De Minimis Provision to allow limited ancillary dealing to clients that have a need for swaps (on a limited basis), and to promote competition by allowing a person to engage in limited swap dealing activity without immediately incurring the regulatory costs associated with SD registration.¹³⁶ The Commission agrees with the commenters and is not adding a notification requirement at this time.

In response to another question in the Proposal, three commenters stated that there should not be a requirement that swap confirmations reference a specific loan because doing so would add operational complexity for little or no benefit.¹³⁷ BDA and Capital One stated that instead, the Commission could require the IDI to notate the loan internally.¹³⁸ ABA stated that the banks should be permitted to document this information in an efficient and effective manner rather than requiring that it be included in legal documentation with a customer.¹³⁹ The Commission agrees with the commenters and is not adding a requirement to reference a particular loan in the swap confirmation for the reasons stated by the commenters. However, the Commission notes that, as with any regulatory requirement, it would be good practice for an IDI to notate and track all loans for which the IDI De Minimis Provision applies to be able to demonstrate why the IDI is not required to register if its AGNA of swap dealing activity exceeds the threshold.

7. Commission Authority To Amend the De Minimis Exception

Two commenters discussed whether the IDI De Minimis Provision could be promulgated without a joint rulemaking.¹⁴⁰ ABA stated that the

Commission is not required to promulgate the IDI De Minimis Provision through joint rulemaking with the SEC because “it is in furtherance of the Commission’s statutory authority to ‘promulgate regulations to establish factors with respect to the making of this determination to exempt’ from ‘designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with and on behalf of its customers.’”¹⁴¹

However, Better Markets asserted that the CFTC’s claim that a “joint rulemaking is not required with respect to changes to the de minimis exception-related factors” is invalid and “would impermissibly enable the CFTC to conduct an end-run around the statutory joint rulemaking requirement.” In particular, Better Markets stated that language potentially permitting unilateral action on the de minimis threshold itself cannot be extended to permit unilateral regulatory actions affecting core definitional issues that must be accomplished through joint rulemaking.¹⁴²

The Commission continues to believe that, as stated in the Proposal that a joint rulemaking with the SEC is not required with respect to the de minimis exception-related factors.¹⁴³ As stated in the SD Definition Adopting Release that was jointly adopted with the SEC—CEA section 1a(49)(D) (like Exchange Act section 3(a)(71)(D)) particularly states that the “Commission” (meaning the CFTC) may exempt de minimis dealers and promulgate related regulations. We (the CFTC and the SEC) do not interpret the joint rulemaking provisions of section 712(d) of the Dodd-Frank Act to require joint rulemaking here, because such an interpretation would read the term “Commission” out of CEA section 1a(49)(D) (and Exchange Act section 3(a)(71)(D)), which themselves were added by the Dodd-Frank Act.¹⁴⁴

Accordingly, the Commission believes that although the definition of “swap dealer” requires joint action, the statute allows for the CFTC and SEC to individually determine the threshold and factors that exempt de minimis SDs and security-based swap dealers pursuant to section 1a(49)(D) of the CEA and section 3(a)(71)(D) of the Securities Exchange Act of 1934, respectively.¹⁴⁵

Better Markets also argued that the Proposal “far exceeds the CFTC’s stated

¹³⁰ See JBA comment letter.

¹³¹ See *id.*

¹³² See BDA comment letter.

¹³³ See Citizens comment letter.

¹³⁴ See ABA, Capital One, and M&T comment letters.

¹³⁵ See ABA and Capital One comment letters.

¹³⁶ See M&T comment letter.

¹³⁷ See ABA, BDA, and Capital One comment letters.

¹³⁸ See BDA and Capital One comment letters.

¹³⁹ See ABA comment letter.

¹⁴⁰ See ABA and Better Markets comment letter.

¹⁴¹ See ABA comment letter.

¹⁴² See Better Markets comment letter.

¹⁴³ 83 FR at 27458.

¹⁴⁴ 77 FR at 30634 n.464.

¹⁴⁵ As discussed, the CFTC has consulted with the SEC regarding the IDI De Minimis Provision.

objective of addressing the ‘quantity’ of swap dealing permissible within the de minimis exemption” and “effect[s] between these extensive changes through sleight of hand—a series of exclusions from the de minimis threshold for swap-related activities that it acknowledges constitute ‘dealing’ under its own regulations.”¹⁴⁶

The Commission believes that Better Markets’ claim that it is “sleight of hand” to use the de minimis threshold to exclude activities that actually do constitute swap dealing is misplaced, because the only purpose of the statutory de minimis provision is to exempt an entity that “engages in a de minimis quantity of swap dealing.”¹⁴⁷ Accordingly, the SD Definition Adopting Release explained that the De Minimis Exception applies only after a “person determines that it is engaged in swap dealing activity,” stating that, sequentially, “the next step is to determine if the person is engaged in more than a de minimis quantity of swap dealing.”¹⁴⁸ Thus, it is entirely appropriate under the statute that the De Minimis Exception be applied in a manner that excludes activity that constitutes swap dealing.

For this reason, the NPRM did not, and had no reason to, propose amendments to the SD Definition.¹⁴⁹ Contrary to Better Markets’ contention, there is no need “to effect a de facto amendment to the SD definition,” and the Commission does not seek to do so. Nor does the Commission seek to change the IDI Swap Dealing Exclusion or other aspects of the SD Definition.¹⁵⁰

The Commission believes the SD Definition Adopting Release recognized that a primary purpose of the statutory de minimis provision is to allow limited swap dealing.¹⁵¹ For example, the SD Definition Adopting Release explained that the CFTC and SEC believe that factors that exclude entities whose dealing activity is sufficiently modest in light of the total size, concentration and

other attributes of the applicable markets can be useful in avoiding the imposition of regulatory burdens on those entities for which dealer regulation would not be expected to contribute significantly to advancing the customer protection, market efficiency and transparency objectives of dealer regulation.¹⁵² Moreover, the SD Definition Adopting Release stated that in connection with any future changes to the requirements of the De Minimis Exception, the CFTC intends to pay particular attention to whether alternative approaches would more effectively promote the regulatory goals that may be associated with a de minimis exception.¹⁵³

This is what the NPRM proposed to do, notably with respect to the dealing activity of IDI’s engaged in swaps in connection with loans. The issue relevant to the Proposal and the final rule is whether this dealing activity is sufficiently modest in light of the total size, concentration and other attributes of the applicable markets to qualify for the De Minimis Exception, and whether an alternative approach would more effectively promote the regulatory goals of the De Minimis Exception.

Better Markets’ and IATP’s emphasis on the word “quantity” implies that the requirements for the De Minimis Exception should or must be stated in terms of a numerical quantity of swap dealing. The Commission does not believe that this is the case. Rather, the Commission has applied the principles set out in the SD Definition Adopting Release, which sought to balance the various interests associated with a de minimis exception, as well as the benefits and burdens associated with such an exception, in developing the factors to implement the de minimis exceptions.¹⁵⁴ Also, as noted above, the SD Definition Adopting Release anticipated that alternative approaches to the de minimis exception may be appropriate.

In the SD Definition Adopting Release, the Commissions considered comments that supported the use of non-quantitative standards in connection with the de minimis exception and the release stated that the Commissions believe that it is more appropriate to base the exception on an objective quantitative standard, to allow the exception to be self-executing, and to promote predictability among market participants and the efficient use of regulatory resources.¹⁵⁵ Each of the

comments considered in this context had suggested a different, non-quantitative approach to the de minimis standard, such as a multi-factor test, or the application of reasoned judgment rather than inflexible bright-line tests.¹⁵⁶

The Commission continues to believe that the appropriate response to such comments is that it is more appropriate to base the exception on an objective quantitative standard, to allow the exception to be self-executing and to promote predictability and efficiency. The IDI De Minimis Provision provides objective standards that are self-executing and could be applied predictably and efficiently. With respect to the reference to a “quantitative” standard, the Commission notes that the SD Definition Adopting Release was responding to a variety of suggested approaches, and in that light, the word “quantitative” was intended to focus the De Minimis Exception on objective standards stated in terms of a number. However, the Commission also believes that the statutory language directing the Commission to establish “factors” with respect to the de minimis exception does not mandate a single approach, but rather the Commission may promulgate standards that take into account the total size, concentration and other attributes of the applicable markets as well as the various interests associated with a de minimis exception.¹⁵⁷ Within this statutory framework, the Commission believes the preference for an “objective quantitative standard” should be read in connection with the statement that the excluded activity be “sufficiently modest.”¹⁵⁸ In that vein, and for the reasons given, the Commission is now adopting a limited qualitative factor. The Commission does not believe the statute or the SD Definition Adopting Release requires that all de minimis factors be stated in numerical terms, so long as the impact on the regulatory scheme for SDs established by the statute is sufficiently modest.¹⁵⁹

Better Markets also asserted that the statutory provision regarding the de minimis exception authorizes the CFTC

¹⁴⁶ See Better Markets comment letter. Similarly, IATP believes that the statutory de minimis provision “authorizes a quantitatively defined rule for who must register” as an SD, but the NPRM “proposes to interpret the establishment of ‘factors’ in such a way as to greatly increase the number and kind of swaps dealer transactions and activities that would be exempted from the de minimis calculation.” See IATP comment letter.

¹⁴⁷ See 7 U.S.C. 1a(49)(D); Better Markets comment letter.

¹⁴⁸ SD Definition Adopting Release, 77 FR at 30607.

¹⁴⁹ For example, the NPRM stated that the Commission is not at this time proposing to amend the IDI Swap Dealing Exclusion in paragraph (5) of the SD Definition. 83 FR at 27458.

¹⁵⁰ *Id.* at 27458–59.

¹⁵¹ *Id.* at 27446 (citing 77 FR at 30628–30, 30707–08).

¹⁵² 77 FR at 30629–30.

¹⁵³ *Id.* at 30635.

¹⁵⁴ *Id.* at 30629.

¹⁵⁵ *Id.* at 30632.

¹⁵⁶ See the following comment letters cited in the SD Definition Adopting Release, 77 FR at 30632 n.443, which are available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=933>; Federal Home Loan Banks (Feb. 22, 2011); The Gavilon Group, LLC (Feb. 22, 2011); and MFX Solutions, Inc. (June 3, 2011). See also the discussion of alternative approaches to the de minimis exception in the SD Definition Adopting Release, 77 FR at 30627 n.389 and accompanying text.

¹⁵⁷ See 77 FR at 30629–30.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

to issue exemptive orders for individual or similarly-situated legal entities based upon generally applicable factors for determining whether such entities may be involved in de minimis swap dealing activities. Better Markets contends that it is unreasonable to conclude that Congress intended a wholesale exemption from registration that is divorced from the particular circumstances of any one petitioner.¹⁶⁰ As noted, however, the CEA states that the Commission shall promulgate factors, through regulation, regarding the De Minimis Exception determination. Nothing in the statutory language prohibits the Commission from establishing a de minimis exception that is self-effectuating. The Commission believes that the IDI De Minimis Provision appropriately excludes entities whose dealing activity is sufficiently modest in light of the total size, concentration and other attributes of the swap market and for which SD regulation would not be expected to contribute significantly to advancing the customer protection, market efficiency and transparency objectives of dealer regulation.¹⁶¹ The Commission sees no basis in the record or requirement in the statute to treat entities differently when they are similarly situated in this respect.

With this regulatory background in mind, the Commission concludes that the IDI De Minimis Provision is an objective factor that should be self-executing and promote predictability and efficiency. The swap dealing activity that would be excluded under this provision, in the aggregate with activity permitted under the \$8 billion threshold, is sufficiently modest in light of the total size, concentration and other attributes of the applicable markets¹⁶² to be appropriately excluded under the de minimis exception.

Lastly, the Commission notes that it consulted with the SEC and the prudential regulators during the preparation of this adopting release.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities.¹⁶³ As noted in the Proposal, the regulations adopted herein affect IDIs that engage in swap dealing activity above an AGNA of \$8 billion that also

enter into loan-related swaps. That is, the regulations are relevant to entities that engage in swap dealing activity with a relevant AGNA measured in the billions of dollars. The Commission does not believe that these entities would be small entities for purposes of the RFA. Additionally, the Commission received no comments on the Proposal’s RFA discussion. Therefore, the regulations being adopted herein will not have a significant economic impact on a substantial number of small entities, as defined in the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1955 (“PRA”)¹⁶⁴ imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (“OMB”) control number. As discussed in the Proposal, the final regulations will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of OMB under the PRA.

The Commission notes that all reporting and recordkeeping requirements applicable to SDs result from other rulemakings, for which the CFTC has sought OMB approval, and are outside the scope of rulemakings related to the De Minimis Exception.¹⁶⁵

C. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.¹⁶⁶ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2)

efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In this section, the Commission considers the costs and benefits resulting from its determinations with respect to the Section 15(a) factors.

In this adopting release, the Commission is amending the De Minimis Exception by establishing as a factor in the de minimis determination whether a given swap has specified characteristics of swaps entered into by IDIs in connection with loans to customers.¹⁶⁷ The Proposal requested public comment on the costs and benefits of the proposed regulation, and specifically invited comments on: (1) The costs and benefits to market participants associated with each change; (2) the direct costs associated with SD registration and compliance; (3) the indirect benefits to registering as an SD; (4) the indirect costs to becoming a registered SD; (5) the costs and benefits to the public associated with the proposed change; (6) how the proposed change affects each of the Section 15(a) factors; (7) whether the Commission identified all of the relevant categories of costs and benefits in its preliminary consideration of the costs and benefits; and (8) whether the costs and benefits of the proposed change, as applied in cross-border contexts, differ from those costs and benefits resulting from their domestic application, and, if so, in what ways and to what extent.

As part of this cost-benefit consideration, the Commission will: (1) Discuss the costs and benefits of the adopted change; and (2) analyze the amendment as it relates to each of the 15(a) factors. The Commission notes that this consideration of costs and benefits is based on the understanding that the swap market functions internationally, with many transactions involving U.S. firms occurring across different international jurisdictions, with some prospective Commission registrants organized outside the U.S., and other entities operating both within and outside the U.S., and commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion below of the costs and benefits of the regulations being adopted refers to their effects on all subject swaps activity, whether by virtue of the activity’s physical location in the United States or

¹⁶⁴ 44 U.S.C. 3501 *et seq.*

¹⁶⁵ Parties wishing to review the CFTC’s information collections on a global basis may do so at <http://www.reginfo.gov>, at which OMB maintains an inventory aggregating each of the CFTC’s currently approved information collections, as well as the information collections that presently are under review.

¹⁶⁶ 7 U.S.C. 19(a).

¹⁶⁷ This exception would be independent of the existing exclusion in paragraph (5) of the SD Definition for swaps entered into by IDIs.

¹⁶⁰ See Better Markets comment letter.

¹⁶¹ 77 FR at 30629–30.

¹⁶² See *id.*

¹⁶³ 5 U.S.C. 601 *et seq.*

by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i).

The IDI De Minimis Provision addresses concerns that there are circumstances where swaps not covered by IDI Swap Dealing Exclusion should be excluded from the de minimis calculation. Specifically, the Commission proposed to add specific factors that an IDI can consider when assessing whether swaps entered into with customers in connection with loans to those customers must be counted towards the IDI's de minimis threshold. The IDI could assess these factors and exclude qualifying swaps from the de minimis calculation regardless of whether the swaps would qualify for the IDI Swap Dealing Exclusion.

1. General Costs and Benefits

There are several policy objectives underlying SD regulation and the de minimis exception to SD registration, which have associated with them general costs and benefits depending on the scope of the de minimis exception. As discussed above in section I.A.3, costs and benefits may be associated with the primary policy objectives of SD regulation, which include reducing systemic risk, increasing counterparty protections, and increasing market efficiency, orderliness, and transparency.¹⁶⁸ The Commission also considers the costs and benefits associated with the policy objectives furthered by a de minimis exception, which include increasing efficiency, allowing limited ancillary dealing, encouraging new participants to enter the swap dealing market, and focusing regulatory resources.¹⁶⁹

As discussed, certain IDIs are restricting loan-related swaps because of the potential that such swaps would have to be counted towards an IDI's de minimis threshold, leading the IDI to register as an SD and incur registration-related costs. The restrictions on loan-related swaps by IDIs may have a market-wide cost of reduced availability of swaps for the loan customers of these IDIs, potentially hampering the ability

of end-user borrowers to enter into hedges in connection with their loans.

The Commission believes that the additional factors in the IDI De Minimis Provision provide market benefits by allowing some IDIs that are not registered SDs to provide swaps to customers in connection with loans, because the IDIs would have a lesser concern that certain swaps would need to be counted against the AGNA threshold. Generally, this may decrease concentration in the markets for swaps and loans and enhance market liquidity, which is helpful for customers of IDIs that may not have access to larger SDs.¹⁷⁰ In particular, as discussed, the IDI De Minimis Provision would facilitate swap dealing in connection with other client services and may encourage more IDIs to participate in the swap market—advancing two market-related benefits of the de minimis exception. Greater availability of loan-related swaps may also improve the ability of customers to hedge their loan-related exposure. The Commission also notes that the IDI De Minimis Provision provides an opportunity for IDIs to tailor the risks of a loan to the loan customer's and the lender's needs and promotes the risk-mitigating effects of swaps.

Commenters generally agreed that the IDI De Minimis Provision should lead to market benefits as it: (1) Better aligns the regulatory framework with the risk mitigation demands of bank customers;¹⁷¹ (2) makes it easier for IDIs to more accurately address the needs of loan customers looking to access cost-effective and tailored hedges for their loans;¹⁷² (3) should provide the benefit of reduced risk and more efficient use of loan collateral through more tailored swaps;¹⁷³ and (4) better reflects how traditional regional banks interact with their commercial customers.¹⁷⁴

Specifically, the Commission is adopting new paragraph (4)(i)(C)(1) of the De Minimis Exception, which provides that a swap must be entered into no earlier than 90 days before execution of the loan agreement, or before transfer of principal to the customer, unless an executed commitment or forward agreement for the applicable loan exists. In that event, the 90-day restriction does not apply.

¹⁷⁰ The Commission also notes that it is possible that bundling the swap and loan may lead to better commercial terms for the customer.

¹⁷¹ See *supra* section II.B.1; M&T comment letter.

¹⁷² See *supra* section II.B.1; Capital One and Frost Bank comment letters.

¹⁷³ See *supra* section II.B.1; Frost Bank comment letter.

¹⁷⁴ See *supra* section II.B.1; Regions comment letter.

Given that many of the entities that the Commission expects to utilize the IDI De Minimis Provision are small and mid-sized banks, the timing restriction in the IDI De Minimis Provision could lead to a market benefit of increased swap availability for the borrowing customers that rely on such IDIs for access to swaps (and thereby advance a policy objective of the de minimis exception).¹⁷⁵ Several commenters generally agreed that this provision would benefit end-user borrowers, stating that it more closely reflects market practice for when loan-related swaps may be entered into.¹⁷⁶

Additionally, paragraph (4)(i)(C)(2), which address the relationship of the swap to the loan, would further the policy objectives of the de minimis exception by providing flexibility to reflect the common market practices of end-users who hedge risk with loan-related swaps. The Commission believes that this factor benefits both IDIs and customers and serves the purposes of the de minimis exception by allowing for greater use of swaps in effective and dynamic hedging strategies, and by reducing the concern that ancillary swap dealing activity may inappropriately subject the IDI to SD registration-related requirements. As discussed, the Commission is of the view that risk-mitigating hedges are beneficial because they lower credit risk and lower the probability of default, though they may increase an IDI's counterparty exposure if a default does occur. However, the Commission is of the view that prudential regulatory oversight of an IDI's derivative activities mitigates the concerns associated with an IDI's increased counterparty exposure in the event of a default. Additionally, the provision requires that the loan-related swaps be permissible under the IDI's loan underwriting criteria and be commercially appropriate, which replaces the proposed requirement that such swaps be required as a condition of the loan, either under the IDI's loan underwriting criteria or as is commercially appropriate. The Commission did not intend for the proposed language to require amendments to loan documents solely for allowing swaps to qualify for the IDI De Minimis Provision. The Commission agrees with the commenters that this clarification will benefit market participants by making it more likely that IDIs will offer loan-

¹⁷⁵ See *supra* section II.B.2; 83 FR at 27460. See generally Citizens, Frost Bank, M&T, and Regions comment letters.

¹⁷⁶ See *supra* section II.B.2. See also Capital One, Citizens, and M&T comment letters.

¹⁶⁸ See also SD Definition Adopting Release, 77 FR at 30628–30, 30707–08. To achieve these policy objectives, registered SDs are subject to a broad range of requirements which may carry their own costs and benefits. These requirements include, among other things, registration, internal and external business conduct standards, reporting, recordkeeping, risk management, posting and collecting margin on uncleared swaps, and chief compliance officer designation and responsibilities. However, costs associated with regulatory requirements applicable to SDs result from other rulemakings and are outside the scope of rulemakings related to the De Minimis Exception.

¹⁶⁹ See *id.*

related swaps to borrowers.¹⁷⁷ Further, as discussed, the restriction that the swaps hedge risks incidental to the borrower's business (other than for risks associated with an excluded commodity) that may affect the borrower's ability to repay the loan provides a limit to the scope of this exception. For example, if a borrower enters into a swap with an IDI for speculative or investment purposes, the IDI would not be able to exclude such swap from its de minimis threshold calculation.

The Commission is also adopting paragraph (4)(i)(C)(3) of the De Minimis Exception, which states that the termination date of the swap cannot extend beyond termination of the loan. A few commenters stated that circumstances can be anticipated at the time of loan origination that would support permitting the termination date of the swap to extend beyond termination of the loan.¹⁷⁸ However, the Commission does not believe that modifying this provision to allow for such circumstances would benefit the market because including that much flexibility would leave open a greater likelihood of abuse of the regulation and would increase the difficulty of policing the application of the regulation. In addition, as discussed, the Commission is of the view that the addition of more complicated timing structures for a swap in relation to a loan increases complexity and may potentially increase risk. In other words, the swap becomes less connected with the origination of the loan. Therefore, it would be appropriate to expect the IDI to register as an SD to the extent the IDI is entering into such swap arrangements in high volumes.

Further, the Commission is adopting paragraph (4)(i)(C)(4)(i), which requires an IDI to be, under the terms of the agreements related to the loan, the source of at least five percent of the maximum principal amount under the loan for a related swap not to be counted towards its de minimis calculation. The Commission is also adopting paragraph (4)(i)(C)(4)(ii), which states that if an IDI is a source of less than a five percent of the maximum principal amount of the loan, the notional amount of all swaps the IDI enters into in connection with the financial terms of the loan cannot exceed the principal amount of the IDI's loan in order to qualify for the IDI De Minimis Provision. The Commission

believes this provision benefits the market because the syndication threshold of five percent provides additional flexibility for IDIs, particularly small and mid-sized IDIs participating in large syndications, to enter into a greater range of loan-related swaps without having those swaps count towards their de minimis calculations. Some commenters also agreed that this provision better reflects industry practice.¹⁷⁹

Conversely, expanding the universe of swaps not required to be counted towards the de minimis threshold also expands the number of swaps potentially not subject to SD regulation, which could result in a general cost of decreased customer protections. As discussed above, however, the proposed IDI De Minimis Provision will likely benefit mostly IDIs with a lesser AGNA of swaps activity, which mitigates the concern that systemic risk will increase as a result of the proposed change. Additionally, the level of activity between unregistered IDIs and other unregistered persons is between only approximately 0.003 percent and 0.007 percent of the total AGNA of swaps activity, depending on the range of AGNA of swaps activity being examined (at AGNAs of between \$1 billion and \$50 billion).¹⁸⁰ Given those low percentages, the Commission is of the view that the general benefits of SD regulation likely would not be significantly diminished if the proposed IDI De Minimis Provision is adopted and some unregistered IDIs marginally expand the number and AGNA of swaps they enter into with customers in connection with loans to those customers. Further, though these entities are active in the swap market, the Commission is of the view that their activity poses less systemic risk as compared to IDIs with a greater AGNA of swaps activity because of their limited AGNA of swaps activity as

¹⁷⁹ See *supra* section II.B.5; Capital One and M&T comment letters.

¹⁸⁰ See *supra* section II.B; 83 FR at 27459. As discussed above, NERA estimated regulatory coverage for several different scenarios, including for: (1) An AGNA threshold; and (2) an AGNA threshold in conjunction with a modified exception for IDI loan-related swaps that eliminated the date restrictions related to the IDI Swap Dealing Exclusion. Although the assumptions and analytical methodology differed from the Commission's approach, NERA's analysis also estimated only a limited decrease in regulatory coverage in the scenario that evaluated an AGNA threshold with a modified exception for IDI loan-related swaps—with \$138,383 billion of swaps activity covered—as compared to the scenario that evaluated just an AGNA threshold—with \$138,406 billion of swaps activity covered (a decrease of 0.017 percent). See ABA comment letter (attaching NERA study).

compared to the overall size of the market.

The Commission has considered, on the one hand, the significant benefits of added market liquidity and, on the other, the costs of potentially reduced customer protections and the potentially increased credit risk that an IDI de minimis level SD may incur because the IDI would be able, under the IDI De Minimis Provision, to expand its swap dealing activities without having to register as an SD. The cost of reduced customer protections is mitigated because such swaps would still be required to be reported to the CFTC. Further, many of the business conduct standards required for SDs are now part of supplementary ISDA protocols.¹⁸¹ Last, the Commission notes that, even without these constraints, IDIs are subject to prudential regulatory requirements that include supervision of their credit risk as well as capital requirements. These prudential regulatory requirements maintain oversight of the IDI with respect to risks of swaps entered into under the IDI De Minimis Provision.

2. Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

(i) Protection of Market Participants and the Public

The IDI De Minimis Provision may expand the universe of swaps that fall outside the scope of SD regulations, potentially increasing systemic risk and reducing counterparty protections. However, the IDIs would still be subject to prudential regulatory requirements, mitigating this concern somewhat. Additionally, as noted, the activity of IDIs that would benefit from this rule amendment poses less systemic risk as compared to IDIs with a greater AGNA of swaps activity because of their limited AGNA of swaps activity as compared to the overall size of the market.

(ii) Efficiency, Competitiveness, and Financial Integrity of Markets

The efficiency, competitiveness, and financial integrity of the markets may also be affected by the addition of the IDI De Minimis Provision since it provides IDIs more flexibility to enter into swaps in connection with loans without registering as SDs. With the added flexibility, the number of IDIs

¹⁸¹ See generally ISDA August 2012 DF Protocol Agreement, available at <https://www.isda.org/protocol/isda-august-2012-df-protocol/>.

¹⁷⁷ See *supra* section II.B.3; ABA and Regions comment letters.

¹⁷⁸ See *supra* section II.B.4; ABA, BDA, CDEU, Citizens, and M&T comment letters.

offering swaps in connection with loans may increase, which might have a positive impact on the efficiency and competitiveness of the market for swaps and loans. Additionally, end-users may be able to more efficiently enter into swaps in connection with loans, and therefore hedge associated risks, because they will not have to establish a new commercial relationship with a third-party swap dealer solely for this purpose. However, the added flexibility may also result in fewer swaps being subject to SD-related regulations.

(iii) Price Discovery

The IDI De Minimis Provision could lead to better price discovery as small and mid-sized banks increase their level of ancillary dealing activity, which might increase the frequency of swap transaction pricing.

(iv) Sound Risk Management

The IDI De Minimis Provision should increase the availability of swaps from IDIs, which could help end-users more effectively mitigate loan-related risk, for example interest rate and currency risk. The increased usage of swaps for risk mitigation may also reduce the risk to IDIs resulting from the defaulting of loan customers. Additionally, having more IDIs offering swaps in connection with loans might decrease concentration in the market for loan-related swaps and thereby decrease risk as well. The Commission also notes that to the extent an IDI is not required to register as an SD, it would still be subject to the risk management requirements of its prudential regulator.

(v) Other Public Interest Considerations

The Commission has not identified any other public interest considerations with respect to the IDI De Minimis Provision.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.¹⁸² The Commission believes that the public

interest to be protected by the antitrust laws is generally to protect competition.

The Commission has considered this final rule to determine whether it is anti-competitive and has identified no anti-competitive effects. Because the Commission has determined that the final rulemaking is not anti-competitive and has no anti-competitive effects, the Commission has not identified any less anti-competitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 1

Commodity futures, Definitions, De minimis exception, Insured depository institutions, Swaps, Swap dealers.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 1 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

■ 2. In § 1.3, add paragraph (4)(i)(C) to the definition of the term “Swap dealer” to read as follows:

§ 1.3 Definitions.

* * * * *

Swap dealer. * * *

(4) * * *

(i) * * *

(C) *Insured depository institution swaps in connection with originating loans to customers.* Solely for purposes of determining whether an insured depository institution has exceeded the \$8 billion aggregate gross notional amount threshold set forth in paragraph (4)(i)(A) of this definition, an insured depository institution may exclude swaps entered into by the insured depository institution with a customer in connection with originating a loan to that customer, subject to the requirements of paragraphs (4)(i)(C)(1) through (6) of this definition.

(1) *Timing of execution of swap.* The insured depository institution enters into the swap with the customer no earlier than 90 days before execution of the applicable loan agreement, or no earlier than 90 days before transfer of principal to the customer by the insured depository institution pursuant to the loan, unless an executed commitment or forward agreement for the applicable loan exists, in which event the 90 day restriction does not apply;

(2) *Relationship of swap to loan.* (i) The rate, asset, liability or other term underlying such swap is, or is related to, a financial term of such loan, which includes, without limitation, the loan’s duration, rate of interest, the currency or currencies in which it is made and its principal amount; or

(ii) Such swap is permissible under the insured depository institution’s loan underwriting criteria and is commercially appropriate in order to hedge risks incidental to the borrower’s business (other than for risks associated with an excluded commodity) that may affect the borrower’s ability to repay the loan;

(3) *Duration of swap.* The duration of the swap does not extend beyond termination of the loan;

(4) *Level of funding of loan.* (i) The insured depository institution is committed to be, under the terms of the agreements related to the loan, the source of at least five percent of the maximum principal amount under the loan; or

(ii) If the insured depository institution is committed to be, under the terms of the agreements related to the loan, the source of less than five percent of the maximum principal amount under the loan, then the aggregate notional amount of all swaps entered by the insured depository institution with the customer in connection with the financial terms of the loan cannot exceed the principal amount of the insured depository institution’s loan;

(5) The swap is considered to have been entered into in connection with originating a loan with a customer if the insured depository institution:

(i) Directly transfers the loan amount to the customer;

(ii) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(iii) Purchases or receives a participation in the loan; or

(iv) Under the terms of the agreements related to the loan, is, or is intended to be, the source of funds for the loan; and

(6) The loan to which the swap relates shall not include:

(i) Any transaction that is a sham, whether or not intended to qualify for the exception from the de minimis threshold in this definition; or

(ii) Any synthetic loan.

* * * * *

Issued in Washington, DC, on March 26, 2019, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

¹⁸² 7 U.S.C. 19(b).

Appendices to De Minimis Exception to the Swap Dealer Definition—Swaps Entered Into by Insured Depository Institutions in Connection With Loans to Customers

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz and Stump voted in the affirmative. Commissioners Behnam and Berkovitz voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

The Commission will today consider the final rule for the de minimis exception for swaps entered into by Insured Depository Institutions (“IDIs”) in connection with loans to customers. Today’s action builds upon the strong public support the CFTC has received for providing a narrowly-tailored exception that promotes the use of loan-related swaps in a commercially practicable and cost-effective manner.

This final rule will increase efficiencies and reduce the burdens for banks, particularly small and regional banks, to enter into swaps with their end-user loan customers without the added burden of unnecessary regulation and associated compliance costs.

But this proposal is far more important than that. This proposal will allow small and medium size commercial borrowers—manufacturers, home builders, agricultural cooperatives, community hospitals and small municipalities—to conduct prudent risk management that is difficult for them under the current rule.

I recently telephoned senior executives of several regional banks to hear about their commercial lending and swaps hedging practices.

One executive serving clients in the Mid Atlantic explained that his firm was the only bank service provider to most of his small and medium sized business clients. If his regional bank could not offer these smaller businesses a fixed interest rate swap to hedge their floating rate loan borrowing, then these borrowers had no means to hedge their exposure to rising interest rates on their loans.

Another executive with a South Eastern bank explained that regulatory limitations on his bank’s ability to offer swap hedging facilities to commercial borrowers meant that they remained exposed to rising interest rates, putting them at risk of having to curtail operations or lay off workers if rates rose. In effect, the current situation is pushing risk down into the real economy, rather than mitigating it as derivatives market reforms were intended.

Another executive with a Midwestern bank said that greater regulatory flexibility would allow his bank to be there for its clients not only in good times, but also in times of greater volatility. It would allow his bank to provide properly hedged lending to support good jobs, healthy communities and safe retirements in towns throughout the Midwest.

I specifically asked these executives if they would engage in more swaps dealing to

compete with Wall Street. Each of them said that they had no intention whatsoever to engage in that type of swaps dealing or speculate in swaps markets. They said that their prudential bank regulator would not allow them to do so. They made clear that their intention was to enable business borrowers to use swaps to mitigate the risk of floating rate commercial loans invested in their local communities. I was impressed with their commitment to serving the risk management needs of their regional clients.

The preamble to the rule directs the CFTC Office of Chief Economist to conduct a study after three years of implementation. This study will examine future trading data to see how the market operates under the rule. It will assist a future Commission in considering whether there is a need for limitations on swap activity, and if so, at what levels. This study is the result of a discussion with a fellow Commissioner who suggested adding limits to the notional size of swaps entered into in connection with the principal balance of related loans. The final rule before us does not set such limits, but does not preclude the Commission from doing so in the future if considered appropriate based upon the study. I believe imposing such limits at this time would be inappropriate without data on which to base such limits and supportive public comments. As I have said many times before, I believe that CFTC policy is best when it is driven by data and not assumptions.

I take seriously, however, the concern about potential misuse of this provision in ways that are not intended. The preamble makes it clear that the Commission expects that the swaps entered into by IDIs are in connection with and related to the originating loan. For instance, a swap with a borrower entering into it for speculative or investment purposes not related to the loan would not be excepted by the IDI from the de minimis calculation. And IDIs, as depository institutions, remain subject to prudential supervision for all of their activities, including swaps dealing. Finally, this rule does not remove the core Dodd-Frank Act swaps requirements of clearing, post-trade reporting, and mandatory trade execution, which I fully support.

Again, I am pleased to see this rule finalized. I do not intend to put before the Commission any other de minimis exception during my remaining time at the CFTC. Nevertheless, staff continues to study possible alternative metrics for the calculation of the swap dealer de minimis threshold, including possible risk-based approaches. I expect that the results of their work will be reviewed by the Commission under the next Chairman and considered for further action.

In conclusion, today’s proposed rulemaking is about much more than legal technicalities, joint rule making or even relief for regional American banks—as important as those things are. Today’s rule is about prudent risk management by America’s small business borrowers and job creators. It is about investment in local communities in the real economy. It is about increasing prosperity and employing our fellow Americans. Frankly, things just don’t get more important than that.

Appendix 3—Supporting Statement of Commissioner Brian D. Quintenz

I support today’s final rule to amend the de minimis exception to swap dealer registration to include IDI loan-related factors. The amendments facilitate IDIs’ provision of hedging swaps to end-user borrowers trying to mitigate the myriad risks—interest rate, currency, commodity price—facing their businesses in connection with their loans. When Congress adopted the definition of “swap dealer” in the Commodity Exchange Act, it recognized that small and medium-sized banks play a critical role in providing credit and risk mitigation services to end-user borrowers.¹

In my view, today’s amendments further Congressional intent, better align the Commission’s swap dealer registration framework with the risk mitigation needs of bank customers, and more accurately reflect current market practices between IDIs and their borrowers. By amending the de minimis exception from swap dealer registration, the Commission is providing small and regional banks with greater flexibility to serve their customers’ needs and greater regulatory clarity about the types of de minimis swap dealing activity they can engage in without triggering registration. I am also pleased that the amendments today were completed with full coordination with the Securities and Exchange Commission.²

Today’s amendments also contain important limitations that prevent IDIs from entering into an unlimited amount of swap dealing transactions with customers without needing to register as a swap dealer. The swap must have a direct relationship with the origination of the loan with the IDI. For example, the rate or term underlying the swap must be related to a financial term of the loan or the swap must be permissible under the IDI’s loan underwriting criteria and commercially appropriate to hedge risks incidental to the borrower’s business. These conditions inherently limit the amount of swap dealing activity IDIs can engage in with customers and still qualify for the de minimis exception. Moreover, the preamble of today’s rule makes absolutely clear that if an IDI entered into a swap with an end-user for the end-user’s speculative purposes, that transaction would not qualify for the de minimis exception.

These amendments are absolutely essential to helping to rationalize the de minimis threshold and ensure that end-users and Main Street businesses don’t suffer from an overly prescriptive, punitive, and far-reaching regulatory regime that was only

¹ 156 Cong. Rec. S5922 (daily ed. July 15, 2010)(statement of Sen. Lincoln)(“In addition, we made it clear that a bank that originates a loan with a customer and offers a swap in connection with that loan shouldn’t be viewed as a swap dealer.”).

² Joint Statement from Chairmen Giancarlo and Clayton on the IDI Exception to the Swap Dealer Definition (Dec. 13, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement121318> (citing the Commissions’ interpretation that the Dodd-Frank Act does not require a joint rulemaking between the two agencies with respect to the de minimis exception to the swap dealer definition).

meant to target the largest financial entities.³ The Commission's no-action letter to a Main Street bank this past August demonstrates the need to remedy the inadequacies of the current de minimis regime to ensure that legitimate client hedging activity is not artificially constrained.⁴ Since that time, the Commission has received similar requests for no-action relief from other banks in order to meet their customers' needs. These needs are especially acute in light of a rising interest rate environment. Many businesses who have received credit over the last several years may not have felt a need to hedge their interest rates given that rates were low and stable. However, in a rising rate environment, banks should have the flexibility to offer their customers hedging services on those prior extensions of credit without artificially falling into a swap dealer registration regime. I believe that today's final rule appropriately addresses these concerns.

However, as I said at the outset, today's amendments are but one of many improvements to the de minimis threshold contemplated by the June 2018 proposal which must be finalized. As I have said repeatedly, notional value is a poor measure of activity and a meaningless measure of risk. Identifying a de minimis quantity of a meaningless number will always still yield another meaningless number. By itself, notional value is an incredibly deficient registration metric by which to impose large costs and achieve substantial policy objectives, but yet it is the one that the CFTC has repeatedly and inexplicably embraced in this context.

I am supportive of the Office of the Chief Economist's (OCE) efforts to rationalize notional amounts into an entity-netted notional (ENNs) measurement that more accurately reflects an entity's swap activity from both a size and risk perspective. In February 2019, OCE issued a report converting the gross notional amounts of the IRS, FX, and CDS markets into ENNs.⁵ That study found that, when measured with ENNs, the notional amounts of the IRS, FX, and CDS markets considered went from \$225 trillion, \$57 trillion, and \$5.5 trillion, respectively, to \$15.4 trillion, \$17 trillion, and \$2 trillion, respectively. In other words, the entire market of those three swap asset classes shrunk from \$290 trillion to \$34 trillion. When measured against this adjusted (and smaller) market size, the current \$8 billion de minimis threshold still only constitutes .0002—two ten-thousandths—of that figure.

³ *Hearing to Review Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act Before the H. Comm. on Agric. and the Subcomm. on General Farm Commodities and Risk Management*, 112th Cong. 14 (Feb. 10, 2011), <https://archives-agriculture.house.gov/sites/republicans.agriculture.house.gov/files/transcripts/112/112-1.pdf>.

⁴ CFTC Staff No-Action Letter 18–20 (August 28, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7775-18>.

⁵ ENNs for Corporate and Sovereign CDS and FX Swaps, Office of the Chief Economist (Feb. 2019), <https://www.cftc.gov/sites/default/files/files/ENNs%20for%20Corporate%20CDS%20and%20FX%20Derivatives%20-%20ADA.pdf>.

Given the irrationality of arguing over de minimis quantities to the ten-thousandth increment, I believe the Commission has plenty of flexibility to make further adjustments to this exception that would be consistent with Congress' intent to exempt a de minimis quantity of swap dealing activity. I would note that the Commission, in its vote on the November 2018 final rule, only rejected reducing the de minimis threshold to \$3 billion and did not state at any point that amounts greater than \$8 billion exceeded a "de minimis quantity of swap dealing." If the rule had taken that view, I would have voted against it. Additionally, the November 2018 rule specifically contemplated further Commission action on additional amendments to the de minimis exception, nullifying any after-the-fact attempt to recast that vote as the Commission's final say on the matter.⁶

Lastly, I am encouraged that, following the Chairman's specific and public direction, staff continues to study both additional adjustments to notional value that would better account for differences between various products, and alternative risk-based registration metrics that could better align the criteria of the de minimis threshold with the costs of swap dealer regulation, particularly the largest costs tied to mitigating systemic risk such as capital and margin requirements.⁷ The results of this staff report will be critical to the Commission's continued consideration of a more risk-sensitive swap dealer registration threshold.

I would like to commend DSIO staff for their hard work on finalizing these amendments and their ongoing, tireless efforts to produce data analyses the Commission can use to further inform necessary improvements to our swap dealer registration regime.

Appendix 4—Dissenting Statement of Commissioner Rostin Behnam

Introduction

I respectfully dissent from the Commodity Futures Trading Commission's (the "Commission" or "CFTC") decision today regarding the application of the swap dealer definition to insured depository institutions ("IDIs"). The Commission's eagerness to bypass clear Congressional intent in order to address longstanding concerns with the original implementation of the statutory exclusion from the swap dealer definition for IDIs, only to the extent they offer to enter swaps transactions in connection with originating customer loans (the "IDI Swap

⁶ De Minimis Exception to the Swap Dealer Definition, 83 FR 56666, 56677, 56679, 56681 (Nov. 13, 2018) (noting that data analysis indicates that increasing the de minimis threshold up to \$100 billion "may have a limited adverse effect on the systemic risk and market efficiency policy considerations of SD regulation. Additionally, a higher threshold could enhance the benefits associated with a de minimis exception, for example by allowing entities to increase ancillary dealing activity").

⁷ Statement of Chairman J. Christopher Giancarlo Regarding the Final Rule on Swap Dealer De Minimis Calculation, (Nov. 5, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement110518>.

Dealing Exclusion"), creates risks and uncertainties that may harm the very financial institutions that the new rule purports to help. By exercising its De Minimis Exception Authority¹ to create as a "factor" whether a given swap has specified characteristics of swaps entered into by IDIs in connection with customer loans, the Commission is creating a new regulatory exemption that intentionally and entirely subsumes the IDI Swap Dealing Exclusion in defiance of conferred regulatory authority. Moreover, not only does this novel exercise in agency discretion undermine the swap dealer definition, but it exemplifies the current Commission's rush to implement sweeping changes to the regulation of swap dealers without regard for the long term consequences of its capricious interpretation of the law and arbitrary analysis of risk.

During the proposal for today's final rule,² I expressed grave concerns with the Commission's use of its De Minimis Exception Authority to redefine swap dealing activity absent a meaningful collaboration and joint rulemaking with the Securities and Exchange Commission ("SEC"), as required by the Dodd-Frank Act.³ I was concerned that the Commission's decision put it at risk of challenge, and concerned that the introduction of an IDI De Minimis Provision that de facto defines the universe of swap dealing activity for all IDIs and then wholly exempts such activity from counting towards only one of two applicable aggregate gross notional registration thresholds was neither efficient nor fair when compared to the *absolute* protections that could be provided by an appropriately amended IDI Swap Dealing Exclusion.

During the Notice of Proposed Rulemaking and through the finalization of the rule setting the de minimis exception at an aggregate gross notional amount (AGNA) threshold of \$8 billion in swap dealing activity, I urged the Commission to act within our delegated authority and work with the SEC to amend the IDI Swap Dealing Exclusion.⁴ Instead, under the guise of harmonization efforts, in December 2018, the Chairmen of our two independent agencies independently and irrespectively of their fellow Commissioners' views issued a joint statement regarding the "IDI Exception to the Swap Dealer Definition."⁵ In purporting to

¹ See 17 CFR 1.3 swap dealer, paragraph (4)(v), providing that the Commission may by rule or regulation change the requirements of the de minimis exception described in paragraphs (4)(i) through (iv) ("De Minimis Exception Authority").

² De Minimis Exception to the Swap Dealer Definition, 83 FR 27444, 27481–2 (proposed June 12, 2018) ("Notice of Proposed Rulemaking" or "NPRM").

³ See The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 section 712(a) and (d), 124 Stat. 1376, 1644 (2010) (the "Dodd-Frank Act").

⁴ See, e.g. De Minimis Exception to the Swap Dealer Definition, 83 FR 56666, 56691 (Nov. 13, 2018).

⁵ J. Christopher Giancarlo, Chairman, CFTC and Jay Clayton, Chairman, SEC, Joint Statement from Chairmen Giancarlo and Clayton on the IDI Exception to the Swap Dealer Definition (Dec. 13, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement121318>.

provide greater clarity, they stated, in part, that, “[O]ur Commissions have not interpreted the joint rulemaking provisions of the Dodd-Frank act to require joint rulemaking with respect to the *de minimis* exception to the swap dealer definition, including an exception for a *de minimis* quantity of swaps entered into by IDIs in connection with loans.”⁶ While I agree that the CFTC has delegated authority to exercise its *De Minimis* Exception Authority under section 1a(49)(D) of the Commodity Exchange Act (“CEA” or the “Act”), this authority is not open-ended and cannot be interpreted to conflict with the clear Congressional directives regarding the exclusion set forth in the swap dealer definition in CEA section 1a(49)(A). Congress clearly did not confer the authority in CEA section 1a(49)(D) so that the CFTC would have free-flowing regulatory authority to determine the scope of the Dodd-Frank Act’s regulatory coverage with regard to an entire segment of the swap dealing population.⁷ Moreover, by viewing CEA section 1a(49)(D) as a blank-check for creating exemptions and exceptions that *de facto* alter the swap dealer definition, the Chairmen—and now the Commissions—are depriving IDIs of legal certainty and benefits of an exclusion.⁸

I believe that IDIs deserve the fullest application of the exclusion provided by Congress in CEA section 1a(49)(A); not an exemption or exception that puts them within the crosshairs of future Commission action should political headwinds or shifting policy dispose it to again alter the rules or its interpretation of the CEA. I think the Commission should have worked with the SEC to jointly amend the IDI Swap Dealing Exclusion to more accurately address swap activities inherent to credit risk management encompassed by loan origination in the commercial lending space.⁹ And, I think the

⁶ *Id.*

⁷ Congress clearly understood that IDIs are subject to prudential regulation and anticipated that depository institutions generally could be required to register as swap dealers regardless of such status. See 7 U.S.C. 6s(c)(1) (providing that any person that is required to be registered as a swap dealer shall register with the CFTC regardless of whether the person also is a depository institution or is registered with the SEC as a security-based swap dealer).

⁸ For example, given the default presumption of full swap dealer designation, it is unclear as to whether and how the CFTC might exercise its authority to grant a limited purpose swap dealer designation under CEA section 1a(49)(B) and CFTC regulation 1.3 Swap dealer, paragraph 3 to an IDI that is required to register as a swap dealer for swap dealing activities that do not meet the IDI *De Minimis* Provision, but may meet the IDI Swap Dealing Exclusion. See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30596, 30644–46, (May 23, 2012) (“SD Definition Adopting Release”).

⁹ For example, the Commissions could have, in consultation with the prudential regulators, reconsidered their interpretation of what Congress meant by “loan origination” in the context of the credit risk management relationship and extended, conditioned, or removed the IDI Swap Dealing Exclusion’s requirement that an IDI enter into a swap within 180 days after the execution of the

Commission should have considered alternative forms of relief that neither disturb the IDI Swap Dealing Exclusion nor require use of the *De Minimis* Exception Authority to reduce regulatory burdens of IDIs.¹⁰ By prioritizing shifting policy over regulatory implementation, the Commission acted impulsively, inviting risk and depriving IDIs and other affected parties the legal certainty and clarity intended by Congress.

IDIs Shall Not Be Considered Swap Dealers

• • •

Section 1a(49)(A) of the CEA generally defines the term “swap dealer” to mean:

[A]ny person who—(i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties in the ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps, *provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.*¹¹

As recognized by the Commission when first interpreting this language in a joint rulemaking with the SEC in 2012, as required by the Dodd-Frank Act,¹² the statute “does not exclude any category of persons from coverage of the dealer definitions; rather it excludes certain activities from the dealer analysis.”¹³ Consistent with this understanding, in analyzing the breadth of the language relevant to IDIs, the CFTC and SEC recognized that the statute’s direct reference to “originating” the loan precluded it from “constru[ing] the exclusion as applying to all swaps entered between an IDI and a borrower at any time during the duration of the loan,” explaining, “If this were the intended scope of the statutory exclusion, there would be no reason for the

loan agreement (or date of transfer of principal to the customer) (17 CFR 1.3 Swap dealer, paragraph 5)(i)(A)) to more accurately address how customers actively manage loan-related risk. Similarly, the Commissions could have more fully analyzed whether and under what circumstances permitting the termination date of a swap to extend beyond the termination date of the related loan could bear an appropriate relationship to loan origination.

¹⁰ For example, the CFTC could consider permitting IDIs that register as swap dealers to demonstrate compliance with their prudential regulatory requirements as a substitute for comparable CFTC swap dealer regulations.

¹¹ 7 U.S.C. 1a(49)(A) (emphasis added).

¹² Dodd-Frank Act at section 712(d).

¹³ SD Definition Adopting Release, 77 FR at 30619–20. As acknowledged by the two Commissions: “In this regard, it is significant that the exceptions in the dealer definitions depend on whether a person engages in certain types of swap or security-based swap activity, not on other characteristics of the person. That is, the exceptions apply for swaps between an insured depository institution and its customers in connection with originating loans, swaps or security-based swaps entered into not as a part of a regular business, and swap or security-based swap dealing that is below a *de minimis* level.” SD Definition Adopting Release, 77 FR at 30619.

text to focus on swaps in connection with ‘originating’ a loan.”¹⁴

The CFTC and SEC understood that the Dodd-Frank Act did not entirely carve IDIs out from coverage of the swap dealer definition. Rather, Congress intended that, to the extent IDIs engage in certain swap activities with their customers related to loan origination, as interpreted by the CFTC jointly with the SEC,¹⁵ such activities would not be included in determining whether an individual IDI is a swap dealer. Critical to today’s decision, the Commissions understood that Congress clearly and specifically stated that the swap activities of IDIs with their customers in connection with originating loans were to be addressed by the Commissions jointly, and through an exclusion from the dealer definition, and not through each agency’s authority with respect to *de minimis* levels of swap dealing activity.¹⁶ The plain meaning is that the CFTC is not free to interpret its *De Minimis* Exception Authority as a means to unilaterally redefine IDI swap activities with customers in connection with loan origination as dealing activities to be wholly “factored” out of the \$8 billion AGNA *de minimis* threshold calculation.¹⁷ The CFTC does not have a blank check.¹⁸

Put simply, in this context where the CFTC is seeking to address swap dealing activities by IDIs, section 712(d) of the Dodd-Frank Act only authorizes the CFTC to act independently when determining which IDIs to exempt from a swap dealer designation based solely on the *quantity* of dealing activity outside of such activity that falls within CEA section 1a(49)(A), and to establish *factors* in connection with establishing this quantitative determination. Congress clearly intended for the *de minimis* exemption to be a quantity based exemption,

¹⁴ SD Definition Adopting Release, 77 FR at 30621–2.

¹⁵ See Dodd-Frank Act, *supra* note 3.

¹⁶ See SD Definition Adopting Release, 77 FR at 30619, *supra* note 13 (in addition to recognizing that the statutory exceptions to the dealer definitions are activities-based, the CFTC and SEC also understood the differentiation between the exceptions available for swaps between an IDI and its customers in connection with originating loans and for swap or security-based swap dealing that is below a *de minimis* level).

¹⁷ See Larry M. Eig, Cong. Research Serv., 97–589, Statutory Interpretation: General Principles and Recent Trends 18 (2014) (it is assumed that Congress speaks to major issues directly: “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes.” (quoting *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001))); See also, e.g. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (“There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.” (quoting *Mobil Oil Corp. v. Higginbottom*, 468 U.S. 618, 625 (1978))).

¹⁸ See, e.g. Neomi Rao, Address at the Brookings Institution: What’s next for Trump’s regulatory agenda: A conversation with OIRA Administrator Neomi Rao (Jan. 26, 2018), Transcript at 10 (“ . . . agencies should not act as though they have a blank check from congress to make law.”), available at https://www.brookings.edu/wp-content/uploads/2018/01/es_20180126_oira_transcript.pdf.

and not an exemption that also considers the characteristics of swap dealing activity as a means to create categorical exclusions, which is what the Commission is doing today for swaps entered by IDIs in connection with commercial loans.

The CFTC's newly minted interpretation of the De Minimis Exception Authority in CEA section 1a(49)(D) in support of its unilateral ability to address swap activities as "factors" in a quantitative determination of de minimis swap dealing activity for registration purposes is a clever attempt to justify its decision to avoid productively collaborating with the SEC. However, this new interpretation is as an inexplicable departure from prior Commission interpretation and unsupported by the plain language of the statute.¹⁹

Inefficiencies

Not only is the CFTC legally hamstrung from its chosen path, but its action today creates redundancy and inefficiencies in our rules. Because swap activities between IDIs and their customers in connection with originating loans were never intended to be swap dealing activity warranting swap dealer registration, it is odd to say that swap activities between IDIs and their customers in connection with originating loans are exceptions to the threshold test for swap dealer registration.²⁰ The IDI De Minimis Provision created today presupposes that what it exempts from counting towards the \$8 billion AGNA de minimis threshold calculation are activities that are otherwise within the scope of the swap dealer definition. But, the Commission created the need for the exception, *i.e.* it defined "swap dealing" activities, when it determined to treat the IDI Swap Dealing Exclusion as immutable.²¹ The CFTC and SEC could have dodged further interpretive risk and inefficient application of the swap dealer definition and avoided considering the application of a de minimis threshold to the swaps activities at issue had the agencies jointly addressed the existing conditions of the IDI Swap Dealing Exclusion that fail to address the spectrum of swap activities typically engaged in with respect to the ongoing credit risk management associated with loan origination.

Risk Beyond Inefficiencies

Beyond the procedural and interpretive issues that call the Commission's action into question, several requirements of the IDI De Minimis Provision push its coverage well beyond swap dealing activities *in connection with* loan origination that it purports to address. Rather, the Commission drafted the

IDI De Minimis Provision to encompass any and all swaps entered into with customers in connection with loans to those customers with the effect that, despite classifying such swaps as dealing activity, they—and the market facing swaps used to hedge them—need not be counted towards the \$8 billion AGNA de minimis threshold calculation. The end result being that IDIs, contrary to Congressional intent, will not have to register as swap dealers to the extent they engage in swaps with their loan customers during the lifetime of the loan. To be clear, had Congress wanted the prudential regulators to provide the sole oversight for IDIs to the extent they engaged in swap dealing activities with customers, it would not have included the exclusionary language for IDIs in CEA section 1a(49)(A) and would have clearly articulated this intent elsewhere in the Dodd-Frank Act.²²

With the purported goal of promoting greater use of swaps in hedging strategies to reduce business risk, and ultimately reducing the need for banks to turn away end-user client demand for swaps that would cut into their adjusted gross notional ancillary swap dealing activity subject to the \$8 billion AGNA de minimis threshold, the IDI De Minimis Provision: (1) Includes no timing restrictions following loan execution or commitment on when a swap must be entered to be in connection with originating a loan; (2) requires only that a swap be *permissible* under the IDIs loan underwriting criteria so as to permit greater use of swaps in "effective and dynamic hedging strategies" during the borrowing relationship,²³ as opposed to mirroring the statute's clear intent of addressing swaps *in connection with* loan origination; and (3) permits an unlimited adjusted gross notional amount of loan-related swaps to be entered, regardless of the principal loan amount outstanding. These requirements—or lack thereof—will permit IDIs to engage in an unlimited and indeterminate level of swap dealing with customers throughout the lifetime of a loan and without having to count such activities towards the \$8 billion AGNA de minimis threshold.

While the Commission believes that the swap dealing activity to be covered by the IDI De Minimis Provision in total does not raise systemic risk concerns, it has made no effort to quantify or qualify how this indeterminate level of swap dealing activity may affect the risk profile of the individual IDIs who each would potentially be subject to swap dealer registration. The Commission simply assumes that the overall risk attributed to the community of small and mid-sized IDIs it has currently identified does not and will not in the future raise systemic risk concerns. With this in mind, it is worth articulating that despite suggestions that this relief is surgically targeted to help "small and

midsize" banks, it can in fact be utilized by banks of all sizes, including those that may be systemically risky. I do not mean to suggest at all that size should be deterministic of which financial entities can avail themselves of relief intended for all IDIs; however, taken in context of the unrestricted nature of the rule before the Commission today, as it relates to the relationship between swaps activity and loan origination, I am extremely concerned about what systemic risks may arise as a result from these unrestricted activities.

The Commission, in part, is punting to prudential regulatory oversight and supervision to ensure that the IDI De Minimis Provision will not lead to a significant expansion of swap dealing activity by unregistered entities, as compared to the overall size of the swap market and not on an individual IDI basis. The Commission should always consider and rely on the risk mitigating effects of prudential oversight when evaluating its approach to swap dealer regulation. However, where Congress clearly dictated that the CFTC primarily regulate certain swap dealing activities, the Commission cannot be so quick to completely defer.²⁴ Indeed, it is astonishing that the IDI De Minimis Provision lacks any requirements to demonstrate compliance or adherence to the Provision with respect to any particular swap or otherwise.²⁵ As the current swap data reporting rules (parts 43 and 45 of the Commission's regulations) do not require IDIs or any entity to indicate whether a particular swap is within the IDI Swap Dealing Exclusion or will be subject to the IDI De Minimis Provision, the Commission will ultimately rely on its enforcement authority to determine whether an IDI can demonstrate why it is not required to register if its adjusted gross notional

²⁴ Similarly, it is not clear to me that supplementary ISDA protocols are an appropriate substitute for the customer protections afforded under the external business conduct rules applicable to swap dealers. *See* Final Rule, De Minimis Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans to Customers, section III.C.1. (to be codified at 17 CFR pt. 1).

²⁵ This seems inconsistent with the Commission's treatment of exemptions in other registration categories. For example, CFTC regulation 4.13(a)(3) provides an exemption from commodity pool operator (CPO) registration for an operator that, among other requirements, meets one of two "de minimis" tests with respect to each individual pool for which it claims an exemption. To claim the exemption, the CPO must file an initial electronic notice of exemption with the National Futures Association. Thereafter, the CPO must annually reaffirm its reliance on the exemption. *See* 17 CFR 4.13(b). Among other things, CFTC regulation 4.13(c) requires each person who has filed a notice of exemption from registration to make and keep records and submit to special calls by the Commission to demonstrate compliance with the applicable criteria for the exemption. In contrast, with regard to the IDI De Minimis Provision, the Commission suggests that "it would be good practice for an IDI to note and track all loans for which the IDI De Minimis Provision applies to be able to demonstrate" compliance. Final Rule, De Minimis Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans to Customers, section II.C.6.(iii) (to be codified at 17 CFR pt. 1).

¹⁹ *See* 83 FR at 56692–3.

²⁰ *See, e.g.,* Frederick Schauer, *Exceptions*, 58 U. Chi. L. Rev. 871, 874–5 877 (1991) (explaining the expectation that exceptions are generally built into the meaning of a primary technical term such that it is odd to say, for example, that foul balls are exceptions to the rule defining home runs because foul balls are not home runs in the first place).

²¹ Not only is this far from efficient, it is a burden. In determining how to exercise its authority, a federal agency should not create solutions in search of problems. *See, e.g.,* Neomi Rao, *supra* note 18 at 10.

²² *See* Larry M. Eig, *supra* note 17 at 3, 14–15 (explaining the basic principles that statutory language should be construed to give effect to all its provisions).

²³ *See* Final Rule, De Minimis Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans to Customers, section II.B.3. (to be codified at 17 CFR pt. 1).

amount of swap dealing activity appears to exceed the \$8 billion AGNA *de minimis* threshold. This cannot be the most efficient use of anyone's resources.

Missed Opportunities and Alternatives

In its efforts to avoid improving the swap dealer definition for the limited purpose of addressing longstanding concerns with the IDI Swap Dealing Exclusion, the Commission missed an opportunity to engage with the SEC and prudential regulators to strategically fix those aspects of the Exclusion that fail to address the realities and practicalities of the IDI swap activities connected to loan origination, which Congress intended our agencies to address. In reviewing the record, it is clear, for example, that the timing parameters in subparagraph (i)(A) of the IDI Swap Dealing Exclusion may be too restrictive and do not correspond to the reality of an ongoing relationship between an IDI and a customer commonly associated with loan origination. Historically, and in comments to the IDI *De Minimis* Proposals, IDIs have provided compelling arguments in support of permitting the termination date of a swap to extend beyond the termination date of the related loan.²⁶ The Commission declined to include "that much flexibility" in the duration requirement of IDI *De Minimis* Provision due to the added complexity and potential for abuse.²⁷ However, it seems that the Commission could have sought—and may still seek—the expertise of the prudential regulators to evaluate the merits of these arguments for consideration in amending the IDI Swap Dealing Exclusion.

In response to Chairman Giancarlo's statement that Commission staff would consider no-action relief for IDIs pending formal Commission action on the proposal for the IDI *De Minimis* Provision,²⁸ the Commission received at least two requests. I believe these requests presented opportunities for a consensus path forward. Given current market uncertainties, data challenges, legal risks, and ambitious policy changes, Commission staff could have: (1) Granted temporary no-action relief consistent with the parameters of the requests—none of which were so inconsistent with the NPRM or policy considerations at issue as to raise additional concerns; (2) committed to completing a data-driven, economic analysis of the foreseeable impacts of the various requirements of the IDI *de Minimis* Provision and any related systemic risks; and (3) proceeded to engage with the SEC and prudential regulators towards a joint rulemaking to amend the IDI Swap Dealing Exclusion as directed by Congress.

Conclusion

Albert Einstein said that, "A clever person solves a problem. A wise person avoids it."

²⁶ See, e.g. Swap Dealer *De Minimis* Exception Final Staff Report at 17 (Aug. 15, 2016), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf; Final Rule, *De Minimis* Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans to Customers, section II. B. 4. (to be codified at 17 CFR pt. 1).

²⁷ *Id.*

²⁸ 83 FR at 56690.

There is no doubt that the Commission was clever in choosing to address longstanding concerns that the IDI Swap Dealing Exclusion is unnecessarily restrictive, lacks clarity, and limits the ability of IDIs to serve their loan customers through the unilateral exercise of its authority with respect to the *de minimis* exception. However, there is also little doubt in my mind that being clever does not make one correct. The uncertainties embodied in the IDI *De Minimis* Provision deprive IDIs and their customers the legal certainty and clarity intended by Congress, and may result in increased risk for market participants and uncertain impact on systemic risk to the financial system. The Commission would have been wise to avoid creating this rambling IDI exemption that will now sit awkwardly beside the IDI Swap Dealing Exclusion in the Commission regulations. These regulations are a marker of our inability to engage and harmonize with our fellow regulators towards a more practical and legally sound solution. As an independent agency, the Commission should use its expertise to act within its authority; and not abuse ill-defined powers to create loopholes. Our agencies are better than that. And more importantly, our stakeholders deserve it.

Appendix 5—Dissenting Statement of Commissioner Dan M. Berkovitz

I respectfully dissent from today's rulemaking, which excludes from counting toward the *de minimis* threshold swaps entered into by insured depository institutions ("IDIs") in connection with loans ("Final Rule").

The Final Rule violates both substantive and procedural provisions of the Dodd-Frank Act. Substantively, the unlimited amount of swap dealing allowed under this provision is not the "*de minimis* quantity" that Congress intended for the Commission to permit without triggering swap dealer registration. Nor should such an unlimited amount of unregistered dealing be permitted by the Commission.

Procedurally, the Final Rule evades the requirement imposed by Congress that the term "swap dealer" be defined or amended only through joint rulemakings with the Securities and Exchange Commission ("SEC"). The Final Rule expands the provision in the swap dealer definition that provides that swaps entered into by an IDI in connection with a loan are not considered swap dealing ("IDI Swap Dealing Exclusion").¹ It does this not by amending the IDI Swap Dealing Exclusion itself, but rather by awkwardly stuffing this new expanded exclusion into the *de minimis* provision. The transparent purpose of this drafting sleight-of-hand is to circumvent the will of Congress that "swap dealer" be defined only through joint rulemakings with the SEC.

I am not opposed to considering reasonable, incremental changes to the current IDI Swap Dealing Exclusion if they serve the intended public policy goals and are accomplished in the manner prescribed

¹ 17 CFR 1.3, definition of Swap dealer, paragraph (5).

by law. The IDI Swap Dealing Exclusion effectively prevents swap dealer registration from impeding the ability of IDIs to engage in limited swap dealing as a part of their core loan origination business. But experience has shown² that some of the conditions in the IDI Swap Dealing Exclusion may be too restrictive and are not achieving the goals set by Congress.³

The Final Rule, however, is not a limited expansion of the IDI Swap Dealing Exclusion that primarily will aid smaller banks, but rather a wholesale expansion that primarily will benefit larger banks. The provision is a wolf in sheep's clothing. In the guise of helping small and mid-size banks, it opens the door for large banks to undertake an unlimited amount of swap dealing with loan customers *without* registering as swap dealers. This change both violates the clear intent behind regulating swap dealers and carelessly introduces risk into the financial system by allowing non-*de minimis* unregulated swap dealing.

I am concerned that smaller banks will be negatively impacted by the Final Rule. The larger banks that will benefit most from this rule—likely large regional and some national commercial banks—compete with smaller banks for loan business from main street companies. The larger institutions have the resources to develop expansive swap dealing capabilities. The smaller banks, which typically operate in one state and may only have a few branches, do not have the resources to establish competitive swap businesses. The larger banks that do may crowd out their smaller brethren. The end result could be less competition and more concentration in local lending markets.

I. Not *De Minimis* Swap Dealing By Any Measure

A. No Limit on Notional Amount of Swap Activity

In defining the term "swap dealer," Congress directed the CFTC and the SEC to jointly further define swap dealer (more on that later), and excepted from registration entities engaging in a *de minimis* quantity of swap dealing. CEA section 1a(49)(D) provides:

The Commission shall exempt from designation as a swap dealer an entity that engages in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.⁴

The CFTC, together with the SEC, jointly further defined the term "swap dealer."⁵ As directed, the Commissions created paragraph (4), dedicated solely to establishing the *de*

² CFTC Staff Letter No. 18–20, No-Action Relief for Excluding Certain Loan-Related Swaps from Counting toward the Swap Dealer Registration *De Minimis* Threshold ("NAL 18–20") (Aug. 28, 2018), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/%40rllettergeneral/documents/letter/2018-08/18-20.pdf>.

³ For example, the time period within which swaps can be entered into in connection with the loan may need to be expanded.

⁴ U.S.C. 1a(49)(D) (emphasis added).

⁵ 17 CFR 1.3, definition of Swap dealer.

minimis quantity of swap dealing activity in which an entity may engage without having to register as a swap dealer (the “De Minimis Exception”).⁶

In November 2018, the Commission unanimously approved setting this maximum de minimis quantity threshold at \$8 billion. This \$8 billion threshold basically applied to all types of dealing swaps. Now, less than four months later, the Final Rule removes this threshold limitation for one particular class of swaps—swaps entered into by IDIs with customers in connection with loans. Under the Final Rule, an IDI can enter into an unlimited quantity of swaps with its borrowers and not be required to register as a swap dealer.⁷ That is not what Congress intended when it provided an exemption from registration for a “de minimis quantity of swap dealing.”

The preamble to the Final Rule reveals the true nature of the new “IDI De Minimis Provision.” It is an unlimited exclusion from counting towards dealing, rather than a de minimis provision that counts the amount of swaps against a pre-defined maximum limit (*i.e.*, a de minimis quantity as specified by the statute). The preamble states, “[a]ny swap that meets the requirements of the IDI Swap Dealing Exclusion would also meet the requirements of the IDI De Minimis Provision.”⁸ This conflation of the two provisions makes it clear that the Final Rule is in fact a full exclusion. A so-called “de minimis” exception for a particular class of swaps that does not contain a numerical limit on the quantity of swaps excepted amounts to a full exclusion of that class of swaps.

The Commission provides no distinct rationale separate from the purpose for the IDI Swap Dealing Exclusion for why the \$8 billion aggregate threshold it enacted four months ago is no longer applicable to these swaps executed by IDIs. Although a federal agency has the discretion to change its rules and regulations in light of new information, the agency must provide a reasoned explanation for a change in course.⁹ It must

study the problem *before* it issues the regulation.¹⁰ Here, the Commission has provided no reasoned explanation for why this particular class of swaps presents any different or lesser risk than any other type of swap that is subject to a numerical aggregate limit. The Commission has not provided any analysis or reasoned estimate of the aggregate amount of swap dealing activity that would be excluded under the new IDI De Minimis Provision. In the absence of any estimate of the aggregate amount of activity that would be excluded under this new provision, it is arbitrary for the Commission to declare that such activity can be considered “de minimis.”

In explaining this shift, the preamble to the Final Rule introduces a “qualitative” standard, which it asserts meets Congress’s requirement that the CFTC define a de minimis “quantity” of swap dealing.¹¹ It suggests that “not all de minimis factors [shall] be stated in numerical terms, so long as the impact on the regulatory scheme for [swap dealers] is sufficiently modest.”¹² The preamble then claims that the amount of swap dealing that will be permitted by the Final Rule can be considered de minimis because it is “sufficiently modest in light of the total size, concentration and other attributes of the applicable markets” and “would not appreciably affect the systemic risk, counterparty protection, and market efficiency considerations of regulation.”¹³

This rationale is deficient for several reasons. First, the Commission has presented no quantitative estimate of the total amount of swap dealing, either by IDIs singly or by all IDIs in the aggregate, that could be excluded from swap dealing regulation under the Final Rule.¹⁴ The Commission has presented data only on the *current* amount of IDI loan-related activity that would fall under the IDI Swap Dealing Exclusion provision in the Final Rule.¹⁵ In the absence of any estimate as to the *additional* amount of swap dealing that would be excluded under the Final Rule, the Commission has no basis to

conclude the total excluded amount of swap dealing is “sufficiently modest,” whether on an absolute or relative basis, for any particular IDI, or all IDIs in the aggregate. To address this problem, the preamble states that the Commission’s Office of the Chief Economist will, within three years, study whether the swaps should be capped to qualify for the de minimis provision. This approach is tantamount to studying where the cows have gone *after* opening the barn door.

Second, this approach is inconsistent with the approach taken four months ago in the de minimis rule, where the Commission determined that registration was warranted for entities engaged in \$8 billion or more of swap dealing activity. This Final Rule will allow an entity to engage in more than \$8 billion of swap dealing activity, yet not register as a swap dealer. The rationale that is proffered in today’s rulemaking—that the total amount of unregistered dealing that will be permitted is modest in light of the total size of the market—was rejected in the prior de minimis rulemaking when suggested by commenters who advocated raising the de minimis level to \$20 billion, \$50 billion, or \$100 billion.¹⁶ To the extent that the Commission relies on policy considerations based on the IDI Swap Dealing Exclusion for excluding IDI swaps from counting as dealing swaps, then the policy exception appropriately belongs as part of that IDI Swap Dealing Exclusion—which must be accomplished through joint rulemaking.

The preamble to the Final Rule further states that the amendment “(1) supports a clearer and more streamlined application of the De Minimis Exception; (2) provides greater clarity regarding which swaps need to be counted towards the [notional] threshold; and (3) accounts for practical considerations relevant to swaps in different circumstances.”¹⁷ Yet the Final Rule does none of these things. The Final Rule replaces one IDI provision with two—an IDI Swap Dealing Exclusion, which excludes swaps from being considered dealing, and a new IDI De Minimis Provision, which considers the swaps as dealing but then says that if the swaps meet various criteria and conditions, they don’t count toward the de minimis threshold. Is that more clear or streamlined? I don’t think so.

B. Contrary to Swap Dealer Registration Requirements and De Minimis Exception

The Final Rule fails to advance the policy goals set forth in the Dodd-Frank Act for regulating swap dealers. Congress recognized that over the counter swaps contributed significantly to the 2008 financial crisis.¹⁸ In the Dodd-Frank Act Congress directed the CFTC to implement a regime of swap dealer

⁶ 17 CFR 1.3, definition of Swap dealer, paragraph (4).

⁷ In the preamble to the Final Rule, the Commission acknowledges that having no relationship to the loan amount is problematic. When discussing the 5% minimum on syndicated loan participations, the Commission rejects commenters’ requests to remove the minimum on the grounds that allowing IDIs with an “immaterial ‘connection’ to the loan (such as \$0.01)” would be inappropriate. See Final Rule, Preamble at 40. Yet the Commission sees no such minimum connection required for loans made directly by an IDI. Although the sham provision in the Final Rule would hopefully prevent this from happening in the worst cases, any meaningful loan amount likely would not be viewed as a sham.

⁸ Final Rule, Preamble at section II.A.1.

⁹ See, e.g., *New York v. United States Dep’t of Commerce*, 351 F. Supp. 3d 502, 518 (S.D.N.Y. 2019) (“[T]he [Administrative Procedure Act (“APA”)] does not say . . . that an agency cannot adopt new policies or otherwise change course. But the APA does require that before an agency does so, it must consider all important aspects of a problem; study the relevant evidence and arrive at a decision rationally supported by that evidence; comply with all applicable procedures and substantive laws; and articulate the facts and reasons—the real reasons—for that decision.”).

¹⁰ *Id.* As noted below, in this instance the Commission has committed to study the issue after it issues the regulation.

¹¹ See Final Rule, Preamble at section II.B.7.

¹² *Id.* at section II.B.7, see also *id.* at section II.B. (citing SD Adopting Release) (reiterating the conclusion reached in the preamble to the SD Adopting Release that “[t]he de minimis exception should allow amounts of swap dealing activity that are sufficiently small that they do not warrant registration to address concerns implicated by SD regulations.”) (emphasis added).

¹³ *Id.* at section II.B.

¹⁴ The de minimis clause in the statute references a de minimis quantity by “an entity,” not in the aggregate across the entire industry.

¹⁵ As part of its comment letter, the American Bankers Association (ABA) submitted an analysis prepared by NERA Economic Consulting, “Cost-Benefit Analysis of the CFTC’s Swap Dealer De Minimis Exception Definition.” NERA estimated that removing the date restrictions on the IDI Exclusion would result in an additional 15% of swaps transaction notional volume. NERA did not provide an estimate of the increase in volume that would result from the “permissible” expansion of the provision to include swaps to hedge the borrower’s business risks that may affect the borrower’s ability to repay the loan, which is discussed in the next section.

¹⁶ Adopting Release, De Minimis Exception to the Swap Dealer Definition, 83 FR 56666, 56677–56678 (Nov. 13, 2018).

¹⁷ Final Rule, Preamble at section II.

¹⁸ See generally Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, Financial Crisis Inquiry Comm’n (2010).

registration and regulation to manage the risks arising from swap dealer activities.

The Commission has adopted a variety of requirements to implement this statutory mandate.¹⁹ CFTC swap dealer regulations require registered swap dealers to have detailed risk management programs for their swap activities; pay or collect both initial and variation margin to offset exposures on swaps; must follow numerous customer facing rules such as providing disclosures and meeting swap documentation requirements; and must follow numerous internal business conduct standards designed to reduce risk, increase transparency and protect counterparties.

None of these requirements or market protections will apply to an unregistered IDI engaged in loan-related swap dealing under the Final Rule, no matter how much loan-related swap dealing is done by the IDI. It is entirely possible that IDIs that are currently registered as swap dealers may de-register and then continue to conduct their loan-related dealing activities in an unregistered status under this exception.

To appreciate how the Final Rule undermines the current regulatory structure, consider the extensive swaps activity an IDI will be able to undertake under the Final Rule. Let's start with subparagraph (4)(i)(C)(2)(i).

Subparagraph (4)(i)(C)(2)(i) states:

Relationship of swap to loan. The rate, asset, liability or other term underlying such swap is, or is related to, a financial term of such loan, which includes, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made and its principal amount. . . .

Although this provision is essentially identical to the completely separate paragraph (5)(B)(1) of the existing IDI Swap Dealing Exclusion, the notional value of swaps entered into under that Exclusion in connection with originating a loan currently is capped at 100% of the amount of the loan outstanding. Under the Final Rule, there is no cap. Therefore, under subparagraph (4)(i)(C)(2)(i), an IDI could enter into an interest rate swap, a currency swap, and a swap that effectively changes the duration of the loan, and each one could have a notional amount greater than the amount of the loan.

Furthermore, the language of the Final Rule could be read to permit an IDI to offer unlimited swaps to the borrower so long as they meet the loose standard of being "related to a financial term of such loan." This standard could potentially allow a host of other types of swaps that can be quite sophisticated in nature. For example, under the Final Rule, a loan customer could enter into a yield curve flattener or steepener swap for the rate on the loan in addition to the other swaps, or could execute many swaps over time on relative changes in the payment currencies for the loan with no notional amount limit.²⁰ The IDI and borrower could

enter into swaps with notional amounts that are multiples of the amount of the loan. There is no limit; it could be ten times the loan amount or more. These swaps can be executed at any time between the signing of a commitment for the loan and the maturity date for the loan.

Turning to subparagraph (4)(i)(C)(2)(ii), it states:

Relationship of swap to loan. . . . Such swap is permissible under the insured depository institution's loan underwriting criteria and is commercially appropriate in order to hedge risks incidental to the borrower's business (other than for risks associated with an excluded commodity) that may affect the borrower's ability to repay the loan.²¹

Subparagraph (4)(i)(C)(2)(ii) omits the language that is in the existing IDI Swap Dealing Exclusion that the swaps must be "required" as a condition of the loan, which provides a clear connection to the *origination* of the loan. Instead, under subparagraph (4)(i)(C)(2)(ii) of the Final Rule, the swaps must merely be (1) *permissible* under the IDI's loan underwriting criteria, and (2) commercially reasonable to hedge risks *incidental* to the borrower's business that may affect the ability to repay the loan.

Under this provision, any legal swap related to a risk that is not an excluded commodity; that is not expressly prohibited in the IDI's loan underwriting criteria; and that is a hedge of any risk incidental to the business that arises at any time subsequent to entering into the loan, would not be counted toward the de minimis threshold. There also is no requirement that the amount of these types of hedging swaps bear any rational relationship to the outstanding amount of the loan. As an example, an IDI could make a ten-year \$10 million loan to an airline and then, two years later, enter into a five-year jet fuel swap with the airline for a notional amount of \$5 billion. Similarly, an IDI could make a loan to an integrated oil and gas company for the construction of a new office building, and then enter into commodity swaps, without limit, to hedge the company's global oil and gas exploration, production and sales. Because these risks are incidental to the borrower's business and could affect its ability to repay its obligations, including the loans, under the Final Rule none of these swaps would be counted toward the de minimis threshold.

In addition, the Final Rule is not limited to IDIs with commercial end-user customers. An IDI can claim the exception for swaps in connection with loans to financial entities customers such as hedge funds and commodity pools, among others.

In response to the above analysis of paragraphs (4)(i)(C)(2)(i) and (ii), it may be asserted that most IDIs primarily offer loans to commercial firms, not financial firms, and would enter into hedging swaps only in very limited amounts directly related to the amounts of the loans. If, indeed, this is

standard commercial practice and sound risk management by IDIs, then I would prefer the CFTC's regulation to reflect such sound risk management practices rather than rely on the self-restraint of IDIs to limit their loan-related swap risks. This is the fundamental purpose of swap dealer regulation. We have learned our lesson the hard way that industry self-regulation does not always work.

C. No Demonstrated Need for This Provision

The Final Rule goes beyond what IDIs have stated they need. In response to the question in the notice of proposed rulemaking²² as to whether the aggregate notional amount of loan-related swaps could exceed the amount of the loan, a few commenters described specific circumstances regarding loans where swaps could exceed the *outstanding* amount of the loan.²³ The circumstances presented were very limited and involved construction or other types of loans in which the full loan amount is disbursed in increments over time, but an interest rate swap is executed at the initial disbursement in a notional amount equal to the full amount of the loan.²⁴ The Final Rule presents no actual facts, data, or comments justifying the removal of the notional amount cap in the IDI Swap Dealing Exclusion, particularly in the context of the de minimis swap dealing provision.

In fact, the record before the Commission in this rulemaking is to the contrary. As previously noted, comments to the Proposal informed the Commission of limited circumstances in which the notional amount of interest rate swaps could exceed the outstanding amount of a loan, not the full amount of the loan. The preamble to the Final Rule does not address why it is necessary for the rule to go beyond the circumstances presented by the commenters, in response to a specific request by the Commission for any such information.

Additionally, the no-action relief currently in effect for one IDI pertaining to swap activity in connection with originating a loan contains several significant limitations that are not found in the Final Rule.²⁵ Two of the specific restrictions in NAL-18-20 are: (1) The client of the IDI "must be a small or medium-sized commercial entity, which for purposes of the relief is an entity with annual

²² Notice of proposed rulemaking, De Minimis Exception to the Swap Dealer Definition, 83 FR 27444 (June 12, 2018) ("Proposal").

²³ See, e.g., comment letter from Citizens Financial Group, Inc., at 6 (Aug. 10, 2018); comment letter from Capital One Financial Corporation, at 3 (Aug. 13, 2018) ("[A] customer may enter a forward starting swap to hedge future draws under a loan. In these cases, the notional amount of the forward starting swap will exceed the principal amount of the loan until future draws are made on that loan."); and comment letter from M&T Bank, at 3 (Aug. 10, 2018) ("This circumstance could arise in construction lending when the project had not advanced sufficiently such that the loan was fully funded, yet the loan had been hedged with a forward-starting or accreting interest rate swap having a notional amount that anticipated the future and higher loan balance."). These and other comment letters submitted in response to the Proposal are available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2885>.

²⁴ See Final Rule, Preamble, section II.B.6.

²⁵ See NAL-18-20.

¹⁹ See 17 CFR part 23.

²⁰ Thankfully, the majority has clarified that swaps for speculative and investment purposes would not be includable under paragraph (4)(i)(C)(2). See Final Rule, Preamble at section II.B.3.

²¹ Note that this paragraph is expressly limited to hedging swaps. The lack of such language in paragraph (4)(C)(2)(i) illustrates that non-hedging swaps are intended to be permitted under that provision.

revenues of under \$750 million"; and (2) the aggregate amount of the loans that can be excluded under the relief may not exceed \$1.5 billion at any time during the relief period.²⁶ In other words, NAL-18-20 provides a cap of \$1.5 billion on the aggregate notional amount of IDI loan-related swaps permitted by the letter that may be outstanding at any one time. There is no indication in the public record that the IDI operating under NAL-18-20 is unduly constrained by these limitations.

II. Joint Rulemaking Is Required

In addition to its various substantive infirmities, I cannot vote today to adopt this rule because it violates a mandate from Congress to define the term "swap dealer" jointly with the SEC. By wholly excluding all IDI De Minimis Provision swaps from counting towards the de minimis threshold, the CFTC is in effect amending the definition of the term "swap dealer." Under our Congressional mandate, neither the CFTC nor the SEC can alone amend this definition.²⁷ For the reasons discussed below, the Final Rule may not be adopted unilaterally by the CFTC.

A. Congressional Definition of "Swap Dealer"

Congress recognized that implementing the Dodd-Frank Act could only be accomplished with coordination amongst the multiple federal financial agencies involved. Title VII of the Dodd-Frank Act directed these financial agencies to consult with one another and, in specific circumstances, engage in joint rulemaking.²⁸

The direction from Congress is clear that the term "swap dealer" must be defined jointly by the CFTC and SEC, and that any amendments to that definition must be accomplished through joint rulemaking as well. Section 712(d)(1) of the Dodd-Frank Act

specifies that the CFTC and the SEC—jointly, and in consultation with the Board of Governors—"shall further define" the term "swap dealer," among others. Section 712(d)(2) provides that the CFTC and SEC must jointly adopt "such other rules regarding such definitions" as the CFTC and SEC determine are necessary, in the public interest, and for the protection of investors.

B. Joint Definition of "Swap Dealer"

In accordance with Section 712(d)(1), the CFTC and the SEC jointly adopted the CFTC Regulation further defining the term swap dealer, among other terms. As directed by CEA section 1a(49)(D), the Commissions together drafted paragraph (4)—the De Minimis Exception—to establish the quantity of swap dealing activity in which a person may engage without having to register as a swap dealer.²⁹ Although implemented jointly, the Commissions provided that the CFTC, alone, could "by rule or regulation change the requirements of the De minimis exception described in paragraphs (4)(i) through (iv) of this definition."³⁰ The two Commissions also adopted paragraph (5), the IDI Swap Dealing Exclusion.³¹ Unlike paragraph (4), the IDI Swap Dealing Exclusion in paragraph (5) does not contain any language permitting the CFTC to amend it unilaterally.

C. Inconsistent With Congressional Intent

Today, the Commission majority evades the joint rulemaking requirement by improperly shoehorning changes to the IDI Swap Dealing Exclusion, which cannot be done singly, into the De Minimis Exception. A comparison of the Final Rule text with that of paragraph (5) confirms that the new IDI De Minimis Provision is an amendment to the IDI Swap Dealing Exclusion under another name.³² The preamble to the Final Rule explicitly acknowledges that "any swap that meets the requirements of the IDI Swap Dealing Exclusion would also meet the requirements of the IDI De Minimis Provision."³³ But calling it a different name—*i.e.*, de minimis—does not alter its essential nature as an exclusion for IDI swaps.

This drafting hocus-pocus is inconsistent with the CEA, which requires changes to the IDI exclusion to be accomplished through joint rulemakings with the SEC.³⁴

²⁹ 17 CFR 1.3, definition of Swap dealer, paragraph (4).

³⁰ 17 CFR 1.3, definition of Swap dealer, paragraph (4)(v) (emphasis added).

³¹ 17 CFR 1.3, definition of Swap dealer, paragraph (5).

³² The Final Rule adds a section to the De Minimis Exception that tracks the precise structure and language of paragraph (5)'s IDI Swap Dealing Exclusion, only it revises key words that significantly broaden the exclusion.

³³ Final Rule, Preamble at section II.A.2.

³⁴ The Commission majority's intent to use the de minimis provision as an end-run around the joint rulemaking requirement is evident from the language in the Proposal. The Proposal states: "The Commission is not at this time proposing to amend the IDI Swap Dealing Exclusion in paragraph (5) of the SD Definition. As discussed above, pursuant to requirements of section 712(d)(1) of the Dodd-Frank Act, the CFTC and SEC jointly adopted the IDI

The preamble claims that this legerdemain is permissible because the amendments are only "factors" for determining which swaps need to be counted towards an IDI's de minimis calculation³⁵ and the CFTC may unilaterally set such "factors." This is a smokescreen. The CFTC may only promulgate regulations individually to "establish factors with respect to the making of this determination to exempt." The words "this determination" refer to the quantity determination in the preceding sentence of the subsection: "[t]he Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers."³⁶ In other words, the "factors" referred to in the second sentence are factors to be used by the Commission to determine the numerical quantity for the exemption created in the first sentence. The direction to establish factors does not create a distinct directive authorizing the CFTC to independently determine what constitutes swap dealing.³⁷ If it did, the de minimis provision could swallow the whole swap dealer definition.

For these reasons, the De Minimis Exception to the swap dealer definition is an improper vehicle through which to expand the type of IDI swaps that are considered to have been made in connection with originating loans to a customer. This expansion can be done only through a joint rulemaking with the SEC.

D. Lack of Consultation

The failure to adopt the Final Rule jointly is not the only procedural defect. Section 712(a)(1) of the Dodd-Frank Act also requires that prior to the commencement of any rulemaking, the "Commission" shall "consult and coordinate" to the extent possible with the SEC and the prudential regulators to ensure the consistency and comparability that Congress envisioned when creating the new swap regulatory framework. The preamble to the Final Rule claims that the "Commission" consulted with the SEC and the prudential regulators during the preparation of this adopting release.³⁸ However, the "Commission" is a five-member body, each member of which votes to approve CFTC rulemakings, enforcement actions, and other activities as specified by

Swap Dealing Exclusion in paragraph (5) as part of the definition of what constitutes swap dealing activity. Rather than proposing to revise the scope of activity that constitutes swap dealing, the Commission is proposing to amend paragraph (4) of the SD Definition, which addresses the de minimis exception." Proposal, 83 FR at 27458–59. The Commission then makes it abundantly clear that this de minimis exception is in fact an expansion of the IDI Swap Dealing Exclusion: "The IDI De Minimis Provision would have requirements that are similar to the IDI Swap Dealing Exclusion, but would encompass a broader scope of loan-related swaps." *Id.* at 27459.

³⁵ Final Rule, Preamble at section II.A.2.

³⁶ 7 U.S.C. 1a(49)(D).

³⁷ See also Statement of Commissioner Dan M. Berkovitz, De Minimis Exception to the Swap Dealer Definition, 83 FR 56666, 56692–93 (Nov. 13, 2018).

³⁸ Final Rule, Preamble at section II.B.7.

²⁶ *Id.*

²⁷ The heads of the two agencies are also not free to decide between themselves when joint rulemaking is required. See Joint Statement from Chairmen Giancarlo and Clayton on the IDI Exception to the Swap Dealer Definition (Dec. 13, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement121318>; see also *Bd. of Trade of City of Chicago v. SEC*, 677 F.2d 1137, 1142 n.8 (7th Cir. 1982) ("While this case was pending, the CFTC and SEC filed with us a copy of a news release announcing their provisional agreement purportedly resolving the jurisdictional dispute at issue in this case. . . . Although Congress has provided that the CFTC 'maintain communications' with the SEC regarding CFTC activities that 'relate' to SEC responsibilities . . . and that the CFTC 'may cooperate' with the SEC . . . the two agencies cannot thereby enlarge or relinquish their statutory jurisdictions. . . . The role of the agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress.")

²⁸ See, e.g., Dodd-Frank Act, Hearing on H.R. 4173, H.R. Rep. No. 111-517 at 358 (June 24, 2010) (Senator Gregg: "[W]e should try and push these various entities to joint activity because they have such overlap in their responsibilities. So to get the SEC and the CFTC and the Federal Reserve in the same room on these issues is really critical."); *id.* at 357 (Senator Reed: "[I]f . . . [the CFTC] decides a swap is different than what it is today, then that changes definitions that have been jointly arrived at, or definitions or jurisdiction or responsibility to the SEC.").

the CEA. The Commission itself was not informed of, and did not participate in, the substantive contents of any such consultation in connection with this rulemaking. This does not appear to conform with the spirit of the Dodd-Frank consultation requirement.

III. Conclusion

Voltaire famously commented “[t]his body which was called and which still calls itself the Holy Roman Empire was in no way holy,

nor Roman, nor an empire.”³⁹ Likewise, the provision that the Commission majority calls the “IDI De Minimis Provision” is not an IDI Provision and is in no way de minimis.

Following the rule of law is critical to maintaining a robust, safe, and integrated financial regulatory system that inspires confidence for both market participants and

³⁹ Voltaire, “An essay on universal history, the manners, and spirit of nations, from the reign of Charlemaign to the age of Lewis XIV,” Chapter 70 (1756).

the public at large. The rule of law applies no less to us as regulators than to the persons we regulate. The Final Rule adopted by the Commission today is inconsistent with the requirements of the Commodity Exchange Act for the regulation of swap dealers and violates the Dodd-Frank Act as to the process for amending those regulations. I therefore dissent.

[FR Doc. 2019-06109 Filed 3-29-19; 8:45 am]

BILLING CODE 6351-01-P



FEDERAL REGISTER

Vol. 84

Monday,

No. 62

April 1, 2019

Part V

The President

Memorandum of March 27, 2019—Federal Housing Finance Reform

Presidential Documents

Title 3—

Memorandum of March 27, 2019

The President

Federal Housing Finance Reform

Memorandum for the Secretary of the Treasury[,] the Secretary of Agriculture[,] the Secretary of Housing and Urban Development[,] the Secretary of Veterans Affairs[,] the Director of the Office of Management and Budget[,] the Director of the Bureau of Consumer Financial Protection[,] the Director of the Federal Housing Finance Agency[,] the Assistant to the President for Economic Policy[, and] the Assistant to the President for Domestic Policy

The housing finance system of the United States is in urgent need of reform. During the financial crisis of 2008, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)—collectively known as the Government-sponsored enterprises (GSEs)—suffered significant losses due to their structural flaws and lack of sufficient regulatory oversight. To prevent their failure, the GSEs received support from the Federal Government and were placed into conservatorship in September 2008. The Housing and Economic Recovery Act of 2008 enacted important reforms to the supervision, oversight, risk management, and governance of the GSEs. The GSEs remain in conservatorship, however, and the housing finance system continues to face significant and fundamental challenges. To date, the GSEs are the dominant participants in the housing finance system and lack real competitors. The lack of comprehensive housing finance reform since the financial crisis of 2008 has left taxpayers potentially exposed to future bailouts, and has left the Federal housing finance programs at the Department of Housing and Urban Development potentially overexposed to risk and with outdated operations. Accordingly, it is time for the United States to reform its housing finance system to reduce taxpayer risks, expand the private sector's role, modernize government housing programs, and make sustainable home ownership for American families our benchmark of success. In order to resolve these ongoing challenges and by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Framework to Reform the GSEs.* (a) The Secretary of the Treasury is hereby directed to develop a plan for administrative and legislative reforms (Treasury Housing Reform Plan) to achieve the following housing reform goals:

- (i) Ending the conservatorships of the GSEs upon the completion of specified reforms;
 - (ii) Facilitating competition in the housing finance market;
 - (iii) Establishing regulation of the GSEs that safeguards their safety and soundness and minimizes the risks they pose to the financial stability of the United States; and
 - (iv) Providing that the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs or the secondary housing finance market.
- (b) The Treasury Housing Reform Plan shall include reform proposals to achieve the following specific objectives:
- (i) Preserving access for qualified homebuyers to 30-year fixed-rate mortgages and other mortgage options that best serve the financial needs of potential homebuyers;

(ii) Maintaining equal access to the Federal housing finance system for lenders of all sizes, charter types, and geographic locations, including the maintenance of a cash window for loan sales;

(iii) Establishing appropriate capital and liquidity requirements for the GSEs;

(iv) Increasing competition and participation of the private sector in the mortgage market, including by authorizing the Federal Housing Finance Agency (FHFA) to approve guarantors of conventional mortgage loans in the secondary market;

(v) Mitigating the risks undertaken by the GSEs, including by altering, if necessary, their respective policies on loan limits, program and product offerings, credit underwriting parameters, and the use of private capital to transfer credit risk;

(vi) Recommending appropriate size and risk profiles for the GSEs' retained mortgage and investment portfolios;

(vii) Defining the role of the GSEs in multifamily mortgage finance;

(viii) Defining the mission of the Federal Home Loan Bank system and its role in supporting Federal housing finance;

(ix) Evaluating, in consultation with the Secretary of Housing and Urban Development and the Director of the Bureau of Consumer Financial Protection, the "QM Patch," whereby the GSEs are exempt from certain requirements of the Qualified Mortgage (QM) determination;

(x) Defining the GSEs' role in promoting affordable housing without duplicating support provided by the Federal Housing Administration (FHA) or other Federal programs; and

(xi) Setting the conditions necessary for the termination of the conservatorships of the GSEs, which shall include the following conditions being satisfied:

(A) The Federal Government is fully compensated for the explicit and implicit guarantees provided by it to the GSEs or any successor entities in the form of an ongoing payment to the United States;

(B) The GSEs' activities are restricted to their core statutory mission and the size of investment and retained mortgage portfolios are appropriately limited; and

(C) The GSEs are subjected to heightened prudential requirements and safety and soundness standards, including increased capital requirements, designed to prevent a future taxpayer bailout and minimize risks to financial stability.

(c) For each reform included in the Treasury Housing Reform Plan, the Secretary of the Treasury must specify whether the proposed reform is a "legislative" reform that would require congressional action or an "administrative" reform that could be implemented without congressional action. For each "administrative" reform, the Treasury Housing Reform Plan shall include a timeline for implementation.

(d) In developing the Treasury Housing Reform Plan, the Secretary of the Treasury shall consult with the Secretary of Agriculture, the Secretary of Housing and Urban Development, the Secretary of Veterans Affairs, the Director of the Office of Management and Budget, the Director of the Bureau of Consumer Financial Protection, the Director of the FHFA, the Assistant to the President for Economic Policy, and the FHFA's Federal Housing Finance Oversight Board.

(e) The Treasury Housing Reform Plan shall be submitted to the President for approval, through the Assistant to the President for Economic Policy, as soon as practicable.

Sec. 2. *Framework to Reform the Programs of the Department of Housing and Urban Development, the FHA, and the Government National Mortgage*

Association (GNMA). (a) The Secretary of Housing and Urban Development is hereby directed to develop a plan for administrative and legislative reforms (HUD Reform Plan) to achieve the following housing reform goals:

- (i) Attempting to ensure that the FHA and GNMA assume primary responsibility for providing housing finance support to low- and moderate-income families that cannot be fulfilled through traditional underwriting;
- (ii) Reducing taxpayer exposure through improved risk management and program and product design; and
- (iii) Modernizing the operations and technology of the FHA and GNMA.

(b) The HUD Reform Plan shall include reform proposals to achieve the following specific objectives:

- (i) Addressing the financial viability of the Home Equity Conversion Mortgage program;
- (ii) Assessing the risks and benefits associated with providing assistance to first-time homebuyers, including down-payment assistance;
- (iii) Defining the appropriate role of the FHA in multifamily mortgage finance;
- (iv) Diversifying FHA lenders through increased participation by registered depository institutions;
- (v) Enhancing GNMA program participation requirements and standards to ensure its safety and soundness and to protect borrower and investor interests; and
- (vi) Reducing abusive and unsound loan origination or servicing practices for loans in the GNMA program, including, if appropriate, by providing for cooperation with other loan program sponsors and regulators.

(c) For each reform included in the HUD Reform Plan, the Secretary of Housing and Urban Development shall specify whether the proposed reform is a “legislative” reform that would require congressional action or an “administrative” reform that could be implemented without congressional action. For each “administrative” reform, the HUD Reform Plan shall include a timeline for implementation.

(d) In developing the HUD Reform Plan, the Secretary of Housing and Urban Development shall consult with the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Veterans Affairs, the Director of the Office of Management and Budget, the Director of the Bureau of Consumer Financial Protection, the Assistant to the President for Economic Policy, and the Assistant to the President for Domestic Policy.

(e) The HUD Reform Plan shall be submitted to the President for approval, through the Assistant to the President for Economic Policy, as soon as practicable.

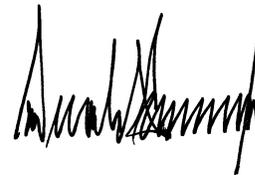
Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of the Treasury is authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to be "Donald Trump", located on the right side of the page.

THE WHITE HOUSE,
Washington, March 27, 2019

Reader Aids

Federal Register

Vol. 84, No. 62

Monday, April 1, 2019

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids **202-741-6000**

Laws **741-6000**

Presidential Documents

Executive orders and proclamations **741-6000**

The United States Government Manual **741-6000**

Other Services

Electronic and on-line services (voice) **741-6020**

Privacy Act Compilation **741-6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: www.govinfo.gov.

Federal Register information and research tools, including Public Inspection List and electronic text are located at: www.federalregister.gov.

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to <https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new>, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to <http://listserv.gsa.gov/archives/publaws-l.html> and select *Join or leave the list (or change settings)*; then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: fedreg.info@nara.gov

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, APRIL

12047-12482 1

CFR PARTS AFFECTED DURING APRIL

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

910 12047

3 CFR

Administrative Orders:

Memorandums:

Memorandum of March 27, 2019 12479

10 CFR

Proposed Rules:

430 12143

12 CFR

Ch. II 12049

13 CFR

107 12059

120 12059

142 12059

146 12059

14 CFR

91 12062

Proposed Rules:

39 12143

71 12146

17 CFR

Ch. I 12074

1 12450

23 12065

232 12073

20 CFR

655 12380

21 CFR

73 12081

806 12083

866 12083

888 12088

Proposed Rules:

1000 12147

1002 12147

1010 12147

1020 12147

1040 12147

1050 12147

26 CFR

Proposed Rules:

1 12169

27 CFR

478 12093

479 12093

555 12095

32 CFR

269 12098

Proposed Rules:

775 12170

33 CFR

100 12099

105 12102

165 12120

Proposed Rules:

100 12178

38 CFR

1 12122

42 CFR

447 12130

48 CFR

202 12137

204 12138

216 12139

225 12140

244 12140

252 (3 documents) 12138,
12140, 12141

Proposed Rules:

202 12179

204 12182

215 12182

216 12179

217 12179

219 12187

225 12179

226 12182

234 12179

235 12179

252 (2 documents) 12182,
12187

50 CFR

Proposed Rules:

217 12330

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion

in today's **List of Public Laws**.

Last List March 25, 2019

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly

enacted public laws. To subscribe, go to <http://listserv.gsa.gov/archives/publaws-l.html>

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.

TABLE OF EFFECTIVE DATES AND TIME PERIODS—APRIL 2019

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these

dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	21 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	35 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
April 1	Apr 16	Apr 22	May 1	May 6	May 16	May 31	Jul 1
April 2	Apr 17	Apr 23	May 2	May 7	May 17	Jun 3	Jul 1
April 3	Apr 18	Apr 24	May 3	May 8	May 20	Jun 3	Jul 2
April 4	Apr 19	Apr 25	May 6	May 9	May 20	Jun 3	Jul 3
April 5	Apr 22	Apr 26	May 6	May 10	May 20	Jun 4	Jul 5
April 8	Apr 23	Apr 29	May 8	May 13	May 23	Jun 7	Jul 8
April 9	Apr 24	Apr 30	May 9	May 14	May 24	Jun 10	Jul 8
April 10	Apr 25	May 1	May 10	May 15	May 28	Jun 10	Jul 9
April 11	Apr 26	May 2	May 13	May 16	May 28	Jun 10	Jul 10
April 12	Apr 29	May 3	May 13	May 17	May 28	Jun 11	Jul 11
April 15	Apr 30	May 6	May 15	May 20	May 30	Jun 14	Jul 15
April 16	May 1	May 7	May 16	May 21	May 31	Jun 17	Jul 15
April 17	May 2	May 8	May 17	May 22	Jun 3	Jun 17	Jul 16
April 18	May 3	May 9	May 20	May 23	Jun 3	Jun 17	Jul 17
April 19	May 6	May 10	May 20	May 24	Jun 3	Jun 18	Jul 18
April 22	May 7	May 13	May 22	May 28	Jun 6	Jun 21	Jul 22
April 23	May 8	May 14	May 23	May 28	Jun 7	Jun 24	Jul 22
April 24	May 9	May 15	May 24	May 29	Jun 10	Jun 24	Jul 23
April 25	May 10	May 16	May 28	May 30	Jun 10	Jun 24	Jul 24
April 26	May 13	May 17	May 28	May 31	Jun 10	Jun 25	Jul 25
April 29	May 14	May 20	May 29	Jun 3	Jun 13	Jun 28	Jul 29
April 30	May 15	May 21	May 30	Jun 4	Jun 14	Jul 1	Jul 29